In the Appellate Tribunal for Electricity
New Delhi
(Appellate Jurisdiction)

Appeal No 109 of 2016

Dated: 27th November, 2017

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

In the matter of :-

M/s Cauvery Hydro Energy Ltd.
No. 67, 'Lavina Courts', 1st Floor
No. 102, 8th Main, 7th Cross, RMV Extension
Bengaluru- 560 080 ... Appellant

Versus

1. **Karnataka Power Transmission Corporation Ltd. (KPTCL)**
   Cauvery Bhavan, K G Road
   Bengaluru – 560 009 ...Respondent No.1

2. **The State Load Despatch Centre (SLDC) Karnataka**
   KPTCL, No. 26,
   Race Course Road,
   Bengaluru – 560009 ...Respondent No.2

3. **Karnataka Electricity Regulatory Commission**
   6th& 7th Floor, Mahalaxmi Chambers
   No. 9/2, M G Road,
   Bengaluru – 560001 ...Respondent No.3

Counsel for the Appellant(s): Mr. Nikhil Majithia
Mr. Angad Mehta

Counsel for the Respondent(s): Ms. Srishti Govil
Ms. Pratiksha Mishra
Mr. Balaji Srivnivasan
Mr. Sriranga S.
Ms. Vaishnavi Subramanyam for R-1& R-2

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by M/s Cauvery Hydro Energy Ltd.(herein after referred to as the **"Appellant"**) under Section 111 of the Electricity Act, 2003 ("**the Act**") challenging the Order dated 7.1.2016("**Impugned Order**") passed by the Karnataka Electricity Regulatory Commission (hereinafter referred to as the **'State Commission'**) under Section 142 & 146 of the Act in Complaint No.13/2013, in the matter regarding opening of original petition OP No. 47 of 2010 and adjudication of the issues which were not even the subject matter of OP No. 47 of 2010.

2. The Appellant, M/s Cauvery Hydro Energy Ltd. is a generating company incorporated under the Companies Act, 1956 having its registered office in Bengaluru and has established a 3 MW hydroelectric project in Mandya District of Karnataka.

3. The Respondent No. 1 i.e. Karnataka Power Transmission Corporation Ltd. is the State Transmission Utility under Section 39 of the Act.

4. The Respondent No. 2 is the State Load Despatch Centre (SLDC) in the State of Karnataka established under section 31 of the Act.

5. The Respondent No.3 i.e. Karnataka Electricity Regulatory Commission is the Electricity Regulatory Commission for the State

of Karnataka exercising jurisdiction and discharging functions in terms of the Act.

6. **Facts of the present Appeal:**

a) The Appellant and Government of Karnataka (GoK) on 9.9.1992 entered into an agreement for setting up of a hydroelectric power station with a minimum installed capacity of 3 MW ("**Project**") at S. Shivanasamudram, Mandya District, Karnataka. On 13.6.1996, GoK passed an order to encourage and promote environmentally friendly projects. According to this order, the wheeling charges and banking fee for mini hydel projects up to 3 MW were determined at 5% and 2% respectively.

b) On 17.8.1998, based on GoK order dated 13.6.1996, the Appellant entered into a Wheeling and Banking Agreement (WBA) with erstwhile Karnataka Electricity Board (KEB) now KPTCL/Respondent No.1 for wheeling of the energy produced from the Project by utilising the network of the Respondent No. 1.

c) The Respondent No. 1 vide order dated 30.8.2000 increased the wheeling charges for the Project of the Appellant from 5% to 20% with effect from 1.9.2000.On 10.3.2003, the State Commission passed Tariff Order, 2003 and in the said order noted about the ongoing cases in Karnataka High Court filed by the generators against the unilateral increase of wheeling charges by the Respondent No. 1 and held that the said order was not applicable for some generators whose case is under adjudication before the Karnataka High Court.

d) The Karnataka High Court vide order dated 13.04.2007, in a writ petition filed by the Appellant directed Respondent No.1 to reconsider the matter in accordance with law and pass appropriate orders. Subsequently, the Appellant approached the Respondent No. 1 to return/adjust the excess energy/monies collected from it. The SLDC vide letter dated 1.7.2010 rejected the request of the Appellant to return the energy and the amount claimed by the Appellant. In 2010, the Appellant approached the State Commission with a Petition No. OP 47/2010 under Section 86 of the Act for the quashing of the Order dated 30.8.2000 passed by the Respondent No.1.

e) On 2.6.2011 the State Commission quashed the Orders date 14.6.2011, 21.9.2011 and 30.8.2000 of the Respondent No. 1 with a direction that Respondent No.1 to recalculate the charges payable by the Appellant and make necessary claims after making adjustment of the charges already paid by the Appellant. The wheeling charges which was contractually fixed at 5% was restored, and the Wheeling Charges at 20% which had been imposed were set aside by the said order.

f) Thereafter, the Appellant wrote many letters to the Respondent No. 1 regarding refund of energy/monies. The Respondent No. 1 vide letter dated 28.11.2011 stated that in terms of the order dated 2.6.2011 of the State Commission, it was not required to refund any excess energy/monies collected from the Appellant. In 2013, the Respondents challenged the order of the State Commission before this Tribunal but the appeal was not allowed by this Tribunal

on the ground that it was filed with an inordinate delay for which the Respondent No. 1 failed to provide proper justification. The matter was further carried in appeal before the Hon'ble Supreme Court as Civil Appeal No. 9963 of 2014, which was also dismissed by the Hon'ble Supreme Court.

g) As the excess energy/monies paid by the Appellant to Respondent No.1 were not being refunded, the Appellant in 2013 approached the State Commission and filed execution proceedings vide Complaint No.13 of 2013. The State Commission vide the Impugned Order re-opened and re-examined the entire matter on merits, and has rendered findings which were not in the spirit of the order dated 2.6.2011, but has also adjudicated the issues which were never the subject matter of Original Petition No.47 of 2010.

h) Aggrieved by the Impugned Order passed by the State Commission, the Appellant has preferred the present appeal.

7. **QUESTIONS OF LAW**

The Appellant has raised the following questions of law in the present appeal:

a. Whether it is not contrary to law for the State Commission to, in execution proceedings (Complaint No. 13/2013), have re-opened and re-examined Original Petition No. 47 of 2010?

b. Whether an executing Court can at all go behind a decree and re-adjudicate the matter on merits?

c. Whether the impugned order does not fall foul of the ratio laid down by the Hon'ble Supreme Court in *Bhavan Vaja and Ors v. Solank Hanuji Khodaji Mansang & Anr., (1973) 2 SCC 40*?

d. Whether the State Commission could have, in execution proceedings, rendered findings on issues that not even the subject matter of the Original Petition?

e. Whether the State Commission could have rendered a finding on the applicability of Cross Subsidy Surcharge with effect from 10.6.2005 when even though this was not an issue in OP No. 47 of 2010 or even in Execution proceedings?

8. We have heard at length the learned counsel for the rival parties and considered carefully their written submissions, arguments putforth during the hearings etc. Gist of the same is discussed hereunder.

9. The learned counsel for the Appellant has made following arguments/submissions for our consideration:

a) The State Commission failed to understand that the subject matter of OP No.47 of 2010 was limited to the issue of the imposition of exorbitant and unilateral increase of Wheeling Charges by Respondent No.1 and the petition only sought the quashing of this order. The scope of OP No. 47 of 2010 was well defined and limited. In Complaint No. 13 of 2013, the State Commission has also dealt the issues that were not even agitated in OP No. 47 of

2010. This is a clear subversion of the mandate of law and the Impugned Order is therefore is to be set aside. The powers of an Executing court are well known and settled. The State Commission failed to recognise that it was only acting as an executing Court and should not have re-examined the subject matter of OP No.47 of 2010.

b) The State Commission vide its order dated 2.6.2011 at para 15 has decided the issue that WBA executed between the Appellant and Respondent No.1 was an admittedly concluded contract. Accordingly, there was no scope to re-open this issue in Complaint No. 13 of 2013. Further, the WBA being a concluded contract was an admitted position taken by the Respondent No.1 in Civil Appeal No.9963 of 2014 before the Hon’ble Supreme Court.

c) The State Commission has failed to appreciate the fact that the powers of an executing Court are limited. It is not for the executing court to either clarify or *" ... explain the true meaning of. .. "* an order passed by the original court. The Impugned Order is also in contravention to the judgement of Hon'ble Supreme Court in case of PTC India v. CERC (2010) 4 SCC 603.

d) The State Commission in the Impugned Order has also erred in making decision related to Cross Subsidy Surcharge (CSS) even though this issue was not raised or decided in OP No. 47 of 2010. The issue of the applicability of CSS has been addressed for the first time by the executing court. The prayer made in Complaint No. 13 of 2013 was for the passing of orders to secure the compliance of the order of 2.6.2011 and for the initiation of appropriate

proceedings against the Respondent No. 1's non-adherence to the order dated 2.6.2011.

e) The State Commission failed to appreciate that the applicability of the Tariff Order, 2003 was not a question for adjudication before it. The State Commission has erred in holding the Impugned Order that *" ... the Tariff Order of 2003 is applicable to the Complainant ... "*. Such finding is misconceived in fact and in law. The Tariff Order, 2003 creates exceptions to its applicability, viz., *" ... The Order of this Commission is not applicable to such cases and also cases of concluded contract where specific provisions in respect of Wheeling Charges are made ...".* WBA being a 'concluded contract', the question of the applicability of the Tariff Order, 2003 to the Appellant does not arise. Even assuming, without admitting, that the WBA does not fall within the exception as aforementioned, the applicability of the Tariff Order, 2003 was in any event not an issue addressed in either OP No.47 of 2010 or the order of 02.06.2011. Further, the State Commission vide order dated 9.6.2005 (Tariff Order, 2005) modified the Tariff Order, 2003. Tariff Order, 2005 is also not applicable to the Appellant by virtue of clause 8.06 of the Tariff Order, 2003 wherein the State Commission has allowed non-applicability of the said order to the generators who have challenged the orders of KPTCL and for the generators which have concluded contracts with KPTCL. Accordingly, the question of getting into this issue at the stage of execution does not arise.

f) The scope of the order dated 2.6.2011 was limited to the quashing of Order dated 30.08.2000 of the Respondent No. 1 which is also

clear from reading of the order. The appeals filed by the Respondent No. 1 against this order with this Tribunal and Hon'ble Supreme Court have been dismissed without interference and has become final. Therefore, the order dated 2.6.2011 as originally passed has to be executed. It was not open to the State Commission to re-examine the merits of the case which ultimately led to passing of Order dated 2.6.2011. By virtue of the Impugned Order, the State Commission has substituted and imposed its own view in the interpretation of the order dated 2.6.2011, which is not permitted. The same has been held by Hon'ble Supreme Court in V. Ramaswami Ayyangar And Ors. Vs. T. N. V. Kailasa Thevar, AIR 1951 SC 189, wherein the Hon'ble Supreme Court held that *" ... their duty was to give effect to the terms of the decree that was already passed and beyond which they could not go. It is true that they were to interpret the decree, but under the guise of interpretation they could not make a new decree for the parties ..."*

g) The Act endeavours to promote the investment in the field of renewable sources of energy, which is clear from Section 61 (h) of the Act. The Appellant is a company in the field of producing electricity from renewable sources of energy. Therefore, the mandate ought to have been towards securing investor confidence instead of depriving the Appellant of monies which are lawfully due to it. The Impugned Order disincentivise investments in the field of renewable sources of energy. This Tribunal vide its judgement dated 07.03.2007 in case of M/s. GMR Industries Ltd Vs APTRANSCO has also emphasised the importance of promoting renewable sources of energy. The Impugned Order is detrimental

to the survival of the Appellant's unit and in derogation of the objectives of the Act and the National Policy.

h) The Appellant also filed a writ petition before the Karnataka High Court challenging the order dated 30.8.2000 of the Respondent No.1 and contended that the wheeling charges were frozen for a period of 10 years in terms of GoK orders dated 8.6.1992 and 13.6.1996. The action of the Respondent No. 1 was also challenged on the ground of promissory estoppel. The Appellant's case is a so covered under the judgement of the Karnataka High Court dated 2.6.2004 in case of Bhoruka Power Corporation Ltd. v. KPTCL (W.P. No. 9366/01 & 39522/2000) wherein the High Court has quashed the demand raised by the Respondent No. 1 on the ground that the wheeling charges could not have been unilaterally revised in 10 years under the agreement between the parties.

i) The Respondent No. 1 has collected 51,21,855 units as excess energy from September 2000 to August 2008. The transmission & network charges collected under wheeling charges as per the Tariff Order, 2003 from April 2003 to August 2008 amounts to Rs. 1,34,82,889. The Appellant in OP No. 47 of 2010 prayed for quashing the order dated 30.8.2000 and refund excess charges with interest @ 2% per month which was produced under Annexure P 14 of the petition and was also the part of the prayer. The State Commission vide order dated 2.6.2011 allowed the petition of the Appellant. Accordingly it is entitled to recover the excess energy/ monies from the Respondent No.1 and also an interest of 2% per month on the excess monies paid by it. For the

claim of 2% interest the Appellant has relied on the Conditions of Supply of Electricity framed by the KERC which provided penal interest of 2% in case there was a delay in crediting the amount beyond a period of 2 months.

j) The Respondents have contended that the transmission &network charges collected are separate charges then the wheeling charges. According to the Appellant the wheeling charges as per the Tariff Order, 2003 were to be collected in two different forms one was excess of 5% wheeling charges in kind and the second was charges under heading transmission and network charges.

k) The Appellant on the issue of going beyond the original decree in the execution proceedings also relied on the judgements of Hon'ble Supreme Court in case of Punjab State Civil Supplies Corporation Ltd. & Anr. v. M/s Atwal Rice & General Mills Rep. by its Partners (2017) 8 SCC 116 and Brakewell Automotive Components India P Ltd. v. PE Selvam Alagappan (2017) 5 SCC 371.

10. The learned counsel for the Respondent Nos. 1 & 2 has made following arguments / submissions on the issues raised in the present Appeal for our consideration:

a) The State Commission while passing the Impugned Order has considered all aspects and has given a reasoned order. The State Commission has not formulated any new issue as alleged by the Appellant. A conjoint reading of the order dared 2.6.2011 and Impugned Order would clearly bring out the mischief attempted by the Appellant. There is no need for setting aside the said order.

b) The Clause 5.03 of the WBA entered between the Appellant and the erstwhile KEB specifically provides for modification or revision of wheeling charges from time to time after notification by the Board. Accordingly, on 30.8.2000 the erstwhile KEB after considering various aspects including increase in transmission costs etc. increased wheeling charges from 5% to 20% payable by the generators of the capacity from 1 MW to 3 MW with effect from 1.9.2000.

c) The State Commission was very well aware of its role in complaint proceedings before it. This is very clear from the para 8 of the Impugned Order where the State Commission has discussed the powers as an executing court and also referred to the judgement of Hon'ble Supreme Court which specifically permits the executing court to consider the pleadings and facts in the proceedings prior to construing the purport and meaning of a decree.

d) On the issue, whether WBA being a concluded contract, the State Commission has dealt the same in the order dated 2.6.2011. The same was examined in light of Karnataka Electricity Reform(KER) Act, 1999 and concluded that the statue overrides contract. In the Impugned Order the State Commission has merely examined the contentions of parties on the issue in context of applicability of Tariff Order, 2003. The State Commission has noted that there is no specific finding regarding admittedly concluded contract and therefore came to a logical conclusion that the Tariff Order, 2003 is applicable. The applicability of Tariff Order, 2003 is not a new issue dealt in the Impugned Order. The same has been dealt by

the State Commission in order dated 2.6.2011 and has held that the Tariff Order, 2003 is applicable and the Respondent No. 1 is not entitled to determine the wheeling charges as envisaged in the WBA.

e) The State Commission on the issue of CSS has gone into the details in order dated 2.6.2011 and concluded that CSS would be attracted in transaction with the Appellant. Thus, the Appellant is misleading this Tribunal by saying that this issue was not even part of proceedings in OP No. 47 of 2010.

f) The Respondents have also denied the allegations of the Appellant regarding violation of Act/National Tariff Policy regarding promotion of renewable sources of energy.

11. After having a careful examination of all the aspects brought before us on the issues raised in the Appeal and submissions made by the Appellant and the Respondents for our consideration, our observations are as follows:-

a) The present case pertains to the decision of the State Commission in Complaint No. 13 of 2013 regarding changing the decision as given in order dated 2.6.2011 by re-opening and re-examining the original petition OP No. 47 of 2010 and adjudication of the issues which were not even the subject matter of OP No. 47 of 2010.

b) On Question No. 7 a) i.e. Whether it is not contrary to law for the State Commission to, in execution proceedings (Complaint No. 13/2013), have re-opened and re-examined Original Petition No.

47 of 2010? and on Question No. 7 b) i.e. Whether an executing Court can at all go behind a decree and re-adjudicate the matter on merits?, we decide as follows:

i. To answer these questions of law there is a need to understand the background of the case. After signing of the WBA in 1998 between the Appellant and the Respondent No. 1, the Respondent No. 1 on 30.8.2000 unilaterally increased the wheeling charges from 5% to 20%. The Appellant in the year 2003 filed a writ petition (W.P. No. 690 of 2003) before the High Court of Karnataka. The High Court vide its order dated 13.4.2007, after observing unilateral increase of wheeling charges by the Respondent No. 1, directed the Respondent No. 1 to hear the Appellant and the decide the issue as per law. Subsequent to disposal of the said writ petition, the Appellant requested Respondent No. 1 to refund the excess wheeling charges collected and also certain network charges collected by the Respondent No. 1 and the Bangalore Electricity Supply Company Limited (BESCOM), as against the 5% wheeling charge agreed in the WBA. The Appellant's request was rejected by the Chief Engineer (Electricity), State Load Despatch Centre (SLDC), vide letter dated 1.7.2010. Subsequently the Appellant had to approach the State Commission with the petition no. 47 of 2010 for quashing the orders of the Respondent No.1. During the aforesaid period the State Commission has also passed the Tariff Order, 2003 and Tariff Order, 2005 related to the Respondent No. 1.

ii. The State Commission vide order dated 2.6.2011 decided upon the petition no. OP 47 of 2010. Now let us examine the findings of the State Commission in order dated 2.6.2011.

The relevant extract from the order dated 2.6.2011 in petition no. OP 47 of 2010 is reproduced below:

> *"11. No doubt it is true that Clause 5.3 states that the wheeling charges specified in the agreement are subject to change from time to time as notified by the Board. But, in our view it does not confer any unilateral power on the respondent. It is well settled law that any action of a "state" authority like the respondent which results in civil consequences has to be taken only after hearing the party which will be affected. Admittedly, the respondents before issuing the impugned order dated 30.8.2000 did not give any notice nor any opportunity of hearing to the petitioner. The Hon'ble High Court in the petitioner's writ petition has also held the same.*
>
> *……………………………………*
>
> *13. It is settled law that the statute overrides a contract. The determination of wheeling and other charges under Section 27 of the Karnataka Electricity Reform Act, 1999 and Section 62 of the Electricity Act, 2003 is within the statutory powers conferred on the Commission and this overrides the contractual rights of the parties to determine the wheeling and other charges from time to time as provided in the agreement with the petitioner. The Hon'ble Supreme*

Court in the case of M/s. PTC India Limited Vs. CERC 2010 (4) SCC 603 has also held that the Regulatory Commissions are entitled to intervene and overwrite the existing contracts under Section 178 as a part of the regulatory framework.

14. This Commission while passing the Tariff Order dated 10.3.2003 had observed that "The Commission is aware that some of the generating companies have challenged the orders of KPTCL in respect of wheeling charges and the Hon'ble Court has passed interim orders. This order of the Commission is not applicable to such cases and also cases of concluded contract where specific provisions in respect of wheeling charges are made. However, KPTCL may make specific proposal in respect of such contracts, in case it is considered justifiable and legal for the consideration of the Commission and appropriate orders". Admittedly, till date KPTCL has not made any application for the fixation of wheeling charges in those cases which are covered by concluded contracts even though such a right was reserved in its favour. In our opinion, the wheeling charges as fixed in the contract and which have not been modified by this Commission continue to apply during the period of the agreement. We are therefore in agreement with the contention of the petitioner that after coming into force of the provisions of the Karnataka Electricity Reforms Act, 1999 and the Electricity Act, 2003, it is the Commission

which alone is empowered to determine the wheeling and other charges and the contention of the respondent that under Clause 5.3 of the agreement it is entitled to determine the wheeling charges from time to time has to be rejected. Both the parties have to abide by the charges including payment of surcharge determined by the Commission from time to time in exercise of its statutory power wherever applicable.

15. Consequently we pass the following order :

(1) The petition is allowed.

(2) It is declared that the order of KPTCL dated 30.8.2000 impugned in the petition is not enforceable against the petitioner and petitioner is liable to pay only 5% of the energy as wheeling charges for the first ten years period as provided in the contract. Consequently, the order No. CEE/SLDC/SEE/ TBC/1042, dated 1.7.2010 of the Chief Engineer, LDC is set aside.

(3) Respondent is directed to re-calculate the charges payable by the petitioner considering the above observations made in this order and make necessary claims after making due adjustments to the charges already paid by the petitioner."

The State Commission after considering the observations of the Karnataka High Court and statutory authority available to

it has decided that the Appellant is liable to pay only 5% of the energy as wheeling charges for the first ten years period as provided in the WBA and directed the Respondent No. 1 to re-calculate the charges payable by the Appellant considering the said observations of the State Commission after making due adjustments to the charges already paid by the Appellant.

iii. The State Commission has discussed in detail the background of the case, which led to filing of the Petition No. OP 47 of 2010. The State Commission after discussing the findings in the Tariff Order, 2003, provisions of the Act & KER Act and judgement of Hon'ble Supreme Court in PTC case has delved on the issue of applicability of Regulations versus contract and has reached to a conclusion that the State Commission alone is empowered to determine the wheeling and other charges and dismissed the contention of the Respondent No. 1 that under Clause 5.3 of the agreement it is entitled to determine the wheeling charges from time to time and went on deciding that the Appellant is liable to pay only 5% of the energy as wheeling charges for the first ten years period as provided in the WBA.

iv. From the above, it can be concluded that the State Commission while rejecting 20% wheeling charges fixed by the Respondent No. 1 under the WBA, by way of this order dated 2.6.2011 has fixed the payment of 5% wheeling charges by the Appellant to the Respondent No. 1 for a period of first 10 years as provided in the contract (WBA). In

our opinion, the State Commission while exercising its regulatory function under the said judicial order has determined the wheeling charges of the Appellant for initial period of 10 years. After examining the order dated 2.6.2011 we find that the State Commission has not arrived at a conclusion regarding admittedly ‘concluded contract’ between the Appellant and the Respondent No. 1 as it merely stated the provisions available in the Tariff Order, 2003.

v. We have also examined the KERC (Tariff) Regulations, 2000 (notified on 9.6.2000) and find that the State Commission is empowered to fix the wheeling charges of the Appellant at variance to the Regulations/Orders under which they are determined. The relevant extract of the same is reproduced below:

> *“7. Saving of inherent power of the Commission:*
>
> *(1) Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Commission.*
>
> *(2) Nothing in these Regulations shall bar the commission from adopting in conformity with the provisions of the Act a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be*

recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.

(3) Nothing in these Regulations shall, expressly or impliedly, bar the Commission dealing with any matter or exercising any power under the Act for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit.”

In our opinion the above provisions allow the State Commission to fix the wheeling charges of the Appellant at variance to the Tariff Order, 2003 although the same was not explicitly brought out in the order date 2.6.2011.

vi. The order dated 2.6.2011 of the State Commission was challenged by the Respondent No. 1 before this Tribunal and Hon’ble Supreme Court. The appeal (IA No. 191 of 2013 in DFR No. 908 of 2013) filed by the Respondent No. 1 before this Tribunal was rejected by this Tribunal vide order dated 15.7.2013 on the ground that there was inordinate delay in filing the said appeal by the Respondent No. 1 without justifiable grounds. Thereafter, Hon’ble Supreme Court also rejected the Appeal (9963 of 2014) of Respondent No. 1 vide its order dated 27.1.2015. Accordingly, the order dated 2.6.2011 of the State Commission has become final and binding on the parties without leaving any scope for further interpretation.

vii. Now let us examine the Impugned findings of the State Commission. The relevant extract is reproduced below:

> *"15) The relevant portion of the said Tariff Order of 2003 further stated that the said Order was not applicable to cases of "concluded contracts", where specific provisions in respect of the Wheeling Charges are made. The Order does not define the words "concluded contract". In OP No.47/ 2010, the Complainant contended that the W&BA in question was a "concluded contract". On the other hand, the Respondents contended that it was not a "concluded contract", as understood in the Tariff Order of 2003, as the W&BA itself provided for revision of the Wheeling Chargers from time-to-time. It is not in dispute that the W&BA in question provided for revising the Wheeling Charges from time-to-time, without assuring any fixed Wheeling Charges for any fixed duration. Therefore, at the time of the proceedings in OP No.47/2010, there was no consensus between the parties as to whether the W&BA in question was a "concluded contract" or not, as understood in the Tariff Order of 2003. On this controversy, there is no specific finding in the Order in OP No.47/2010. There was no issue framed in that case as to whether the Tariff Order of 2003 was applicable to the Complainant or not. The observation made in this Order, as noted above, that, "Admittedly, till date KPTCL has not made any application for fixation of wheeling Charges in those cases which are*

covered by concluded contracts even though such a right was reserved in its favour", is only a statement of fact that the first Respondent-KPTCL had not made any application in such cases. This statement of fact does not even amount to an implied finding that there was a "concluded contract". Such an implication cannot be drawn, because the Commission, in the last sentence of paragraph-14 of its Order in OP No.47/2010, has observed that both the parties have to abide by the charges, including payment of Surcharge determined by the Commission from time-to-time in the exercise of its statutory power wherever applicable. The principles laid down in the above-referred decision of the Hon'ble Supreme Court in the Bhavan Vaja case would equally apply to ascertain the true meaning and effect of the ambiguous words of the Tariff Order of 2003. We are, therefore, of the considered view that "concluded contract" referred to in the Tariff order of 2003, relates to a contract where a fixed Wheeling Charge for a particular number of years was agreed to be levied, without there being a right to vary the same, in the meantime. The alteration of such a "concluded contract" may lead a party affected to plead in defence the promissory estoppel and legitimate expectation. For the above reasons, we hold that there is no finding by this Commission in its Order in OP No.47/2010, that the W&BA in question was a "concluded contract", insofar as it relates to the levying of the Wheeling Charges. Therefore, the Tariff Order of 2003 is

applicable to the Complainant and its contention that the said Order was not applicable is to be rejected.

………………………………

17) From the above discussions, we note that the interpretation of the Order in OP No.47/2010, as made by both the parties, is not acceptable. We hold that the Wheeling and Banking Charges as mentioned in the W&BA is applicable till 31.3.2003 and the Wheeling and Banking Charges as determined in the Tariff Order of 2003 is applicable from 1.4.2003 to 9.6.2005. The Wheeling and Banking Charges for the subsequent period shall be as determined in the Order dated 9.6.2005. Further, we hold that, apart from the Wheeling and Banking Charges, the Cross-Subsidy Surcharge is also applicable from 10.6.2005 at different rates for different periods, as per the periodical Orders of the Commission determining the Cross-Subsidy Surcharge."

From the above it can be seen that the State Commission while deciding that the WBA is not a 'concluded contract', has held that the Tariff Order, 2003 is applicable to the Appellant. The Appellant is liable to pay wheeling and banking charges as per the provisions of the WBA until 31.3.2003. The Wheeling and Banking Charges as determined in the Tariff Order, 2003 are applicable to the Appellant from 1.4.2003 to 9.6.2005. The Wheeling and Banking Charges for the subsequent period as determined in the Order dated 9.6.2005 shall be applicable to the

Appellant. The State Commission has further held that CSS is also applicable to the Appellant from 10.6.2005 at different rates for different periods, as per the periodical Orders of the State Commission determining CSS.

viii. The Appellant, regarding imposition of its own view by the State Commission while interpreting the order dated 2.6.2011 has relied on the judgement of Hon'ble Supreme Court in case of V. Ramaswami Ayyangar and Ors. v. T. N. V. Kailasa Thevar, AIR 1951 SC 189, wherein the Hon'ble Supreme Court has held that *" ... their duty was to give effect to the terms of the decree that was already passed and beyond which they could not go. It is true that they were to interpret the decree, but under the guise of interpretation they could not make a new decree for the parties ..."*

As discussed above and in light of the above judgement of Hon’ble Supreme Court we find that under the guise of interpretation of the order dated 2.6.2011 the State Commission has tried to make a new decree.

ix. It is a fact that the State Commission in the order dated 2.6.2011 at para 14 has held that “….*Both the parties have to abide by the charges including payment of surcharge determined by the Commission from time to time in exercise of its statutory power wherever applicable.”* Even after holding this and being aware of its statutory powers the State Commission has proceeded to decide that “…. *It is declared that the order of KPTCL dated 30.8.2000 impugned in the*

petition is not enforceable against the petitioner and petitioner is liable to pay only 5% of the energy as wheeling charges for the first ten years period as provided in the contract." The State Commission after having decided the wheeling charges for the Appellant for a period of 10 years in the order dated 2.6.2011 has proceeded to conclude (in the Impugned Order) that for the purpose of wheeling charges the Tariff Order, 2003 is applicable to the Appellant is not justifiable and is contrary to the facts and circumstances of the case. Accordingly, we do not agree to the contention of the State Commission that the Tariff Order, 2003 is applicable to it for the purpose of wheeling charges.

x. In view of the discussions as above, we are of the considered opinion that the State Commission while deciding the rate of wheeling charges applicable to the Appellant in the Impugned Order has re-adjudicated the case on merits, which is not allowed under the law. Accordingly, we decide that the Appellant is liable to pay only 5% as wheeling charges from the date of signing of WBA (17.8.1998) until 16.8.2008 i.e. completion of initial 10 years period as held by the State Commission in its order dated 2.6.2011. Hence, the Impugned Order of the State Commission to this extent is set aside.

xi. Accordingly, the issues raised are decided in favour of the Appellant.

c) On Question No. 7 c) i.e. Whether the impugned order does not fall foul of the ratio laid down by the Hon'ble Supreme Court in *Bhavan Vaja and Ors v. Solank Hanuji Khodaji Mansang & Anr., (1973) 2 SCC 40*?, we decide as follows:

i. The State Commission while passing the Impugned Order has relied on the judgement of the Hon'ble Supreme Court in case of Bhavan Vaja and Ors v. Solank Hanuji Khodaji Mansang & Anr., (1973) 2 SCC 40. In this regard the relevant extract from the Impugned Order is reproduced below:

> *"8) On perusal of the Order in OP No.47/2010 and the contentions raised by the respective parties regarding its compliance or non-compliance, we are of the considered opinion that the Order in OP No.47/2010 may give room for different interpretations, which requires further investigation to ascertain its proper meaning and true effect. For this purpose, the Commission has to consider the pleadings of the parties in OP No.47/2010, as well as the facts leading to filing of OP No.47/2010. The decision of the Hon"ble Supreme Court, reported in (1973) 2 SCC 40, in the case of Bhavan Vaja and others –Vs- Solanki Hanuji Khodaji Mansang and another supports the above view of the Commission, for further investigation of the Order in OP No.47/2010. The principle stated in the said decision reads thus :*

> *"Held, it is true that an executing court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading up to the decree. In order to find out the meaning of the words employed in a decree the court often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution court and if that court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it. The jurisdiction of execution court does not begin and end with merely looking at the decree as it is finally drafted.""*

ii. We have gone through the said judgement of Hon'ble Supreme Court and have found that in the same judgement the Hon'ble Supreme Court has also held that*"…..The Board had gone into the matter and had pronounced on the same. The pronouncement has not been challenged in appeal. Therefore, whether the order of the Board is correct or not, it is binding on the parties to the litigation."*

At para 11 b) above we have already decided that the order dated 2.6.2011 of the State Commission has become final and is binding to the parties concerned.

iii. In view of the above and our decision at para 11 b) the judgement of the Hon'ble Supreme Court in case of Bhavan Vaja and Ors v. Solank Hanuji Khodaji Mansang & Anr., (1973) 2 SCC 40 as quoted by the State Commission while justifying its decision to re-adjudicate the issues does not apply.

iv. Hence, this issue is decided in favour of the Appellant.

d) On Question No. 7 d) i.e. Whether the State Commission could have, in execution proceedings, rendered findings on issues that not even the subject matter of the Original Petition? and on Question No. 7 e) i.e. Whether the State Commission could have rendered a finding on the applicability of Cross Subsidy Surcharge with effect from 10.6.2005 when even though this was not an issue in OP No. 47 of 2010 or even in Execution proceedings?, we decide as follows:

i. The Appellant has alleged that the State Commission in the Impugned Order has also raised new issues, which were never subject matter of original petition OP 47 of 2010. These issues include about WBA being a concluded contract or not, applicability of the Tariff Order, 2003 to the Appellant and applicability of CSS to the Appellant.

ii. At 11 b) above, we have already decided that 5% wheeling charges shall be applicable to the Appellant for initial 10 years after signing of the WBA and the same has been decided considering the background of the case and

regulatory powers available with the State Commission. Accordingly, the question whether WBA is a concluded contract or not do have any further bearing in present case. Here we would like to clarify that after completion of initial period of 10 years the orders/regulations of the State Commission in respect of wheeling charges shall also apply to the Appellant.

iii. The State Commission at para 14 of its order dated 2.6.2011 has observed that *"…….Both the parties have to abide by the charges including payment of surcharge determined by the Commission from time to time in exercise of its statutory power wherever applicable."* The State Commission has clearly brought out that the Appellant and the Respondent No. 1 have to pay charges determined by the State Commission from time to time including payment of surcharge. The State Commission at para 13 of the order dated 2.6.2011 has also observed as below:

> *"13. It is settled law that the statute overrides a contract. The determination of wheeling and other charges under Section 27 of the Karnataka Electricity Reform Act, 1999 and Section 62 of the Electricity Act, 2003 is within the statutory powers conferred on the Commission and this overrides the contractual rights of the parties to determine the wheeling and other charges from time to time as provided in the agreement with the petitioner. The Hon'ble Supreme Court in the case of M/s. PTC India Limited Vs. CERC*

2010 (4) SCC 603 has also held that the Regulatory Commissions are entitled to intervene and overwrite the existing contracts under Section 178 as a part of the regulatory framework."

The State Commission based on the provisions of the Act and the judgement of Hon'ble Supreme Court has clearly brought out the applicability of statue vis-a-vis contracts.

iv. At para 11 b) above we have already decided that as opined by the State Commission in its order dated 2.6.2011,5% wheeling charges shall be applicable to the Appellant for a period of initial 10 years i.e. up to 16.8.2008 from the date signing of the WBA (which was signed on 17.8.1998). The same has been decided considering the background of the case and regulatory powers available with the State Commission. This does not mean that the other applicable provisions of the Tariff Order, 2003(excluding wheeling charges) and subsequent order/regulations of the State Commission (excluding wheeling charges until 16.8.2008) are not applicable to the Appellant. Hence, we would like to clarify that the applicability of Tariff Order, 2003 or any other subsequent order/regulations of the State Commission having bearing on the Appellant other than the wheeling charges (up to initial period of 10 years from the date of signing of WBA) are applicable to the Appellant. Hence, the contention of the Appellant regarding non-applicability of Tariff Order, 2003/Tariff Order, 2005 (excluding wheeling charges till 16.8.2008) and CSS is misplaced. This holds

good even if the State Commission would have not dealt this issue in the Impugned Order.

v. The Appellant has also contended that the transmission and network charges as envisaged in Tariff Order, 2003 and Tariff Order, 2005 are not applicable to it as they are the part of the wheeling charges as opposed to the Respondents' considering them different from the wheeling charges. We are of the opinion that this issue needs clarification from the State Commission and hence we remand this issue to the State Commission to clarify the same as this will decide final amount to be adjusted between the Appellant and the Respondent No. 1.

vi. There is also one other issue raised by the Appellant related to adjustment of energy/monies with 2% per month interest rate. The State Commission has not dealt specifically with such prayer of the Appellant in detail in the order dated 2.6.2011. The State Commission in the Impugned Order has dealt this issue. The relevant extract from the Impugned Order is reproduced below:

"16. One of the prayers made in OP No.47/2010 was to charge interest at 2% per month on the energy to be returned and the amount to be refunded by the Respondents. On this point, no issue was framed and no discussion has taken place in the Order in OP No.47/2010. There was no specific averment in OP No.47/2010 supporting the claim for interest. The W&BA

entered into between the parties does not provide for payment of interest on return of energy or on refund of the amount by the Respondents to the Complainant, if such contingency should arise for any reason. The awarding of interest is at the discretion of the Commission and unless it is specifically granted in the Order, the presumption is that the request for award of interest was rejected."

The State Commission has rejected the grant of any interest by holding that it is at the discretion of the State Commission and unless specifically it is granted in the order, it should not be presumed otherwise. This has been concluded by the State Commission after considering inherent powers of the State Commission, provisions of the WBA and lack of supporting averments by the Appellant in its petition. The reliance of the Appellant on the Conditions of Supply of Electricity framed by the KERC on this issue is misplaced as the said conditions are with reference to supply of electricity by the distribution licensee to the consumers in the State of Karnataka.

Accordingly on this issue, we agree with the impugned findings of the State Commission.

vii. Hence, the issues raised are decided accordingly.

ORDER

We are of the considered opinion that the issues raised in the present Appeal have some merit as discussed above. The Appeal is hereby partially allowed.

The Impugned Order dated 7.1.2016 passed by the State Commission is set aside to the extent on the issue of Wheeling charges and remanded to the State Commission for clarifying its stand on Transmission and Network charges at Para 11 d) above.

No order as to costs.

Pronounced in the Open Court on this **27th day of November, 2017.**

(I. J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

√
REPORTABLE/NON-REPORTABLE

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