Appellate Tribunal for Electricity
(Appellate Jurisdiction)

JUDGMENT IN APPEAL NO.128 OF 2011

Dated: 2nd July, 2012
Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

In the Matter of:
M/s. Lanco Kondapalli Power Limited
Hyderabad

...Appellant,

Versus

1. **Andhra Pradesh Power Co-ordination Committee Vidyut Soudha, Hyderabad**

2. **M/s. Transmission Corporation of Andhra Pradesh Hyderabad**

3. **Central Power Distribution Company of Andhra Pradesh Ltd., Mint Compound, Hyderabad**

4. **Southern Power Distribution Company of Andhra Pradesh Tirupati**

5. **Northern Power Distribution Company of Andhra Pradesh**

6. **Eastern Power Distribution Company of Andhra Pradesh Ltd.,**

7. **Andhra Pradesh Electricity Regulatory Commission**

… Respondent (s)

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5. **Northern Power Distribution Company of Andhra Pradesh**

6. **Eastern Power Distribution Company of Andhra Pradesh**
   Vishakapatnam

7. **Andhra Pradesh Electricity Regulatory Commission**

… Respondent (s)

Counsel for the Appellant (s) : Mr. Krishnan Venugopal, Sr. Adv.
Mr. Sakya Singha Chaudhuri
Ms. Anusha Nagarajan
Mr. Gaurav Roy
Mr. Sitesh Mukherjee
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Mr. Ishan Arora

Counsel for the Respondent(s):Mr. K.V. Mohan
Mr. K.V.Balakrishnan for APERC
Ms. Surbhi Sharma
Mr. P. Shiva Rao
Ms. Sikha Ohri for R-2 & R- 6

O R D E R

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. M/S. Lanco Kondapalli Power Limited, the Appellant filed two Petitions claiming the re-imbursement of Minimum Alternate Tax and the Capacity Charges before Andhra State Commission. The said Petitions were dismissed by the State Commission on 13.6.2011 on the ground that it was barred by limitation. Aggrieved by these impugned orders, the Appellant has filed these two Appeals in Appeal No.128 of 2011 and Appeal No.129 of 2011 before this Tribunal. Since the issue raised in both these Appeals is common, this common judgment is rendered.

2. Let us deal with the facts of each of the Appeals.

3. The brief facts in Appeal No.128 of 2011 are as follows:

(1) This Appeal relates to claim of the Appellant for reimbursement of Minimum Alternate Tax.

(2) M/s. LANCO Kondapalli Power Private Limited, the Appellant herein, is engaged in the generation and sale of electricity having its Registered Office in Hitec City, Madhapur, Hyderabad. It has set-up a 368.144 MW Combined Cycle Power Project at Kondapalli Industrial Development Area, Krishna District, Andhra Pradesh.

(3) Andhra Pradesh Power Coordination Committee, the first Respondent in this Appeal, was constituted on 7.6.2005 to ensure coordination between the four distribution Companies of Andhra Pradesh i.e. (1) Central Power Distribution Company of Andhra Pradesh Ltd (2) Southern Power Distribution Company of Andhra Pradesh Ltd (3) Northern Power Distribution Company of Andhra Pradesh Ltd and (4) Eastern Power Distribution Company of Andhra Pradesh Ltd (Respondent 3 to 6). M/s. Transmission Corporation of Andhra Pradesh (APTRANSCO) is the 2nd Respondent.

(4) As a part of power sector reforms, Andhra Pradesh State Electricity Board was unbundled in the first phase into Generation and Transmission

Corporation. The unbundling of the Transmission Corporations into four Distribution Companies under Second Transfer Scheme was notified by the Government on 31.3.2000. Under this scheme, Respondents No.3 to 6 were formed and the business of distribution was vested in such companies. However, the procurement of power for Respondents No.3 to 6 were carried out by the Respondent No.2, M/s. Transmission Corporation of Andhra Pradesh (APTRANSCO) for the period relevant for this Appeal.

(5) The erstwhile Andhra Pradesh State Electricity Board had invited bids for short gestation power projects. The Appellant submitted a bid for the liquid fuel based power station at Machilipatnam, Krishna district in the State. This was accepted by the State Electricity Board and approved by the Government of Andhra Pradesh. Accordingly, the PPA was entered into between the parties.

(6) Pursuant to the PPA, the Appellant set-up a 368.144 MW combined cycle thermal power plant. The short gestation power plant was completed in time and the commercial operation for the first generating unit of the project was declared on 26.7.2000. In the meantime, the provision relating to the payment of

Minimum Alternate Tax (MAT) was inserted into the Income Tax Act, 1961 w.e.f 1.4.2001. The Appellant was a Minimum Alternate Tax (MAT) assessee. It paid MAT for all the assessment years.

(7) As per article 3.8 of the PPA, all Advance Income Tax payment made by the Appellant has to be refunded by the Transmission Corporation i.e. APTRANSCO (R-2) to the Appellant on proof of payment of such income tax. In terms of the above clause of the PPA, the Appellant called upon the Respondent-2, M/s. Transmission Corporation of Andhra Pradesh (APTRANSCO) to make payments by issuing the supplemental bills for reimbursement of the income tax amount paid by them. However, the Transmission Corporation of Andhra Pradesh (APTRANSCO) (R-2) failed to make any payment despite several reminders and notices sent by the Appellant.

(8) Owing to the non responsive attitude of the 2nd Respondent, the Appellant on 8.9.2003 issued a Notice of arbitration under article 14 of the PPA for the reference of the dispute to the arbitrator, relating to the reimbursement of the MAT.

(9) In response to the arbitration notice dated 8.9.2003, M/s. Transmission Corporation of Andhra Pradesh (APTRANSCO) (R-2) sent a reply letter dated 24.9.2003 stating that a meeting would be convened by the APTRANSCO (R-2) for discussing the pending problems and requesting the Appellant not to press for reference to arbitration till the final settlement of the dispute.

(10) In response to this letter, the Appellant wrote back to APTRANSCO (R-2) on 14.10.2003 intimating the nomination of its Company Secretary Mr. D Krishna Rao, as its representative to participate in the negotiation between the parties. However, there was no intimation about the meeting for negotiation.

(11) Since the APTRANSCO (R-2) took no steps to initiate discussion, the Appellant wrote another letter on 4.11.2003 reminding the Respondent that no meeting had been fixed by the APTRANSCO (R-2) as assured for resolving the dispute.

(12) On 25.11.2003, APTRANSCO (R-2) informed the Appellant that a meeting would be held to discuss the outstanding issues on 27.11.2003 at 4 p.m. However despite waiting by the representative of the Appellant at the venue, the APTRANSCO (R-2) did not hold the

meeting. As a result of this, the meeting did not materialise. Consequently, the Appellant, apprised the APTRANSCO (R-2) of the same through the letter dated 28.11.2003. Thereafter, APTRANSCO (R-2) intimated to the Appellant that it has designated Sri Patanjali Rao, Chief General Manager, to act as its representative to resolve the pending issues. However, APTRANSCO (R-2) took no further action to convene the meeting for resolution of the dispute.

(13) In the light of the lack of cooperation on the part of the APTRANSCO (R-2), the Appellant proceeded to issue notice on 26.3.2004 to R-2 informing the nomination of Justice B P Jeevan Reddy as its arbitrator and requesting to nominate their arbitrator as envisaged under the PPA.

(14) For the first time, the APTRANSCO (R-2) by the letter dated 8.4.2004 intimated to the Appellant that the resort to arbitration was unwarranted as the process of mutual negotiation had not been exhausted and as such, the arbitration clause was not enforceable in the light of the Section 86 (1) (f) of the 2003 Act.

(15) Since APTRANSCO (R-2) had refused to appoint any arbitrator as provided under PPA, the Appellant approached the High Court of Andhra Pradesh and

filed Arbitration Application No.31/2004 under Section 11 (6) of the Arbitration Act 1996 on 27.4.2004 praying for appointment of Arbitrator. APTRANSCO (R-2) contested the said Application challenging the maintainability of arbitration proceedings over the dispute between the generating Company and the licensee. The matter was periodically adjourned for final disposal.

(16) During the pendency of the said Application for appointment of Arbitrator before the High Court of Andhra Pradesh, the Hon'ble Supreme Court in the case of Gujarat Urja case rendered a judgment holding that Section 11 (6) of the Arbitration Act 1996 cannot be invoked by the High Court in the case of disputes between generating companies and licensees as the same was superseded by Section 86 (1) (f) of the 2003 Act.

(17) In the light of the said Judgment by the Hon'ble Supreme Court, the Application No.31/2004 filed by the Appellant was disposed of by the High Court on 18.3.2009 giving liberty to the Appellant to approach the State commission for the appropriate relief.

(18) In the light of the above, the Appellant filed a Petition in OP No.18 of 2009 before the State

Commission claiming the reimbursement of the MAT paid by the Appellant. The State Commission, after hearing both the parties, passed the impugned order dated 13.6.2011 rejecting the claim of the Appellant towards reimbursement of MAT in respect of the bills relating to the period prior to 2006 on the ground that it was barred by limitation as per the Limitation Act, 1963.

(19) The State Commission further held that the period spent by the Appellant in the arbitration proceedings before the High Court could not be excluded under Section 14(2) of the Limitation Act since the proceedings could not be said to have been pursued in good faith.

(20) Challenging this order dated 13.6.2011 relating to the claim relating to reimbursement of the MAT in respect of the period prior to 2006; the Appellant has filed this Appeal in Appeal No.128/2011.

4. The facts in Appeal No.129 of 2011 are same with slight difference which are as follows:

(1) This Appeal relates to the claim for capacity charges.

(2) The erstwhile Andhra Pradesh State Electricity Board invited bids through competitive bidding process

for short gestation power project. The Appellant, engaged in the business of generation and sale of electricity, had submitted bids for liquid fuel based power station of 355 MW at Machilipatnanam, Krishna district of Andhra Pradesh. This was accepted by the State Electricity Board and approved by the State Government. Then the Appellant and the State Electricity Board entered into a Power Purchase Agreement on 31.3.1997. The Appellant has implemented the project and declared the Commercial Operation Date (COD) of the project as 25.10.2000.

(3) Under Article 3.1 of the PPA, the Respondents are required to "*pay for the capacity of the project, in respect of any tariff year a capacity charge*..." calculated in the manner as set out in the PPA. Article 2.1 of the PPA required the Respondents to pay capacity charges from the Date of Commercial Operation of the first unit.

(4) Thus, under Clause 2.1 read with clause 5.2 of the PPA, the Appellant was entitled to recover capacity charges from the date of the commercial operation of the first generating unit and also for the energy units generated during the testing of the generating units.

(5) Accordingly, the Appellant raised 6 invoices on the Respondent for the period between 16.9.2000 and 11.1.2001 towards payment of capacity charges. However, the Respondents have neither denied the correctness of the bills nor made any effort about the payment towards those bills.

(6) Owing to the non-responsive attitude, the Appellant initiated the arbitration proceedings on 8.9.2003 by issuing a notice of arbitration.

(7) As stated in the facts in other Appeal No.128 of 2011, APTRANSCO replied to the Notice of the Arbitration stating that a meeting will be convened for discussing the pending problems. Accordingly, the Appellant nominated its Company Secretary Mr. D Krishna Rao as its representative to participate in the mutual negotiations. But, the Respondents have not convened the meeting as promised. Then APTRANSCO intimated the Appellant that it has designated Sri Patanjali Rao, CGM to resolve the pending issues. Even then no further action had been taken to convene the meeting.

(8) In the light of the lack of cooperation, the Appellant issued a notice on 26.3.2004 nominating retired Supreme Court Justice B P Jeevan Reddy as

its arbitrator and requesting the Respondents to nominate their Arbitrator as per the PPA.

(9) On 8.4.2004, APTRANSCO (R-2) sent intimation to the Appellant that the resort to arbitration was unwarranted as the process of mutual negotiation had not been exhausted.

(10) As APTRANSCO (R-2) failed to appoint its arbitrator as per the PPA, the Appellant, M/s. Lanco Kondapalli Power Limited filed an Arbitration application on 27.4.2004 in the High Court of Andhra Pradesh for appointment of Arbitrator in respect of the claim for capacity charges. Counter was filed by the Respondent-2 questioning the maintainability of the arbitration proceeding before the High Court. In the mean time, during the pendency of the said application, the Hon'ble Supreme Court in Gujarat Urja case held that the application for appointment of arbitrator could not be entertained by the High Court under Section 11 (6) of the 1996 Act as it was superseded by Section 86 (1) of the 2003 Act.

(11) In the light of the said decision the High Court disposed of the said arbitration application on 18.3.2009 giving liberty to the Appellant to approach the State Commission. Thereafter, on 5.6.2009, the

Appellant filed a petition before the State Commission in OP No.33 of 2009 claiming the capacity charges.

(12) The State Commission ultimately passed the impugned order on 13.6.2011 holding that the claim made by the Appellant was barred by limitation and that the period spent by the Appellant in the Arbitration proceedings could not be excluded under Section 14 of the Limitation Act since the proceedings could not be said to have been pursued in good faith.

(13) As against this impugned order dated 13.6.2011 passed rejecting the claim for capacity charges, the Appellant has filed this Appeal No.129 of 2011.

5. Let us now deal with the dispute relating to the Appeal No.128 of 2011.

6. The present dispute arises out of the non payment of the invoices raised by the Appellant for reimbursement of the amount spent by the Appellant towards the Minimum Alternate Tax (MAT) under the Power Purchase Agreement entered into between the Appellant and the Andhra Pradesh Electricity Board.

7. As enumerated above in the facts, the Appellant made sincere efforts to settle the matter with the Respondent. Having failed in the same, the Appellant filed an application

in the High Court on 27.4.2004 for appointment of Arbitrator. However, in view of the fact that the Hon'ble Supreme Court gave a judgment on 13.3.2008 in Gujarat Urja Case that this dispute can be resolved only by the State Commission, the High Court disposed of the application by the order dated 18.3.2009 giving the Appellant the liberty to approach the Andhra Pradesh State Commission for the relief. Accordingly, the Appellant filed a Petition No.18 of 2009 before the State Commission claiming the reimbursement of MAT. On the basis of the objection raised by the Respondent, the State Commission passed the impugned order dated 13.6.2011 rejecting the claim of the Appellant as barred by limitation as the period spent in the arbitration proceedings before the High Court could not be excluded U/S 14 of the Limitation Act.

8. Challenging the same, the Appellant has filed this Appeal.

9. According to the Appellant, the Respondents have to reimburse the Minimum Alternate Tax (MAT) as per article 3.8 of the PPA dated 31.3.1997 for the period from 2001-02 to 2008-09. Before the State Commission, the Respondents objected to the maintainability of the claim for the period between 2001-02 and 2005-06 on the ground that it was barred by limitation. However, the Respondents have

conceded for the re-imbursement in respect of the claim for the period 2006-09.

10. According to the Appellant before the State Commission, the period the Appellant had spent for pursuing the arbitration proceedings have to be excluded u/s 14 (2) of the Limitation Act and in that event, the petition must be construed to be within time. However, the State Commission having considered the pleas made by the respective parties allowed the claim for the period only for 2006-09, but found that the claim for the period prior to 2006 to 2009 are barred by limitation in view of the fact that the exclusion provided under Article 14 (2) of the Limitation Act would not apply to the present facts of the case.

11. Let us now refer to the issues framed and findings rendered by the State Commission in the case relating to this Appeal.

12. **This Appeal No.128 of 2011 would relate to OP No.18 of 2009** filed by the Appellant before the State Commission claiming reimbursement of Minimum Alternate Tax. In this matter two important issues were framed by the State Commission:

    (1) Whether the Petitioner is entitled for reimbursement of MAT as per Article 3.8 of the PPA dated 31.3.1997 for the period from 2001-02 to 2008-

09 and if so, whether it is necessary to direct the Respondent to pay late payment charges on account of delay in reimbursement of Minimum Alternate Tax (MAT) ?

(2) Whether the claim for the period 2001-02 to 2005-06 is barred by limitation?

13. In respect of the First Issue, the Respondents themselves conceded that claim for reimbursement of MAT for the period 2006 to 2009 is maintainable but only opposed the claim for the earlier period since it was not maintainable as it was barred by limitation. Accordingly, the State Commission decided in favour of the Appellant in respect of the period 2006 to 2009 and directed for reimbursement of the same for the period from 2006 to 2009 holding that it was not barred by time. The relevant portion of the finding is as follows:

> *"However, in the conclusion part of the written arguments, the Respondents have conceded to the claim of MAT from the period from 2006 to 2009 in the light of the latest judgment of the Appellate Tribunal dated 06.08.2009 in Appeals No.41, 59 & 60 of 2009. Hence, there is no need to this Commission to decide the issue specifically about the entitlement. Hence this issue is answered in favour of the petitioner and against the Respondents for the period which is not barred by time".*

14. In respect of the Second Issue framed for the claim with reference to the earlier period i.e. from 2001-02 to 2005-06 as mentioned above, the Respondents objected to the claim on the ground of limitation and accordingly, the State Commission upheld the objection raised by the Respondent and rejected the claim of the Appellant by refusing to exclude the period spent before the High Court in the arbitration proceedings under Sec 14 (2) of the Limitation Act on the ground that the approach of the Appellant before the High Court in the arbitration proceedings without approaching the State Commission cannot be said to be in good faith. The relevant finding in the impugned order is as follows:

> *"So, the prosecution of the proceeding ignoring specific provision in the Act itself cannot be said that it is done with good faith. At the same time, ignorance of law is also not an excuse to start the lis in a wrong court which has no jurisdiction. Moreover, the AP Electricity Reform Act is not repealed u/s 185 of the said Act even if the cause of action is arisen prior to the Act and it continuously follows even after the advent of the Act, the same cannot be wiped out.*
>
> *24. It is not a concurrent remedy and party has offered one remedy and availed one remedy and he becomes unsuccessful, he cannot get the benefit of Section14 when instituting the alternate remedy. When the Act has specifically confined to approach the Commission u/s 86 (1) (f) of the Act which is a Special Act to make any claim and the Commission itself can decide or arbitrates by appointing an Arbitrator. So, it has*

> *specifically debarred the jurisdiction contained u/s 11 of the Arbitration Act which is a general enactment, since Special Act overrides the provisions of general Act".*

15. Thus, in this case, the claim for reimbursement of MAT was allowed in respect of the period 2006 to 2009 but it was not allowed in respect of 2001-02 to 2005-06 on the ground that it was barred by limitation and the period spent before the High Court in the arbitration proceedings could not be excluded under Section14 (2) of the Limitation Act.

16. **Now let us refer to the details of the dispute as well as the issue framed and findings rendered by the Commission in the case relating to Appeal No.129 of 2011.**

17. This Appeal, 129/2011 relates to OP No.33 of 2009 filed by the Appellant for claiming the capacity charges in respect of six invoices from 16.9.2000 to 11.1.2001 along with the interest. The main issue framed by the State Commission is as follows:

> *"Whether the main Petition is barred by limitation and the same is liable to be rejected as prayed for?*

18. In this case, it was specifically objected to by the Respondent APTRANSCO by contending that the limitation for claim in question is for 3 years under Article 55 of the Limitation Act and the same had expired on 11.1.2004 and

as the time spent by the Petitioner in Arbitration Application was for a different relief from the present claim for the capacity charges, Section 14 (2) of the Limitation Act would not apply to the present case and as such it is barred by limitation.

19. On the other hand, it was contended by the Petitioner/ Appellant before the State Commission that it filed the Petition before the High Court for appointment of an Arbitrator as the Respondent had not cooperated with them for appointment of an Arbitrator and only when the said Petition was disposed of by the High Court in the light of the Hon'ble Supreme Court judgment in Gujarat Urja Case, the cause of action then arose for the Appellant to file a Petition before the State Commission and that therefore, the time spent by the Appellant in prosecuting the matter before the High Court with good faith has to be excluded u/s 14 (2) of the Limitation Act.

20. Rejecting this contention, the State Commission has given the following findings in the impugned order in this Appeal:

> *"In this case, the cause of action has arisen in the month of January, 2001 which has to be filed within 3 years from the date of said period. In this case, the Petitioner has approached the Hon'ble High Curt for appointment of an arbitrator on 27.4.2004 and now claims exemption u/s 14 (2) of Limitation Act. In*

*order to attract the application of Section 14 (2), the parties seeking its benefit must satisfy the Court **(a)** that the petitioner is prosecuting another civil proceeding with due diligence **(b)** that the earlier proceeding and the latter proceeding relate to the same matter in issue and **(c)** the former proceeding is being prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature is unable to entertain it. In this case, the Petitioner (in main OP) has filed the AAO 31/2004 on 27.4.2004. The said petition was closed based on the case of Gujarat Urja Vikas Nigam Ltd and finally held "in view of the above, needless to mention that the parties are at liberty to approach the Commission u/s 86 (1) (f) of the Act". Due diligence cannot be measured by any absolute standard. It depends on relative fact of a particular case. Due diligence, is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under particular circumstances. When a party proceeds contrary to a clearly expressed provision of law cannot be said or regarded as prosecuting others civil proceeding in good faith.*

The Petitioner is harping upon the observation and also the cause of action for filing of Petition before the Commission. Whereas, the Respondents are claiming that the courts have already held that there is a specific provision in the Act which is a special Act invoking clause u/s 11 of Arbitration Act which is a general Act cannot be entertained. The contention that the Arbitration Act is a Special Act and the EA 2003 is a general Act as contended by the Counsel for the

Petitioner in OP 33/2009 is unsustainable; since the EA 2003 is a special Act whereas Arbitration Act is a General Act".

21. So, the crux of the findings in both the impugned orders is that the claim of the Appellant with regard to reimbursement of the MAT as well as the capacity charges had not been made in time; the period spent by the Appellant/Petitioner before the High Court in the arbitration proceedings could not be said to have been proceeded under good faith and that therefore, the Petition for claim of the reimbursement of the MAT and Capacity Charges in respect of above period cannot be entertained as barred by limitation.

22. In the light of the findings rendered by the State Commission in both these matters rejecting the claim of the Appellant /Petitioner on the ground that it was barred by limitation, the only question which may arise for consideration in these Appeals, is this:

"**Whether the State Commission was right in dismissing the petitions filed by the Petitioner/ Appellant claiming reimbursement of the MAT as well as the capacity charges on the ground that it was barred by limitation while denying the benefit under Article 14 (2) of the Limitation Act, 1963?**

23. The short submissions made by the Learned Senior Counsel appearing for the Appellant in both these Appeals is as follows:

    (1) Under the PPA, the cause of Action accrued in favour of the Appellant only on 12.8.2001 i.e. after 90 days after the first invoice in respect of Minimum Alternate Tax was raised on 14.5.2001. Under the PPA, the Appellant is entitled to exercise the remedy only thereafter. As the Respondent did not settle the invoices for reimbursement of MAT for a considerable time, the Appellant finally issued a notice for arbitration on 8.9.2003. Having no positive response from the Respondent, the Appellant filed an application on 27.4.2004 before the High Court for appointment of Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996. Only when Gujarat Urja case was pronounced on 13.3.2008 by Hon'ble Supreme Court clarifying the legal position that the disputes between the parties have to be settled only by the State Commission under Section 86 (1) of the Electricity Act, 2003 the High Court disposed of the said arbitration proceedings in the light of the Hon'ble Supreme Court decision on 18.3.2009 giving the liberty to the Appellant/Petitioner to approach the State Commission for the relief. Thereafter, the Appellant filed a petition in

OP No.18 of 2009 before the State Commission with reference to reimbursement of the MAT.

(2) Similarly, the Respondents did not settle the invoices for capacity charges raised by the Appellant for a considerable period of time. Therefore, the Appellant issued a Notice for arbitration on 8.9.2003. Finding that there was no positive response, the Appellant filed an application on 27.4.2004 before the High Court for appointment of arbitrator in respect of the claim for capacity charges.

(3) As mentioned above, in view of the judgment of the Hon'ble Supreme Court in Gujarat Urja Case, the High Court disposed of the petition on 18.3.2009 giving liberty to the Petitioner to approach the State Commission. Accordingly, the Appellant filed the petition on 5.6.2009 regarding non payment of capacity charges. As such there was no delay due to the lack of bona fide.

(4) Section 14 (2) of the Limitation Act contemplates exclusion of the entire period of pendency before the wrong forum. It is the settled law that time spent in prosecuting the proceedings in the wrong forum right up to the disposal of the said proceeding holding that it was a wrong forum, as specified u/s 14(2) of the

Limitation Act, must be excluded while computing the period of limitation since the Appellant initiated the arbitration proceedings before the High Court diligently in good faith and ultimately the High Court rejected the said petition on the ground that the said court was unable to entertain the said proceedings due to the defective jurisdiction. Hence, the period beginning from 8.9.2003, the date of Notice of arbitration, to 18.3.2009, the date of disposal of the arbitration proceedings by the High Court has to excluded and if it is excluded, the Petition filed before the State Commission shall be construed to have been filed within time and as such they are entitled to the claim for reimbursement of MAT as well as the capacity charges.

(5) Furthermore, the very same issue had already been decided in the judgment of this Tribunal in Spectrum Power Generation case in Appeal No.90 of 2011 dated 10th August, 2011 which is in favour of the Appellant and therefore, the same may be followed in these Appeals as well.

24. In reply to the above submissions, the Learned Counsel appearing for the Respondents urged the following contentions:

(1) The Appellant filed a Petition in OP No.18/2009 before the State Commission on 23.2.2009 claiming MAT for the years 2001 to 2009 but in the Arbitration notice which was issued on 26.3.2004, the Appellant claimed MAT only for the years 1.4.2001 to 15.6.2003. Thus, there was no notice of arbitration for the claim of the MAT for the period from July, 2003 onwards.

(2) Further, the claim for the period from the year 2001 to 15.6.2003 is barred by limitation as the proceedings in OP No.18 of 2009 was filed on 23.2.2009. The claim of the Appellant for the period from July, 2003 to 2006 was also barred by law of limitation as there was no arbitration notice.

(3) Appellant filed OP No.18 of 2009 before the State Commission even before the disposal of the Petition by the Appellant before the High Court which was disposed of on 18.3.2009. When that being the case, there was no reason as to what prevented the Appellant from filing the petition before the State Commission soon after the Gujarat Urja judgment was pronounced i.e. on 13.3.2008. As such, there is absolutely no material to show that the arbitration proceedings were prosecuted by the Appellant with

good faith to enable it to claim the benefits of the Section 14 (2) of the Limitation Act.

(4) In respect of the claim for capacity charges relating to Appeal No.129 of 2011, the Petitioner Appellant filed application on 27.4.2004 before the High Court seeking appointment of arbitrator. The Respondent immediately filed a counter stating that the State Commission alone has got the jurisdiction to decide the issue in the arbitrary dispute. In the very same counter, the Respondent also raised a question with regard to the maintainability of the claim on the ground that the claim was barred by limitation. But the Appellant did not contest this issue. On the other hand, he waited till 18.3.2009 on which date, the High Court disposed of the matter and only thereafter he approached the Commission that too after 3 months i.e. on 5.6.2009.

(5) The claim of the Appellant that the period between 8.9.2003 (the date of notice of arbitration) and 18.3.2009 (the date of disposal of the petition by the High Court) has to be excluded as per Section 14(2) of the Limitation Act, is not valid. The position of law is very much clear with reference to the jurisdiction of the State Commission at that time itself when the Appellant

filed the Application before the High Court on 27.4.2004. Therefore, there was no bona fide on the part of the Petitioner/Appellant in prosecuting the arbitration proceedings before the High Court instead of approaching the State Commission.

(6) To invoke Section 14(2) of the Limitation Act, the proceedings filed in other Court need to be filed at a later date and the similar proceedings filed in the earlier court should have been dismissed due to lack of jurisdiction. In this case, there are no similar proceedings. The Appellant filed the petition before the High Court for appointment of Arbitrator to get the dispute resolved whereas the prayer made by the Petitioner/Appellant before the State Commission was for adjudication of the dispute and not for appointment of Arbitrator. Thus, these proceedings are not similar. This shows that there was no good faith.

(7) The findings given by this Tribunal in Spectrum case i.e. in Appeal No.90 of 2011 was on the basis of the peculiar facts of that case and the said finding would not apply to the present facts of the case. Hence, there is no merit in the Appeals filed by the Appellant.

25. Learned Senior Counsel for the Appellant has cited the following decisions in support of his plea:

(1) Gujarat Urja Vikas Nigam Limited v. Essar Power Limited (2008) 4 SCC 755

(2) State of Goa V Western Builders (2006) 6 SCC 239

(3) Ramdutt Ramkissendas v. E.D. Sassoon & Co. MANU/PR/0123/1929

(4) Abdul Rahim Oosman and Co. Ojamshee Purshottamdas & Co. AIR 1930 Cal 5

(5) Chaman Lal v State of UP AIR 1980 All 308

(6) J Kumaradasan Nair & Anr. V. IRAC Sohan & Ors (2009) 12 SCC 175

(7) Milkfood v. GMC Ice Cream (2004) 7 SCC 288

(8) HBM Print Ltd. V. Scantrans India Pvt Ltd (2009) 17 SCC 338

(9) Tulip Hotels Pvt Ltd v. Trade Wings Limited MANU/MHUY/0875/2009

(10) Rajiv Vyas v. Johnwin Manavalan MANU/MHY/1125/2010

(11) Municipal Corporation Jabalpur v Rajesh Construction Co. (2007) 5 SCC 344

(12) Spectrum Power Generation Ltd V. APTRANSCO & Ors. Appeal No.90 of 2011 dated 10.8.2011

(13) Transmission Corporation of A.P Ltd v. Lanco Kondapalli Power (P) Ltd (2006) 1 SCC 540

(14) Fuljit Kaur v. State of Punjab (2010) 11 SCC 455

(15) Kunnyammed v. State of Kerala (2000) 6 SCC 359

(16) Mysore State Electricity Board v Bangalore Woollen, Cotton and Silk Mills AIR 1963 sc 1128

(17) Punjab State Electricity Board v. Bassi Cold Storage AIR 1994 SC 2544

(18) Grid Corporation of India v. India Charge Chrome (1998) 5 SCC 438

(19) Ghasi Ram & Ors v. Chait Ram Saini and Ors (1998) 6 SCC 200

(20) Vijay Kumar Rampal & Ors v. Diwan Devi & Ors. AIR 1985 sc 1669

(21) Consolidated Engineering Enterprises v. Irrigation Department (2008) 7 SCC 169

(22) Coal India Ltd v. Ujjal Transport Agency & Ors. (2011) 1 SCC 117

(23) SBP & Co. V. Patel Engineering Ltd & Anr. (2005) 8 scc 618

(24) A.K Gupta & Sons Ltd. Damodar Valley Corporation AIR 1967 SC 96

26. On the other hand, the Learned Counsel for the Respondents have cited the following decisions in support of his reply:

(1) Milk Food Limited Vs. M/S GMC Ice Cream (P) Limited (2004) 7 SCC

(2) M/s. Gujarat Urja Vikas Nigam Limited v M/s. ESSAR Power Limited in Appeal No.77 & 86 of 2009

(3) The Mysore State Electricity Board Vs. Bangalore Woollen, Cotton and Silk Mills Limited & Ors (1963) AIR 1128

(4) M/s. Punjab State Electricity Board Vs. M/s. Bassi Cold Storage (1994) AUR SC

(5) M/s. Gird Corporation of Orissa Limited Vs. M/s. Indian Charge Chrome Limited (1998) AUR SC

(6) M/s. Lanco Kondapalli Power Private Limited Vs. A.P Power Coordiantion Committee & Otrhers in Supreme Court Appeal (Civil) No.7562 of 2006

(7) M/s. Jupitor Chit Fund Vs. Sri. Shiv Narain Mehta (Dead By LRs in AIR 2000 SC

(8) M/s. Ghasi Ram Vs. M/s. Chait Ram Saini in (1998) AIR SC

(9) M/s. Fuljit Kaur Vs. State of Punjab (2010) 11 SCC

(10) M/s. Haryana Financial Vs. M/s. Jagadamba Oils Mills (2002) AIR SC

(11) M/s. Mukri Gopalan Vs. Cheppilat Puthapurayilaboobacker (1995) 5 SCC

(12) State of Madhya Pradesh v. Anshuman Shukla AIR SC 2008

(13) M/s. Lanco Kondapalli Power Private Limited Vs. Transmission Corporation of Andhra Pradesh Limited in I.A. No.750 of 2004 in OP No.2996 of 2003

27. Let us deal with those decisions which are relevant to the issue in question at the appropriate stage.

28. At the outset, it shall be stated that the Appellant does not seriously dispute the fact that the Limitation Act would be applicable to the present case. Even though in the pleadings of the Appeals, the Appellant pleaded that the Limitation Act would not apply, at the time of hearing, the Appellant submitted that although the claim must have been made by the Appellant within 3 years from the date of cause of action, the Appellant is entitled to claim for exclusion of the whole period spent during arbitration proceedings initiated by it before the High Court of Andhra Pradesh U/S 14 (2) of the Limitation Act, 1963, as decided in the Spectrum Case.

29. Per contra, it is submitted by the Respondent that the benefits of Section 14 (2) of the Act, 1963 could not be availed of by the Appellant as there was no good faith as reflected in the present facts of the case. It is further submitted by the Respondent that the finding by this Tribunal in Appeal No.90 of 2011 (Spectrum Case) cited by the Appellant on the facts of that case, would not apply to the present Appeals as the facts of these cases are entirely different.

30. He also cited the Judgment rendered by the Hon'ble Supreme Court in the case of Haryana Financial Services reported at AIR 2002 SC (Page- 834), with regard to the aspect of finding effect of the Judgments:

> "*Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes".*
>
> *.....*
>
> *The following words of Lord Denning in the matter of applying precedents have become locus classics:*
>
> *"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.".*
>
> *xxx xxx xxx*

> *"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the said branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."*

31. On the strength of this judgment of Hon'ble Supreme Court, the Respondent strenuously contended that the findings rendered by this Tribunal in Spectrum Case would be of no use to the Appellant when there are material differences in the facts between Spectrum case and these Appeals. He also furnished the following chart giving the particulars of the differences between these cases. The charts are as follows:

CHART-I

DIFFERENCES BETWEEN SPECTRUM CASE (APPEAL NO.90/2011) AND APPEAL No.128 OF 2011

M/s. Spectrum Power Generation Limited (Appeal No.90/2011)	M/s. Lanco Kondapalli Power Limited (Appeal No.128 of 2011)
W.P. No.18165/2003 was filed on dated 25.8.2003 challenging APTRANSCO letter dated 20.08.2003 under Article 226 of Constitution, which is a Constitutional Right, and is permissible in certain cases even though there is special mechanism and **the same was admitted and interim order was granted**.	Last claim for MAT was made by LANCO for the first time on 14.5.2001. A notice was issued on 26.3.2004 by LANCO under Article 14.2 invoking arbitration on the issue of MAT for the period upto 15.06.2003. The A.A. No.31/2004 was filed by LANCO in High Court on 27.04.2004. Counter was filed by APTRANSCO on 10.08.2004 stating that no arbitration after enactment of Electricity Act, 2003. **The A.A.**

	No.31/2004 was not even admitted by the High Court. **No order was passed by the High Court.**
Arbitration issue was not raised in Spectrum Case.	Although Arbitration is not there, LANCO filed and pursued Arbitration matter till 2009.
No Supreme Court Order directing the party to approach APERC	There is a Supreme Court order dated 05.02.2007 directing LANCO to go to APERC in respect of resolution of dispute arose under the same PPA.
No proceedings were filed in APERC till the disposal of W.P. No.18165/2003 (disposed on 06.11.2009 by High Court, Hyderabad).	O.P. No.23/2005 was filed by APTRANSCO before the APERC in respect of Levy of Liquidated Damages (L.D). LANCO instead of filing counter to the said O.P filed I.A No.6/2007 (under Section 8 of the Arbitration & Conciliation Act, 1998) in O.P. No.23/2005 seeking the Commission to reject O.P. No.23/2005 and relegate the parties for Arbitration in terms of Article 14 of the PPA. However, APERC passed order on 11.11.2008 dismissing the I.A as not pressed by LANCO on 01.11.2008. Further, LANCO filed Counter and Counter claim on 10.11.2008 in reply to the O.P No.23/05 filed by APTRANSCO, submitting to jurisdiction of APERC
Even after reckoning the period from the Gujarat Urja Vikas Nigam Case, the O.P. No.39/2009, which was filed by Spectrum, found to be within Limitation.	In this case it is not, because few claims were barred even before invoking of Article 14.1 of the PPA. For claims beyond 15.06.2003 there was no arbitration proceedings.

CHART-II

DIFFERENCES BETWEEN SPECTRUM CASE (APPEAL NO.90/2011) AND APPEAL No.129 OF 2011

M/s. Spectrum Power Generation Limited (Appeal No.90/2011)	M/s. Lanco Kondapalli Power Limited (Appeal No.129 of 2011)
W.P. No.18165/2003 was filed on dated 25.8.2003 challenging APTRANSCO letter dated 20.08.2003 under Article 226 of Constitution, which is a Constitutional Right, and is permissible in certain cases even though there is special mechanism; **The same was admitted and interim order was granted**.	Last claim was made by LANCO on 11.1.2001. A notice was issued on 26.3.2004 by LANCO under Article 14.2 invoking arbitration. A.A. No.31/2004 was filed by LANCO in High Court on 27.04.2004. Counter was filed by APTRANSCO on 10.08.2004 stating that there is no arbitration after enactment of Electricity Act, 2003, and the claims are barred by limitation. **No order was passed by the High Court nor the same was admitted.**
Arbitration issue was not raised in Spectrum Case.	Although Arbitration is not there, LANCO filed and pursued the Arbitration matter till 2009
No Supreme Court Order directing the party to approach APERC	There is a Supreme Court order dated 05.02.2007 directing LANCO to go to APERC in respect of resolution of dispute on issue of Liquidated Damages which also arose under the same PPA.
No proceedings were filed in APERC till the disposal of W.P. No.18165/2003 (disposed on 06.11.2009 by High Court, Hyderabad).	O.P. No.23/2005 was filed by APTRANSCO before the APERC in respect of Levy of Liquidated Damages (L.D). LANCO instead of filing counter to the said O.P filed I.A No.6/2007 (under Section 8 of

	the Arbitration & Conciliation Act, 1996) in O.P. No.23/2005 seeking the Commission to reject O.P. No.23/2005 and relegate the parties for Arbitration in terms of Article 14 of the PPA. However, APERC passed order on 11.11.2008 dismissing the I.A as not pressed by LANCO. Further, LANCO filed Counter and Counter claim on 10.11.2008 in reply to the O.P No.23/05 filed by APTRANSCO, submitting to jurisdiction of APERC
Even after reckoning the period from the date of 25.8.2003 upto 13.3.2008, the date of Gujarat Urja Vikas Nigam Case, the O.P. No.39/2009, which was filed by Spectrum, **found to be within Limitation.**	In this case it is not, because LANCO allowed 9 years, 2 months period lapsed, even before invoking Article 14.1 of the PPA, and 3 years 2 months lapsed prior to notice issued under Article 14.2 of the PPA.

32. In the light of the above stand taken by the Respondent. It would be proper to refer to the discussion and findings made and rendered by this Tribunal in Spectrum Case (Appeal No.90 of 2011) dated 10th August, 2011 in order to find out as to whether the findings in that case would apply to the present Appeals. They are as under:

> *34. Now let us examine the provisions of Electricity Act 2003 along with the Judgments of Hon'ble Supreme Court.*

35. Section 86 of the Electricity Act 2003 deals with the functions of the State Commission. Relevant portion of Section 86(1)(f) is reproduced below:

> ***"86. Functions of State Commission.***—*(1) The State Commission shall discharge the following functions, namely:—* ***(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;"***

36. Thus, in terms of Section 86(1)(f) of the Electricity Act 2003 the State Commission has jurisdiction to adjudicate upon the disputes between the licensees and generating companies by itself or refer such dispute for arbitration. However, Section 175 of the Electricity Act 2003 provides that the provisions of the Electricity Act 2003 are in addition to and not in derogation of any other law for the time being in force. Section 175 of the Electricity Act 2003 read as under:

> ***"175. Provisions of this Act to be in addition to and not in derogation of other laws.***—*The provisions of this Act are in addition to and not in derogation of any other law for the time being in force."*

37. This provision of the 2003 Act, somewhat blurred the situation in regard to jurisdiction of the State Commission under Section 86(1)(f) of the 2003 Act. One of the views earlier taken was that in view of Section 175 of the Electricity Act, 2003, Section 11 of the Arbitration and Conciliation Act, 1996 is also available for arbitrating disputes between licensees and generating companies. Where the Arbitration Clause in PPA provide for arbitration as per provisions of Arbitration and Conciliation Act 1996, arbitration of

disputes arising out of such PPAs would have to be done as per the provisions of Arbitration and Conciliation Act 1996. Some authorities considered that State Commission had jurisdiction under Section 86(1)(f) only over the matters arising out of disputes under Sections 9, 20 and 29 of the 2003 Act.

38. As a matter of fact, the Hon'ble Supreme Court in the decision reported in 2006 1 SCC 540 Transmission Corporation of AP Ltd Vs. M/S. Lanco Kondapalli power Limited has held that " As to whether Section 86 (1) (f) of the 2003 Act confers an exclusive jurisdiction to decide all disputes and differences between a licensee and a generating company is open to question".

39. Thus it is clear that the legal position on the date of the Writ Petition was not clear. Under those circumstances, it cannot be stated that the Appellant approached the High Court without good faith or without due diligence. On the other hand, the Appellant correctly decided to approach the Hon'ble High Court as the validity of the letter could be challenged only under Article 226 of the Constitution of India.

40. The issue in regard to jurisdiction of the State Commission under section 86(1)(f) of 2003 Act remained open till it was finally settled by the Judgement of Hon'ble Supreme Court in "Gujarat Urja Vikas Nigam Vs Essar Power Ltd rendered on 13.8.2008. The relevant extracts of this judgment of Hon'ble Supreme Court dated 13.8.2008 is reproduced below:

> *"26. It may be noted that Section 86(1)(f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the*

generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word 'and' in Section 86(1)(f) between the words 'generating companies' and 'to refer any dispute for arbitration' means 'or'. It is well settled that sometimes 'and' can mean 'or' and sometimes 'or' can mean 'and' (vide G.P. Singh's 'Principle of Statutory Interpretation' 9th Edition, 2004 page 404.)

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

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

29. This is also evident from Section 158 of the Electricity Act, 2003 which has been quoted

above. We may clarify that the agreement dated 30.5.1996 is not a part of the licence of the licensee. An agreement is something prior to the issuance of a licence. Hence any provision for arbitration in the agreement cannot be deemed to be a provision for arbitration in the licence. Hence also it is the State Commission which alone has power to arbitrate/adjudicate the dispute either itself or by appointing an arbitrator.

31. We may now deal with the submission of Mr. Fali S. Nariman that in view of Section 175 of the Electricity Act, 2003, Section 11 of the Arbitration and Conciliation Act, 1996 is also available for arbitrating disputes between licensees and generating companies.

32. Section 175 of the Electricity Act, 2003 states that the provisions of the Act are in addition to and not in derogation of any other law. This would apparently imply that the Arbitration and Conciliation Act, 1996 will also apply to disputes such as the one with which we are concerned. However, in our opinion Section 175 has to be read along with Section 174 and not in isolation.

33. Section 174 provides that the Electricity Act, 2003 will prevail over anything inconsistent in any other law. In our opinion the inconsistency may be express or implied. Since Section 86(1)(f) is a special provision for adjudicating disputes between licensees and generating companies, in our opinion by implication Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes i.e. disputes between licensees and generating companies. This is because of the principle that the special law

overrides the general law. For adjudication of disputes between the licensees and generating companies there is a special law namely 86(1)(f) of the Electricity Act, 2003. Hence the general law in Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes.

34. It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner, vide Chandra Kishore Jha vs. Mahavir Prasad, AIR 1999 SC 3558 (para 12), Dhananjaya Reddy vs. State of Karnataka, AIR 2001 SC 1512 (para 22), etc. Section 86(1)(f) provides a special manner of making references to an arbitrator in disputes between a licensee and a generating company. Hence by implication all other methods are barred."

41. This judgment of Hon'ble supreme Court has removed all the doubts in regard to the jurisdiction of the State Commission under section 86(1)(f) of the 2003 Act. After 13.3.2008 i.e. the date of pronouncement of this judgment by the Hon'ble Supreme Court, it has become a settled law that only State Commissions have jurisdiction to adjudicate upon the disputes between generating companies and licensees. But, prior to 13.3.2008 the issue was open to question as held by Hon'ble Supreme Court in Lanco Case (supra).

42. In view of the above fact and legal situation, it has to be held that the Appellant approached the High Court with due diligence and in good faith to challenge the letter which had been issued on 20.8.2003. In fact, the Appellant rushed to the High Court immediately

and filed a Writ Petition on 25.8. 2003 and obtained the stay order on 28.8.2003 and got the stay order made absolute on 3.9.2003, despite the objection raised by the 1st Respondent.

43. In view of the above, we are of the considered opinion that the Appellant had acted with due diligence and in good faith in filing the Writ Petition being WP (c) No. 18165/2003 before Hon'ble High Court of Andhra Pradesh.

60. Summary of Our Findings:

We are of the view that the findings rendered by the State Commission on the limitation point is not legally sustainable and on the other hand it has to be held that the petition filed by the Appellant before the Commission, was filed within a period of limitation in the light of the fact that Appellant is entitled to the benefit as available under section 14 (2) of the Limitation Act.

33. The gist of the ratio given in the above Spectrum judgment is as follows:

(1) **In terms of Section 86(1) (f) of the Electricity Act, 2003 the State Commission has jurisdiction to adjudicate upon the disputes between the licensees and generating companies by itself or refer such disputes for arbitration. However, Section 175 of the Electricity Act, 2003 provides that the provisions of the Electricity Act, 2003**

are in addition to and not in derogation of any other law for the time being in force.

(2) Section 175 of the Act, 2003 somewhat blurred the situation in regard to jurisdiction of the State Commission Under Section 86 (1) (f) of the 2003 Act. One of the views earlier taken was that in view of Section 175 of the Electricity Act, 2003, Section 11 of the Arbitration and Conciliation Act, 1996 is also available for arbitrating disputes between licensees and generating Companies. The very view expressed by the Courts, the State Commission had jurisdiction U/s 86 (1) (f) over the matters arising out of the disputes under Sections 9, 20 and 29 of the 2003 act. At this stage, the Hon'ble Supreme Court held in 2006 1 SCC 540 Transmission Corporation of AP Ltd Vs M/S. Lanco Kondapalli Power Limited has held that the question " as to whether Section 86 (1) (f) of the 2003 Act confers exclusive jurisdiction to decide all disputes and differences between a licensee and a generating company is open to question". With this effect, the Hon'ble Supreme Court directed the High Court to go into this question. Therefore, the legal position on the date on which the High Court was approached was not clear.

(3) However, the issue in regard to jurisdiction of the State Commission U/S 86 (1) (f) of 2003 Act was not settled till it was finally decided by the Hon'ble Supreme Court in Gujarat Urja Case on 13.8.2008.

(4) Thus, the Hon'ble Supreme Court has removed all the doubts in regard to jurisdiction of the State Commission u/s 86 (1) (f) of the 2003 Act.

(5) Thus, prior to 13.3.2008, the said issue was open to question as held by the Hon'ble Supreme Court. Only after 13.3.2008, the date of the judgment of the Hon'ble Supreme Court, it has become settled law that only the State Commission has jurisdiction to adjudicate upon the dispute between generating companies and the licensees.

(6) In view of the above facts and legal situation, it has to be held that the Petition was filed by the Appellant before the State Commission in good faith by acting with due diligence".

34. Thus, the ratio has already been decided in the above case. However, we are now to find out whether the legal position settled in the above Spectrum judgment would apply to the present facts of these Appeals in the context of the plea raised by the Respondent that this judgment would not apply to the present facts of the case.

35. We are to be remembered at this juncture, the basic principle that merely because there are some differences in the facts between Spectrum case and the facts in these Appeals, it cannot be said that the ratio decided in the Spectrum case cannot be applied to the present Appeals. Each case has got its own facts. Though the facts are different, we have to cull out the ratio decidendi decided in the earlier decision and then find out whether the said ratio decided would be made applicable to the present Appeals.

36. Bearing this in our mind, we shall now discuss with regard to the applicability of the said ratio found in the Spectrum Case to the issues that arise for consideration in these Appeals. For this process, we have to analyse the various provisions of the Limitation Act as well as the articles found in the PPA.

37. Let us first refer to Section 14 (2) of the Limitation Act, 1963. The same is as follows:

> *"14 (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting* ***with due diligence*** *another civil proceedings, whether in a court of first instance or of appeal or revision,* ***against the same party*** *for* ***the same relief*** *shall be excluded, where such proceeding is prosecuted* ***in good faith*** *in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."*

38. The reading of the above provision would make it clear that the period spent by the Applicant in the proceedings before the Wrong Forum against the same party which were ultimately rejected for want of jurisdiction, shall be excluded only when such proceedings were prosecuted with due diligence and good faith. Under this Section the following pre-requisite conditions have to be specified:

    (1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party against the same party;

    (2) The prior proceedings had been prosecuted with due diligence and good faith;

    (3) The failure of the prior proceedings was due to defect of jurisdiction or other cause of like nature;

    (4) The earlier proceeding and the later proceeding must relate to the same matter in issue, and

    (5) Both the proceedings are in a court".

39. Now let us examine whether all these ingredients have been satisfied in the present case.

40. The dispute in question relate to the failure to observe a contractual obligation to pay the money. Under Limitation Act, the period of Limitation in respect of the present dispute

is 3 years from the date when the cause of action arises under Article 55 of the Limitation Act, 1963.

41. Let us now first see when the cause of action arose in the dispute which is relating to the reimbursement of MAT in Appeal No.128 of 2011. Under the PPA, the cause of action arises in favour of the Appellant on 12.8.2001 i.e. 90 days after the last invoice was raised on 14.5.2001 claiming the MAT. It is not disputed that on a combined reading of clause 1.1(19), Clause 5.5, Clause 5.7, Clause 9.1 and Clause 9.3 of the PPA, the Electricity Board could raise the dispute in respect of any invoice for a further period of 60 days after the due date for payment which is 30 days from the date of the presentation of the bill. So, under the PPA only after expiry of 90 days, the Appellant was entitled to exercise its remedy claiming its right. In other words, it is only at this point the cause of action would arise in favour of the Appellant.

42. In the present case, the notice of arbitration was issued and served on the Respondent on 8.9.2003. U/S 21 of the Arbitration and Conciliation Act, 1996, it is a notice by which a request is made by the Appellant to the Respondent to refer the dispute for arbitration which represents the commencement of the arbitration proceedings. Thus, the notice for arbitration was issued within 3 years i.e. at the

time only 2 years and 1 months out of 3 years had expired by then. That apart, the Appellant is entitled to an additional limitation period of 3 years for filing the arbitration petition under Section 11 (6) of the 1996 Act for appointment of arbitrator by the Respondent. In the present case, the Appellant filed its arbitration proceedings before the High Court as early as on 27.4.2004 i.e. less than 8 months it served the notice of arbitration on the Respondent.

43. The Respondent contended that the notice of Arbitration sent on 8.9.2003 was only for amicable settlement under Article 14 (2) of the PPA and not for arbitration under Article 14.3 of the PPA and therefore, the said notice cannot be construed to be the Notice for Arbitration. This contention cannot be countenanced for the following reasons.

44. The perusal of the Notice of the Arbitration dated 8.9.2003 makes it clear that it is a notice requesting for referring the dispute to arbitration while leaving room for amicable settlement if the Respondent so desires. In Para 2.1 of the notice of arbitration it is stated that "this notice constitutes a demand that the disputes described herein between the Claimant and the Respondent be referred to arbitration".

45. It is also stated in Para 10.2 that "the claimant shall notify the Respondent of their appointed arbitrator in due course".

46. In fact, the Respondents also must have understood this, which is clear from the perusal of the letter dated 10.12.2003 sent by the Respondent to the Appellant. This is also evident from the fact that Respondent informed the Appellant about the appointment of Shri Patanjali Rao as their representative for settlement talks, without going for arbitration as demanded by the Appellant. Moreover, even assuming that it is a notice leaving room for resolving the dispute between the parties amicably, this by itself would not preclude it from the commencement of the arbitration proceedings.

47. The main contention of the Respondent is that the Appellant could not be said to have commenced the arbitration proceedings in good faith before the High Court because even at that stage, the legal position was clear that only the State Commission would have exclusive jurisdiction to adjudicate upon the dispute between the generating companies and licensees u/s 86 (1) (f) of the 2003 Act. This contention also in our view is not tenable.

48. As a matter of fact, as pointed out by the Appellant in another dispute under the same PPA, the Hon'ble Supreme Court, in Transmission Corporation of A.P Ltd v. Lanco Kondapalli Power (P) Ltd.. (2006) 1 SCC 540 (the Lanco case) remanded the case back to the High Court to decide

the very same issue as the law was not clear then. The relevant observation is as follows:

> "*as to whether Section 86 (1) (f) of the 2003 Act confers and exclusive jurisdiction to decide all disputes and differences between a licensee and a generating company* ***is open to question***"

49. Thus, the Hon'ble Supreme Court while delivering its judgment in the Lanco case had granted leave and given detailed reasons as to why the above question was being left open to the High Court to find out as to whether the jurisdiction of the Commission U/S 86 (1) (f) was exclusive. As a matter of fact as pointed out by the Appellant, this Tribunal while dealing with the same issue in the Spectrum Power Generation Limited vs. APTRANSCO in Appeal No.90 of 2011 dated 10.8.2011 relying upon the said decision of the Hon'ble Supreme Court held that the legal position then was not clear with reference to the exclusive jurisdiction of the Commission to decide dispute between the generating companies and the licensees. It further held that in the light of the facts of that case that the time spent by the Applicant before the High Court has to be excluded for calculating the period of limitation u/s 14 (2) of the Limitation Act. The relevant portion of the judgment in the Spectrum Case is again to be quoted which is given below:

38. As a matter of fact, the Hon'ble Supreme Court in the decision reported in 2006 1 SCC 540 Transmission Corporation of AP Ltd Vs. M/S. Lanco Kondapalli power Limited has held that " As to whether Section 86 (1) (f) of the 2003 Act confers an exclusive jurisdiction to decide all disputes and differences between a licensee and a generating company is open to question".

39. Thus it is clear that the legal position on the date of the Writ Petition was not clear. Under those circumstances, it cannot be stated that the Appellant approached the High Court without good faith or without due diligence. On the other hand, the Appellant correctly decided to approach the Hon'ble High Court as the validity of the letter could be challenged only under Article 226 of the Constitution of India.

40. The issue in regard to jurisdiction of the State Commission under section 86(1)(f) of 2003 Act remained open till it was finally settled by the Judgement of Hon'ble Supreme Court in "Gujarat Urja Vikas Nigam Vs Essar Power Ltd rendered on 13.8.2008. The relevant extracts of this judgment of Hon'ble Supreme Court dated 13.8.2008 is reproduced below (Para 26 – 34 of the Supreme Court judgment extracted)

41. This judgment of Hon'ble supreme Court has removed all the doubts in regard to the jurisdiction of the State Commission under section 86(1)(f) of the 2003 Act. After 13.3.2008 i.e. the date of pronouncement of this judgment by the Hon'ble Supreme Court, it has become a settled law that only State Commissions have jurisdiction to adjudicate upon the disputes between generating companies and

licensees. But, prior to 13.3.2008 the issue was open to question as held by Hon'ble Supreme Court in Lanco Case (supra).

42. In view of the above fact and legal situation, it has to be held that the Appellant approached the High Court with due diligence and in good faith to challenge the letter which had been issued on 20.8.2003."

50. Thus, it is clear that prior to the judgment of Hon'ble Supreme Court in Gujarat Urja Case, the exclusive nature of the jurisdiction of the State Commission was not free from doubt, and therefore, the time spent pursuing an alternate remedy in the High Court in good faith should be excluded U/S 14(2) of the Limitation Act.

51. The Respondent further contended that even when the arbitration proceedings initiated by the Appellant was pending before the High Court, the Respondent took a specific stand through its counter that the High Court has no jurisdiction to decide the dispute of this nature and only the State Commission will have the jurisdiction and despite that, the Appellant did not choose to withdraw the said application before the High Court to enable the Appellant to approach the State Commission and on the other hand, it kept quiet all along and that this conduct would show that the Appellant's inaction was not bona fide.

52. The real question therefore in the present case is this: "Whether the choice of wrong Forum was under a bona fide mistake or good faith or was it for some oblique purpose such as to gain or to derive any benefit such as to preserve a favourable interim order?"

53. The direct answer for this question is that the Appellant in this case, cannot be accused of lack of bona fide or lack of good faith, since the Appellant did not gain any benefit by getting any stay order in its favour or other interim order during the pendency of the arbitration proceedings before the High Court.

54. As a matter of fact, the Hon'ble Supreme Court in Vijay Kumar Rampal & Ors V Diwan Devi & Ors AIR 1985 SC 1669 case, has expressly observed that the litigant may be mistaken in its choice of forum for a variety of reasons including wrong advice of the counsel and merely because the litigant by mistake choose the wrong forum, it cannot be straightway said that his action was not bona fide. The relevant observation of Hon'ble Supreme Court in Vijay Kumar Rampal & Ors v. Diwan Devi & Ors, AIR 1985 SC 1669 Para 3 has observed as follows:

> *"Section 14 of the Limitation Act provides for exclusion of time of proceeding bona fide in court without jurisdiction. In computing the period of limitation for any suit the time during which the plaintiff has been*

prosecuting with due diligence another civil proceeding against the defendant shall be excluded where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which from a defect of jurisdiction is unable to entertain it. The expression good faith qualifies prosecuting the proceeding in the Court which ultimately is found to have no jurisdiction. Failure to pay the requisite court fee found deficient on a contention being raised or the error of judgment in valuing a suit filed before a court which was ultimately found to have no jurisdiction has absolutely nothing to do with the question of good faith in prosecuting the suit as provided in Section 14 of the Limitation Act. The High Court in our opinion was in error in holding that defective valuation and improper computation of court fees discloses lack of good faith on the part of the plaintiff".

55. The Learned Counsel for the Respondent relied upon (a) Mysore State Electricity Board vs. Bangalore Woollen Cotton and Silk Mills Limited, AIR 1963 SC 1128 (Mysore SEB case) (b) Punjab State Electricity Board v Bassi Cold Storage, AIR 1994 SC ,Page-2544 and (c) Grid Corporation Of India v India Charge Chrome, (1998) AIR SC Page-1761 in order to show that there is a doubt in good faith on the part of the Appellant.

56. The observation in above cases are as under:

(a) Mysore State Electricity Board V. Bangalore Wooleen Cotton and Silk Mills Ltd reported in 1963 AIR SC Page 1128

" Thus it appears from what we have stated above, that none of the provisions of the 1910 Act or the 1948 Act make the present dispute a matter directed or required to be referred to arbitration either under Section 52 of the 1910 Act or Section 76 (2) of the 1948 Act. Therefore, the Respondents can call for an Arbitration Under Section 76 (1) of the Act, if they can establish that the dispute in the present case is a question which arises under the 1948 Act. It is indeed true that sub Section (1) of Section 76 uses words of wide amplitude. It states that " all questions arising between the State Government or the Board and a licensee or other person shall be determined by arbitration". We, however, think that it is implicit in the sub-section that the question is one which arises under the 1948 Act. Obviously, it could not have been contemplated that any question arising between the State Government on one side and any person on the other shall be determined by arbitration. If that were the meaning of the sub section".

(b) The Punjab State Electricity Board Vs. Bassi Cold Storage reported in 1994 AIR SC, Page 2544

"Having found that the dispute of the present nature cannot be subject matter of arbitration being not covered by any of the Sections of the Act dealing with arbitration; and having held that the provisions of the Act have to override what has been mentioned in the Condition, and having further held that the Act would prevail over the general law of arbitration now contained in the Arbitration Act of 1940, we would hold that though the present dispute would have been referable to arbitration because of what has been provided in Condition 29, it cannot be done, in

view of the provisions in the Act which would override the stipulation contained in the aforesaid Condition."

(c) M/s. Grid Corporation of Orissa Ltd Vs. M/s. Indian Charge Chrome Ltd reported in 1998 AIR SC, Page 1761

" For the conclusions recorded herein above all the three appeals are allowed. The judgment and order dated 10.2.98 passed by the High Court is set aside and resultantly the appointment of the Arbitrator stands quashed. The ICCL is directed to make the payment of arrears as indicated above. The application made by ICCL to the Regulatory Commission will dispose of the matter in accordance with law. In the facts and circumstances of the case the parties are directed to bear their own costs".

57. As correctly pointed out by the Appellant, these decisions were given much earlier before 2003 Act which dealt with different provisions of the Electricity Act 1910 and the Electricity Supply Act, 1948. Hence these decisions would be of no help to the Respondent.

58. The Hon'ble Supreme Court as indicated above, has specifically in the Transmission Corporation of A.P Ltd v. Lanco Kondapalli Power (P) Limited (2006) 1 SCC 540 held that legal position was not clear under the 2003 Act. Therefore, the reliance on the decisions given prior to the Act is misplaced. As a matter of fact, the Hon'ble Supreme Court in the Lanco case rejected the Respondent's

arguments based upon prior decision of the Hon'ble Supreme Court and left open the question of the exclusive nature of the Commission's jurisdiction u/s 86 (i)(f) of the Act for the decision of High Court. It is also to be pointed out in this context that the subsequent judgment of the Hon'ble Supreme Court in the Gujarat Urja case is exclusively based upon an independent analysis of the Section 86 (i)(f) in the context of 2003 Act. Therefore, the contention of the Respondent that the legal position was clear even prior to the Lanco Case and Gujarat Urja Case, is not well founded.

59. The Respondent further argued that in any event, the Appellant did not show good faith since even after the judgment of the Hon'ble Supreme Court in Gujarat Urja case was pronounced, the Appellant did not take immediate steps to withdraw the Arbitration proceedings pending before the High Court and on the other hand, it continued to prosecute the said arbitration proceedings before the High Court.

60. It is also pointed out by the Respondent that there was absence of good faith on the part of the Appellant because in November, 2008 the Appellant withdrew a previously filed application for stay of proceedings u/s 8 of 1996 Act and filed a counter claim before the State Commission. On the strength of this fact, the Respondent contended that this would show that the Appellant knew that the arbitration

proceedings were not maintainable at that stage itself but even then it continued to prosecute the arbitration proceedings before the High Court which reflects lack of good faith.

61. We are unable to accept this contention of the Respondent as this incident is not sufficient to doubt the good faith of the Appellant in prosecuting the matter before the High Court through the arbitration proceedings. As a matter of fact, as mentioned earlier, the notice of arbitration was issued by the Appellant on 8.9.2003 to the Respondent requesting for appointment of the arbitrator. Having waited for a long period and having failed to receive any positive response from the Respondent during the said period, the Appellant was constrained to approach the High Court seeking for the prayer for appointment of arbitrator on the basis of the notice of arbitration dated 8.9.2003 demanding for the reference to the Arbitration. Therefore, the approach of the Appellant before the High Court for appointment of arbitrator cannot be said to be without good faith.

62. The Respondent also relied upon the order of the Hon'ble Supreme Court dated 5.2.2007 in SLP No.7562 of 2006 pertaining to another dispute arising out of the PPA in respect of liquidated damages claimed by the Respondent against the Appellant. In that case, the SLP was filed by

the Appellant against an interim order of a Division Bench of the AP High Court. In that SLP, the Hon'ble Supreme Court refused to stay the proceedings before the State Commission as the proceedings before the State Commission had already commenced but it granted liberty to the parties to raise the question of jurisdiction before the Commission. Thus, in this matter also, the Hon'ble Supreme Court left the question of jurisdiction to be decided by the State Commission and allowed the parties to raise the question of jurisdiction before the Commission.

63. Thus, it is clear that even when the order was passed on 5.2.2007 by the Hon'ble Supreme Court in the above SLP, the legal position with respect to the Commission's exclusive jurisdiction was not clear. As such, it is evident that the Appellant cannot be said to have been benefited in continuing with the arbitration proceedings before the Andhra High Court till the Appellant filed the petition before the State Commission after disposal of the arbitration application by the High Court.

64. Of course, as pointed out by the Respondent, it is true that even though law was made clear in Gujarat Urja case by the judgment of the Hon'ble Supreme Court dated 13.3.2008, the Appellant did not immediately rush to the High Court to withdraw the application on the strength of the said

judgment and on the other hand, the Appellant kept quiet even thereafter for one year till the High Court disposed of the Proceedings on 18.3.2009. According to the Respondent, this inaction is not bona fide. How can it be ? Merely because the Appellant did not take steps to get the proceedings withdrawn immediately from the High Court after the pronouncement of the Gujarat Urja Case, it cannot be straightway attributed to lack of good faith on the part of the Appellant since the Appellant had to wait till the matter is taken-up for disposal by the High Court i.e. on 18.3.2009.

65. If the said inaction of not taking steps to withdraw the petition could be attributed to the Appellant, the same inaction could be attributed to the Respondent also in not approaching the High Court immediately thereafter to get the arbitration proceedings dismissed on the strength of the Supreme Court judgment. Therefore, on this count, the Appellant's good faith in prosecuting the proceedings in arbitration proceedings before the High Court cannot be doubted.

66. As mentioned above, Section 14(2) of the Limitation Act contemplates the exclusion of the entire period of pendency before the wrong forum.

67. As a matter of fact, the Hon'ble Supreme Court in the Coal India v. Ujjal Transport Agency and Others (2011) 1 SCC

117 held that the entire period spent for prosecuting the proceedings right up to the disposal of the proceedings by the Court on the ground specified in Section 14 of the limitation Act must be excluded while computing the period of limitation. The relevant observation of the Hon'ble Supreme Court is as under:

> *"The question that therefore, would arise for consideration is whether the Appellants have bona fide and diligently pursuing the remedy before a wrong Forum. The first Respondent contended that different causes were shown and different explanations were given by the Appellants in application for condonation of delay filed by the Appellant before the District Court on 3.11.2009, the subsequent application under Section 34 (3) of the Act read with Section 14 of the Limitation act filed on 8.1.2010 and the application dated 29.10.2009 for withdrawal of the appeal filed before the High Court. But a careful examination of these applications shows that there is, in fact, no inconsistency. The first appellant is a Corporation and it has to act through its Board of Directors and not at the level of individual officers. It is true that the appellants have stated that they became aware that the appeal was not maintainable before the High Court when they came to know about the execution proceedings. But thereafter, there was some uncertainty as to whether the application under Section 34 of the Act had to be filed in the District Court only after the withdrawal of "appeal" under Section 34 of the Act before the High Court, or whether the withdrawal and filing of fresh application under Section 34 of the Act should be simultaneous, or whether to avoid delay, the application under Section 34 of the act should be filed in the District*

Court immediately even before the application for withdrawal could be moved before the High Court. In fact, the Appellants demonstrated their diligence and bona fides by filing the application under Section 34 of the act on 19.10.2009 itself immediately on reopening of court, without waiting for a formal order of withdrawal of the "appeal" under Section 34 before the wrong forum. Therefore, it cannot be said that filing of the applications under section 34 of the act on 19.10.2009 was belated. Further, if the period spent before the Wrong Forum is excluded, the application is filed within three months and there is no question of explaining any delay.

68. In the light of the above judgment, it is clear that even though the High court disposed of the arbitration proceedings only on 18.3.2009 i.e. about a year after Gujarat Urja Case, the Appellant is entitled to exclusion of the entire period beginning from 8.9.2003, the date of notice of arbitration till 18.3.2009 i.e. the date of disposal of the arbitration application as all the ingredients of Section 14 (2) of the Limitation Act have been satisfied. If the said period is excluded, then the Petition filed before the State Commission with reference to reimbursement of the MAT shall be construed to be within time. Accordingly, it is held that the Appellant is entitled for the re-imbursement of MAT for the earlier period also.

69. **Let us now see when the cause of Action arose in the dispute which is relating to the capacity charges in Appeal No.129 of 2011**.

70. The Commercial Operation Date for the first generating unit of the project was declared on 26.7.2000. The commercial operation date for the 2nd generating unit was declared on 24.9.2000. The total capacity of 368.144 MW was demonstrated on 25.10.2000 in the presence of the officials from the Board. Thus, the Commercial Operation for the entire project was declared on 25.10.2000.

71. Under Article 3.1 of the PPA, the Respondents are required to pay capacity charges for the capacity of the project in respect of any tariff year calculated in the manner set out in the PPA. Article 2.1 of the PPA required the Respondents to pay capacity charges from the date of the Commercial Operation of the first unit i.e. from 26.7.2000.

72. As mentioned above, the first unit commenced its operation on 26.7.2000. The Appellant raised six invoices on the Respondent between 16.9.2000 and 11.1.2001. Upon failure of the Respondent to make payment, the Appellant made several efforts to settle the dispute amicably with the Respondents.

73. Since there was non-responsive attitude on the part of the Respondent, the Appellant issued notice of Arbitration on 8.9.2003. In reply to this letter, the Respondent APTRANSCO (R-2) sent a letter on 24.9.2003 requesting the Appellant not to seek reference to arbitration at that

stage and stating that the meeting will be convened by the APTRANSCO (R-2) for discussing the pending problems.

74. As mentioned in the facts in the other Appeal, on receipt of the letter, the Appellant wrote a letter on 14.10.2003 to APTRANSCO to nominate its Company Secretary, as its representative to have discussion without prejudice to the commencement of the arbitration proceedings. Despite that, the Respondents took no steps to initiate the discussions. The Appellant sent letters after letters reminding that no meeting had been held as promised.

75. Thereafter, on 25.11.2003 APTRANSCO informed the Appellant that meeting would be held on 27.11.2003. Even on that date, no meeting was held. Thereupon, APTRANSCO (R-2) intimated to the Appellant that it had designated Shri Patanjali Rao, CGM to act on its behalf to discuss in the meeting on the pending issues. Even then, no meeting was held. In view of the above, the Appellant sent a notice on 26.3.2004 nominating Justice B P Jeevan Reddy, Retd Supreme Court Judge as its arbitrator and requesting the Respondent to nominate their arbitrator. For the first time on 8.4.2004, APTRANSCO (R-2), through its reply letter contended that the resort to arbitration was unwarranted as the process of mutual negotiation had not been exhausted.

76. Having found no positive response from the Respondent to settle the issue through negotiation or through Arbitration, the Appellant filed an application before the Andhra High Court u/s 11 (6) of the Arbitration Act, 1996 for appointment of Arbitrator, which was contested by the Respondent.

77. As indicated earlier, during the pendency of these proceedings, the Hon'ble Supreme Court in the Gujarat Urja case rendered a judgment holding that the application for appointment of arbitrator to resolve this dispute could not be entertained by the High Court since Section 11 (6) of the 1996 Act had been superseded by Section 86 (1) (f) of the 2003 Act.

78. In the light of the said decision, the High Court of Andhra Pradesh on 18.3.2009, disposed of the said arbitration application giving liberty to the Appellant to approach the State Commission for the appropriate relief. Accordingly, the Appellant filed a Petition before the State Commission on 5.6.2009. In reply to the main objection regarding maintainability on the ground of bar of limitation raised by the Respondents, the Appellant/Petitioner submitted that the period spent by the Appellant in the arbitration proceedings shall be excluded under Section 14 of the Limitation Act for calculating the period of limitation. However, the State Commission rejected the contention of the Appellant and

passed the impugned order on 13.6.2011 dismissing the petition filed by the Appellant holding that the period spent by the Appellant in the arbitration proceedings could not be excluded u/s 14 (2) of the Limitation Act since the proceedings could not be said to have been pursued in good faith.

79. In the light of the above facts, we have to answer the question as to whether ingredients of the Section 14 (2) of the Limitation Act as mentioned earlier, have been satisfied in the present matter also?

80. In this context, we are to find out as to when actually the cause of action had accrued in this dispute which is relating to the refund of the capacity charges in Appeal No.129 of 2011.

81. Article 5.2 (a) of the PPA provides for billing of monthly tariff bills. It stipulates that each bill for the billing month shall be payable by the Board on the due date of payment. The term "due date of payment" has been defined as not later than 30 days from the metering date or 25 days from the date of its presentation to the designated officer of the Board. This definition has been provided in Article 1.1 (19) of the PPA.

82. Article 5.7 of the PPA provides that the Board may not dispute any amount after 60 days following the due date of payment.

83. Article 9.1 (a) provides the various events which would constitute the Board's default. Article 9.3 of the PPA mandates for the Arbitration of the Appellant in case of the Boards default.

84. Thus, in terms of Article 5.2 (a) read with Article 1.1 (19) of the PPA, the due date of payment of an invoice is 25 days from the date of presentation of the said invoice.

85. Article 5.7 of the PPA allows further period of 60 days to the Respondent from the date of payment to raise any dispute in respect of the said invoice.

86. The perusal of these clauses would make it evident that once the 85 days period expires, the Respondent shall be deemed to have accepted the invoice to be accrued and the right of the Appellant to recover any amount there under fructifies.

87. Based on this rationale, Article 9.1(a) of the PPA contemplates that a Board's default would entitle the Appellant to terminate the PPA or to receive the damages and it would get triggered only upon the default in payment

of invoice continuously for 60 days from the date of the payment.

88. Article 9.3 provides that right of the Appellant to initiate action for recovery of the sum due under the invoice accrues upon default in payment by the Respondent continued even after the expiry of 85 days from the date of invoice.

89. In the present case, the Respondent neither made requisite payments under the invoices in time nor raised any dispute in respect thereof. As a consequence, the liability of the Respondents to make the payment under the relevant invoices crystallized only 85 days after the raising of the last invoice i.e. on 6.4.2001. Thus, the right of the Appellant to sue accrued first when the Board Default occurred due to the failure of the Respondents to pay the capacity charges relating to the present dispute. Accordingly, the cause of action in respect of non payment of capacity charges arose only on 6.4.2001 being 85 days after the last invoice was raised.

90. Let us now refer to the relevant article which requires reference of dispute to the arbitration. Article 14 of the PPA deals with the same which is as follows:

> *(1) In the event that any dispute is not resolved between the parties pursuant to Article 14.1, then such dispute shall be settled exclusively and finally by*

arbitration. It is specifically understood and agreed that any dispute that cannot be resolved between the parties, including any matter relating to the interpretation of this Agreement, shall be submitted to arbitration irrespective of the magnitude thereof, and the amount in dispute or whether such dispute would otherwise be considered justiciable or right for resolution by any court or arbitral tribunal. This Agreement and the rights and obligations of the parties hereunder shall remain in full force and effect pending the award in such arbitration proceedings, which award shall determine whether and when termination of this Agreement if relevant shall become effective.

(2) Each arbitration shall be conducted in accordance with the Arbitration Rules of the United Nations Commission on International Trade Laws from time to time (the Rules) except to the extent the rules conflict with the provisions of this Article 14.2 in which event, the provisions of this Article 14.2 shall prevail. Any award rendered pursuant to arbitration hereunder shall be a 'foreign award' within the meaning of the Arbitration and Conciliation Act, 1996 (the Act") to the extent inconsistent with such Act".

91. This provision would indicate the following aspects:

(1) When the dispute is not resolved between the parties under Article 14.1 then such a dispute shall be settled exclusively by arbitration;

(2) Each arbitration shall be conducted in accordance with the Arbitration Rules of the United Nations Commission

on International Trade Laws from time to time as per the provision of the Article 14.2.

(3) Any award rendered pursuant to the Arbitration shall be construed to be a foreign award within the meaning of the Arbitration and Conciliation Act, 1996.

92. As indicated in the narration of facts, the Appellant made several efforts to settle the dispute amicably with the Respondents. Due to non responsive attitude of the Respondents no solution could be reached. In view of the above, the Appellant in order to preserve its rights under the PPA had to issue the notice of the Arbitration to the Respondents on 8.9.2003 under Article 14.2 of the PPA read with Article 3 of the UNCITRAL Rules.

93. This notice was issued on 8.9.2003 i.e. within 2 years and 6 months after the cause of action arose. As per Section 43 (2) of the 1996 Act, Arbitration shall be deemed to have commenced on the date referred to in Section 21. Section 21 of the 1996 Act provides that “Unless otherwise agreed by the parties, the arbitral proceedings, in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the Respondent”.

94. Article 3 of the UNCITRAL Rules also provides that the date of notice of arbitration is commenced from the arbitration proceedings. The notice of arbitration would provide that "this notice constitutes a demand that the disputes described herein between the Claimant and the Respondent be referred to arbitration".

95. In the present case, it is evident that the Notice of arbitration issued on 8.9.2003 as we have referred to earlier, contained a request for the dispute between the parties to be referred to arbitration and constitutes the notice of arbitration contemplated under Section 21 for commencement of the arbitration proceedings.

96. According to the Respondent, the Arbitration proceedings cannot be said to have commenced on 8.9.2003 since the mutual negotiation for settlement of the dispute had not been finalised under clause 14 (1) of the PPA. It is further contended by the Respondents that only in the notice of 26.3.2004 the Appellant nominated its arbitrator and therefore, the arbitration proceedings will be construed to have been commenced on 26.3.2004.

97. As we found in the discussions in the earlier paragraphs relating to the Appeal No.128/2011, this contention cannot be countenanced. Under Section 77 of the 1996 Act, a party may resort to arbitral or judicial proceedings even

during conciliation in order to preserve its rights. In the letter of the Appellant dated 14.10.2003 sent to the Respondents in response to the letter dated 24.9.2003 sent by the Respondent, it is clearly stated that the designation of its representative under article 14.1 was without prejudice to the initiation of arbitration proceedings by the Appellant already made through the notice dated 8.9.2003

98. As held by the Bombay High Court in Tulip Hotels, Pvt Limited v. Trade Wings Limited MANU/HM/0875/2009, when a party refuses to participate in the reconciliation proceedings, stipulated as condition precedent, it cannot seek to defeat the arbitration by contending that conciliation proceedings have failed. The relevant observations are as under:

> "*Thus, when conciliation is not binding on parties and still parties provided for it as first step towards dispute resolution, it cannot be said that parties wanted to avoid dispute resolution through alternate means or procedures. It cannot be overlooked that they provided for arbitration also as next or last step in that direction. Parties are in trade and business and therefore are aware of every possibility of the disputes arising between them because of the relationship which they entered into. They have therefore made arrangements for its speedy resolution through alternate procedures well known in such relationships. It cannot be accepted that the parties had no intention to make such provisions or then they deliberately*

made provisions in a way conducive to defeat the alternate dispute resolution in certain situations. Initial step of conciliation agreed for by them clearly shows the confidence which parties had in each other. They also felt and accepted that in conciliation all disputes may not be resolved and hence, differences left unresolved even after conciliation are and were agreed to be referred to arbitration. This is obviously because of non-binding character of conciliation. Even if conciliation is held to be binding still it does not mean that when it is not allowed to take place, the arbitration clause cannot be resorted to. Scheme of Clause 19 does not permit invocation of arbitration clause till the conciliation is first sought. Only if it takes place, the residue or "same" i.e. unsettled disputes can then be placed before the arbitrator. However, if it is avoided by one of the parties that does not mean that the other party is rendered a helpless spectator. Dispute resolution is the aim of Clause 19 and it cannot be frustrated by any unwilling party. Language of Clause 19 requires the disputes to be first tried to be resolved through the intervention of a conciliator appointed by the Parties to the dispute with utmost speed. If it is not resolved within one month, then appointment of arbitrator is envisaged. Thus, primacy given to fast resolution and hence non binding mode of dispute resolution is explicit. It is only because of the confidence which parties reposed in each other. Present Applicants having duly invoked the conciliation clause, because of negative response or no response from the Respondents they are fully justified in calling upon them to appoint the arbitrator. Earlier judgment of this Court on application under Section 11 (6) only means that till the efforts to conciliate in terms of Section 62 of 1996 act are not made, arbitration cannot be resorted to. Clause 19 does not clothe the Respondents with right

to frustrate the dispute redressal mechanism agreed to between parties. Such procedure of dispute resolution is one of the essential part of the arrangements reached between them and every effort will have to be made to make it real and meaningful. Interpretation which tends to defeat its right spirit and purpose needs to be avoided. It is not in dispute before me that the "disputes" could not have been referred to conciliation or to arbitration.

99. In yet another case, the Bombay High Court in Rajiv Vyas v. Johnwin Manavalan, MANU/MH/1125/2010 held that the failure to mutually negotiate which is stipulated as a condition precedent to arbitration proceedings would not invalidate the arbitration proceedings.

100. Hon'ble Supreme Court also held in the case of Municipal Corporation of Jabalpur v Rajesh Construction Company reported in (2007) 5 SCC 344 that wherein it is held that "even despite non-fulfilment of a condition precedent to arbitration of furnishing of security, the court still allowed the arbitration proceedings to continue subject to deposit of such security".

101. The relevant observation in the above judgment is as under:

"....... Mr. Mukherjee, appearing on behalf of the Corporation, on instruction, had submitted before us that they shall constitute an Arbitration Board as soon as the Respondent furnishes security in terms of clause 29 (d) of the contract and if any direction is

given to the Arbitration Board to proceed from the stage the learned arbitrator had already reached, that would not be objected to. That is to say, Mr. Mukherjee contended that the Arbitration Board may be directed to take over the arbitration proceedings from the stage the learned arbitrator had already reached.

Such being the stand taken by the Corporation, we direct the Respondent to furnish the security of a sum to be determined by the Corporation within six weeks from this date and in the event security determined by the Corporation is furnished within the time mentioned herein earlier, the Corporation shall constitute an Arbitration Board in compliance with clause 29 of the contract. It is directed that the Arbitration Board shall proceed from the stage the learned arbitrator appointed by the High Court had already reached".

Therefore, it cannot be contended that the notice of arbitration dated 8.9.2003 was not valid especially when the demand for arbitration was specially referred to in the said notice requesting for the reference of such dispute to the Arbitration.

102. As indicated above, the Respondents have contended that it was only by way of the notice on 26.3.2004 the Appellant conveyed its choice of Arbitrator and therefore, the Arbitration proceedings could be deemed to have commenced only on 26.3.2004.

103. In elaboration of this submission, it is argued by the Respondents that even at the time of commencement of

the arbitration proceedings namely on 26.3.2004, the claim of the Appellant was barred by limitation.

104. The Respondents have relied upon the judgment of Hon'ble Supreme Court in Milkfood case. The Hon'ble Supreme Court in the decision observed that under the Arbitration Act, 1940, the arbitration proceedings commenced on the date on which a request for appointment of arbitrator was made. The relevant portion of the decision of the Hon'ble Supreme Court in the case of Milkfood Ltd vs M/s. GMC Ice Cream (P) Ltd 2004 (7) SCC 288 is as under:

> *" Section 21 of the 1996 Act, as noticed hereinbefore, provides as to when the arbitral proceedings would be deemed to have commenced. Section 21 although may be construed to be laying down a provision for the purpose of the said Act but the same must be given its full effect having regard to the fact that the repeal and saving clause is also contained therein. Section 21 of the act must, therefore, be construed having regard to Section 85 (2) (a) of the 1996 Act. Once it is so construed, indisputably the service of notice and/or issuance of request for appointment of an arbitrator in terms of the arbitration agreement must be held to be determinative of the commencement of the arbitral proceedings".*

105. This decision would not apply to the present facts of the case. The Hon'ble Supreme Court held so in that case while analysing the provisions of the Arbitration Act, 1940 in

relation to commencement of arbitration proceedings. This is because Section 37 (3) of the 1940 Act provides that for computation of the period of limitation, the date of commencement of arbitration proceedings shall be considered to be the date on which the request for appointment of arbitrator is made. The present dispute related to the arbitration proceedings under 1996 Act. Under Section 42 (2) read with Section 21 of the 1996 Act the appointment of an arbitrator is not a requirement for commencement of arbitration proceedings. As a matter of fact, the notice of arbitration which was issued by the Appellant on 8.9.2003 complied with the requirements of Section. It is clear that in the said notice the demand for the dispute was made for referring to arbitration. In fact, in the very same judgment i.e. Milk Case, the following observation is quite relevant:

> *" For the purpose of the Limitation Act an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other a notice requiring the appointment of an arbitrator".*

106. The perusal of the notice of arbitration dated 8.9.2003 shows that it contains all the elements that are stipulated in Article 3 of the UNCITRAL Rules. In other words, in the present case the arbitration proceedings had commenced by issuing notice on 8.9.2003. Thus, the arbitration proceedings were initiated within 2 years and 6 months of

accrual of the cause of action in the instant case and as such the proceedings were instituted within the prescribed period of limitation. Once the period of limitation stood stalled by issuing the arbitration notice, the Appellant was required to file an application under Sec 11 (6) of the 1996 Act within a period of 3 years as prescribed under Article 137 of the Limitation Act. In the present case, the application for appointment of Arbitrator was filed before the High Court of Andhra Pradesh on 27.4.2004 i.e. within the prescribed period of limitation.

107. According to the Appellant, in view of Section 14(2) of the Limitation Act, the time spent for prosecuting arbitral proceedings till the disposal of the arbitration application by the High Court of Andhra Pradesh should be excluded for the purpose of ascertaining whether the claims of the Appellant were made within the period of limitation.

108. As mentioned above, Section 14 (2) of the Limitation Act provide that in computing the period of limitation, the time during which the Applicant had been prosecuted with due diligence another proceeding, before the Wrong Forum shall be excluded where the proceeding relates to the same matter in issue and is prosecuted in good faith in the Court which has no jurisdiction.

109. In other words, the said Section operates to exclude the entire time spent prosecuting proceedings arising out of the same cause of action before another court if (i) the proceedings have been prosecuted diligently and in good faith (ii) if the said court is unable to entertain the said proceedings due to a defect in jurisdiction.

110. In order to find out whether the time spent in prosecuting arbitration proceedings would qualify for exclusion of time in computing the period of limitation, it is relevant to note that Section 43 (1) of the 1996 Act which provides that the limitation Act shall apply to the arbitration proceedings as it applies to proceedings in the Court. It follows that Section 14 of the Limitation Act would also apply to the arbitration proceedings. In the following decision in principle, the claim made by the litigant that the time spent in arbitration proceedings has to be excluded under Section 14 of the Limitation Act had been upheld.

111. While excluding the time spent in an earlier round of arbitration proceedings for the purpose of ascertaining as to whether the subsequent arbitration proceedings were instituted within time, the Privy Council in Ramdutt Ramkissendas v. E.D Sassoon & Co. MANU/PR/0123/1929 held as follows*:*

> *"….if the words suit instituted, appeal preferred, and application made in Section 3 are to be applied to arbitration proceedings, it seems to follow that the same interpretation must be put upon them in Section 14, and that civil proceedings in a court must be held to cover civil proceedings before arbitrators whom the parties have substituted for the courts of law to be the judges of the dispute between them…."*

112. The Calcutta High Court in Abdul Rahim Oosman and Co. v. Ojamshee Purshottamdas & Co AIR 1`930 Cal 5 @ Para 17, while analysing the scope of Section 14 of the limitation Act held that *"in my opinion, the proceedings before the arbitrator were proceedings in a Court within the meaning of the Section".*

113. Again, the Allahabad High Court in Chaman Lal V. State of UP, AIR 1980 All 308 @ Paras 7, 10, the Court held that the time spent in arbitration proceedings that were finally dismissed owing to lack of jurisdiction of the arbitrator shall be excluded while determining if the subsequent proceedings before the additional district judge were within the limitation period.

114. That apart, Hon'ble Supreme Court in the case of J Kumaradasan Nair and Another v. IRAC Sohan and Ors (2009) 12 SCC 175 has held that even where the provisions of Section 14 (2) are not applicable, the

principles therein could still be held to be applicable. The relevant observations are as under:

> "*The provisions contained in Section 5 and 14 of the Limitation Act are meant for grant of relief where a person has committed some mistake. The provisions of Section 5 and 14 of the Limitation Act alike should, thus be applied in a broad based manner. When sub-section (2) of Section 14 of the Limitation Act per se is not applicable, the same would not mean that the principles akin thereto would not be applied. Otherwise, the provisions of Section 5 of the Limitation Act would apply. There cannot be any doubt whatsoever that the same would be applicable to a case of this nature".*

115. Therefore, the principles of Section 14(2) of the Limitation Act would be applicable for the purposes of the exclusion of time spent prosecuting the arbitration proceedings while computing the period of limitation in the present case.

116. The main condition provided u/s 14 of the Limitation Act is that the time spent for the proceedings, in the wrong Forum, in respect of which time is sought to be excluded should be prosecuted (i) diligently (ii) with good faith.

117. While referring to the definition, the Hon'ble Supreme Court under Section 2 (h) of the Limitation Act, in the case of Ghasi Rom & Ors v Chait Ram Saini and Ors (1998) 6 SCC 200 has observed as follows:

(h) “good faith” – nothing shall be deemed to be done in good faith which is not done with due care and attention….”

The aforesaid definition shows that an act done with due care and attention satisfies the test of “good faith”. “Due care” means that sufficient care was taken so far as circumstances demanded and there was absence of negligence. In other words, the plaintiff has taken sufficient care which is a reasonable man is expected to take in order to avoid any injury.

118. The above observation would make it clear that it has to be found out as to whether the Appellant has taken sufficient care without negligence, which a reasonable man is expected to take in order to avoid any injury.

119. According to the Appellant, in the present case, the Appellant initiated arbitration proceedings in accordance with the PPA under the bona fide belief that arbitral proceedings were maintainable. It also pointed out that the Appellant claiming a substantial sum of money from the Respondent, had no interest in delaying proceedings and under those circumstances, the Appellant took all steps to settle the matter initially and having found that there was no response, he took prompt steps to initiate and prosecute the arbitration proceedings diligently in the High Court on the basis of notice of arbitration.

120. As we held in the earlier paragraphs while discussing the issue in the other Appeal, position of law with respect to

maintainability of the arbitration proceedings before the High Court under Section 11 (6) of the 1996 Act was not clear before the Gujarat Urja case judgment was pronounced. As a matter of fact, even in November, 2007, the Appellant filed an application Under Section 8 of 1996 Act by instituting the proceedings before the State Commission in respect of other disputes under the PPA seeking reference to arbitration. In that matter, the High Court of Andhra Pradesh passed an order of injunction on 5.10.2004 thereby recognising the maintainability of the arbitration proceedings. As we have pointed out earlier, the Hon'ble Supreme Court while granting leave in a SLP against the said judgment of High Court in Transmission Corporation of AP Ltd vs Lanco Kondapalli Power (P) Ltd (2006) 1 SCC 540 has specifically observed that the question as to whether State Commission has exclusive jurisdiction to decide all the disputes between the licensee and a generating company is left open to be decided by the High Court.

121. In view of the above observation, it is clear that the Hon'ble Supreme Court felt that the issue as to maintainability of arbitration proceedings had to be decided based on an interpretation of various provisions of the 2003 Act by the High Court. Had the position been clear at that stage, the Hon'ble Supreme Court then would have disposed of the

SLP with the observation that arbitration could not be resorted to, except as and when directed by the State Commission u/s 86 (i) (f) of the 2003 Act. As referred to earlier, the Hon'ble Supreme Court in that case directed the High Court to determine the question of maintainability of the arbitration proceedings in exercise of its powers U/S 11 of 1996 Act.

122. As we have discussed earlier, this Tribunal in the judgement in Spectrum Case while examining the issue as to whether the time spent in the arbitration proceedings before the High Court in respect of similar power purchase agreement could be excluded, held that the said period shall be excluded u/s 14 of the Limitation Act on the ground that the position of law as to the exclusive jurisdiction of the State Commission was not clear prior to the decision of the Hon'ble Supreme Court in Gujarat Urja Case. As a matter of fact, in that case, the Respondents have advanced the similar arguments that it was settled by the judgment of various courts including the Supreme Court much before the decision of the Hon'ble Supreme Court in the Gujarat Urja Case that the arbitration proceedings in relation to the dispute under the 2003 Act before the High Court were not maintainable. We have rejected their arguments in the above case by giving valid reasons.

123. Now in the present case, the Respondents have relied upon the Mysore SEB case, the Bassi Cold Storage Case and the India Charge Chrome Case. As we have indicated in the discussions in the other Appeal, these decisions would not apply in the present case which arose out of the 2003 Act whereas those decisions cited by the Respondents had dealt with the various provisions of the Electricity Act, 1910, Electricity Supply Act, 1948 which have already been repealed.

124. The entire premise of Section 14(2) of the Limitation Act is a mistake as to the correct forum for prosecuting proceedings. Section 14(2) specifically relates to the instances where jurisdiction of a particular forum was wrongly invoked due to a bona fide error. The Hon'ble Supreme Court, in Consolidated Engineering Enterprises v. Irrigation Department, (2008) 7 SCC 169 while dealing with the issue of Section 14 of the Limitation Act has held as follows:

> "*The Policy of the Section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an*

element of mistake is inherent in the invocation of Section 14. In fact, the Section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by bona fide litigious activity…The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of a bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy in a wrong court, should be excluded"

125. The above decision would make it clear that an element of the mistake is inherent in the invocation of Section 14 and this section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. Therefore, the fact that the arbitration proceedings were eventually held to be not maintainable does not exclude the operation of Section 14.

126. In the instant case, the institution of arbitration proceedings was premised on a genuine and bona fide impression that disputes had to be referred to arbitration as referred in their notice of Arbitration dated 8.9.2003. Therefore, the time spent in prosecuting the arbitration

proceedings shall stand excluded under Section 14 of the limitation Act for the purpose of computing the limitation period.

127. The Respondents have argued that the Appellant should have approached the Commission immediately after the decision of the Hon'ble Supreme Court in the Gujarat Urja Case. As we have discussed earlier that after the judgment in Gujarat Urja Case rendered on 13.3.2008, the arbitration application filed by the Appellant came up before the Hon'ble High Court for the first time only on 18.3.2009. On the very same date, the Appellant itself pointed out the judgment in the Gujarat Urja case rendered by the Hon'ble Supreme Court and requested the High Court to dispose of the application giving liberty to the Appellant to approach the State Commission. It is not disputed that this request was made by the Appellant itself voluntarily in the very presence of the Respondents. Therefore, it is the date on which the arbitration proceedings before the Wrong Forum is disposed of on the ground of the lack of jurisdiction which is relevant for the purpose of computing the period of limitation.

128. The Hon'ble Supreme Court in SBP & Co. v. Patel Engineering Ltd & Anr (2005) 8 SCC 618 has held that in exercise of its powers under Section 11 of the 1996 Act, the

High Court is required to judicially determine inter alia the maintainability of the arbitration proceedings while exercising its jurisdiction to appoint the arbitral tribunal. The relevant portion of the judgment in this case is as under:

> *" 39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause".*

129. In exercise of such judicial discretion the High Court of Andhra Pradesh relied upon the decision of Hon'ble Supreme Court in Gujarat Urja Case and disposed of the application for appointment of Arbitrator.

130. It is only thereupon the Appellant could approach the State Commission after the judicial finding rendered by the High Court that the arbitration proceedings were not

maintainable. In the present case, the Appellant approached the State Commission within 3 months thereafter.

131. In view of the above discussion, it has to be held that in computing the period of limitation for the proceedings commenced before the State Commission the period between 8.9.2003, the date of notice of arbitration and 18.3.2009, the date of disposal of arbitration proceedings by the High Court ought to be excluded. In that event, the claims of the Appellant cannot be said to be barred by limitation and they must be construed to have been made before the Commission within time.

132. <u>Summary of Our Findings</u>

(1) **The Findings rendered by the State Commission on the Limitation Point is not legally sustainable. On the other hand, it has to be held that the Petitions filed by the Appellant claiming re-imbursement of the MAT as well as the refund of the Capacity Charges have been filed before the State Commission within the period of limitation in the light of the fact that the Appellant is entitled to the benefit as available U/S 14 (2) of the Limitation Act.**

(2) **The notice dated 8.9.2003 sent by the Appellant to the Respondent shall be construed to be the notice of Arbitration. Since there was no positive response from the Respondent for the appointment of the Arbitrator, the Appellant was compelled to file the arbitration application before the High Court under Section 11 (6) of the Arbitration Act on 27.4.2004. On that date, the legal position was not clear as to the exclusive jurisdiction of the Commission to decide the dispute between the licensee and the generating Company. The Hon'ble Supreme Court reported in 2001 (1) SCC 540 Transmission Corporation of Andhra Pradesh Ltd Vs M/s. Lanco Kondapalli Power Limited has specifically held that the High Court will decide the question as to whether Section 86 (1) (f) of the 2003 Act confers exclusive jurisdiction to the State Commission to decide the dispute between the licensee and generating company, as it was not clear then. The legal position was clear only when the judgment in Gujarat Urja Case was rendered by Hon'ble Supreme Court on 13.3.2008 removing all the doubts in regard to the exclusive jurisdiction of the State Commission under the 2003 Act and holding that the State Commission alone has got**

the jurisdiction to adjudicate upon the dispute between the generating company and the licensee. On the strength of this judgment, the High Court of Andhra Pradesh disposed of the arbitration applications filed by the Appellant on 18.3.2009 giving liberty to the Appellant to approach the State Commission for the appropriate relief. On that basis, the Appellant filed two Petitions before the State Commission claiming for re-imbursement of MAT as well as for refund of Capacity Charges. The action of the Appellant in approaching the High Court for appointment of the Arbitrator in the arbitration application on the basis of the notice of arbitration dated 8.9.2003 without approaching the State Commission is bona fide. Hence the time spent during the pendency of the arbitration proceedings till the disposal of those proceedings by the Court i.e. on 18.3.2009 has to excluded for computing the period of limitation. If the said period is excluded, the Petitions filed by the Appellant before the Commission is well within the time. Therefore, the Appellant is entitled to the re-imbursement and refund of the amounts as it has claimed.

(3) **The ratio decided by this Tribunal in Spectrum Case in Appeal No.90 of 2011 dated 10.8.2011 would squarely apply to the present Appeals also as the issue raised in these Appeals as well as in the Spectrum Case is the same. As such, the Appellant is entitled to the benefit of 14 (2) of the Limitation Act as held in the Spectrum Case.**

133. In view of our above findings, both the impugned orders in Appeal No.128 and Appeal No.129 of 2011 passed on 13.6.2011 by the Andhra State Commission are set-aside. With a result, the State Commission is directed to pass the consequential orders with reference to both the claims made by the Appellant for reimbursement of Minimum Alternate Tax (MAT) as well as for the refund of the Capacity Charges along with the interest in the light of our finding that the claims made by the Appellant in both the Applications made before the State Commission were not barred by limitation.

134. The Consequential orders shall be passed by the Andhra State Commission in terms of above judgment within a period of 3 months from today.

135. In the meantime, the Appellants are also at liberty to approach the State Commission praying for passing the consequential orders in terms of this judgment.

136. Thus, both the Appeals are allowed. However, there is no order as to costs.

(Rakesh Nath) ***(Justice M. Karpaga Vinayagam)***
Technical Member ***Chairperson***

Dated: Jun, 2012

√REPORTABLE/~~NON-REPORTABALE~~