Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No 29 of 2011

Dated 31ST May, 2012

Coram : Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of

Tarini Infrastructure Limited

…. Appellant(s)

Vs.

Gujarat Urja Vikas Nigam Ltd.
Though its Chairman and Managing Director,
Sardar Patel Vidyut Bhavan,
Race Course, Vadora, Gujarat 390007.

Narmada Water Resources
Through Secretary – Irrigation, Water Supply
& Kalpsar Department, Sachivalaya, Gandhinagar, Gujarat

Gujarat Electricity Transmission Company Ltd.
Through its Chairman and Managing Director
Sardar Patel Vidyut Bhavan,
Race Course, Vadora, Gujarat 390007.

Gujarat Electricity Regulatory Commission,
First Floor, Neptune Tower, Opposite Nehru Bridge,
Ashram Road, Ahmedabad – 380 009,
Gujarat – India ….Respondent(s)

Counsel for the Appellant(s) : Mr. Sanjay Sen
Ms. Shikha Ohri
Ms. Survi Sharma

Counsel for the Respondent(s) : Mr. Anand K. Ganesan for R-3

JUDGEMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. M/S Tarini Infrastructure limited, a company under the Companies Act,1956 responded to the call of Narmada Water Resources, a statutory body under the Government of Gujarat for participation in the bids from private parties for building Small Hydro Power Generation Project in river Daman Ganga at Madhuban reservoir which is about 35 kilometres from Vapi in the district of Valsad, and was successful in getting its bid accepted and accordingly was awarded the Concession for building two Small Hydro Power Projects of 3 MW (2X 1500KW) and 2.6 MW (1X 2600 KW) at Daman Ganga. The 'Bid Document' was prepared and issued on 9.11.2006 by the Govt. of Gujarat. The Concession Agreement between the Narmada Water Resources and the appellant was executed on 27.8.2007 and the power plants were to be at a distance of 1km from each other and were to be connected to the nearest sub-station of the Respondent No. 1 Gujarat Urja Vikas Nigam Ltd. (GUVNL) which is a successor entity of the erstwhile Gujarat Electricity Board, and the said sub-station according to the Bid Document issued by the Govt. of Gujarat was less than 4km from the dam. In terms of the Concession Agreement dated 27.8.2007 the project was to be completed within 24

months. In terms of the Clause 3.1.3 of the Concession Agreement, the Appellant would be required to submit DPR to be prepared by a qualified consultant in accordance with the provisions of the Schedule 2 within four months of the Agreement. The Schedule 2 referred to are specifications and standards as specified in the RPF document of the project to be finalized in the DPR. The appellant in terms of the Concession Agreement submitted in July, 2007, a Detailed Project Report (DPR) for the development of the two Small Hydro Power Projects. In terms of the DPR, the power can be stepped up to 11/33KV level at the switchyard of the generating station for further evacuation of the same to the nearest 66KV sub- station at Rakholi which is about 4Kms from the proposed powerhouse site. The Concession Agreement further provided that at the end of 35 years form the date of signing of the Concession Agreement the projects were to be transferred to Narmada Water Resources and through lease the appellant would utilise the project site, use water for generation of electricity and construct the projects and maintain the same. The appellant would have to pay a license fee of 0.23 paisa per unit of the electricity produced and transmit to the interconnection point.

2. In terms of the DPR the total cost estimate of the two projects (without Interest During Construction) was Rs.3135 Lakh. On 29.1.2008 the appellant entered into a provisional Power Purchase Agreement (PPA)

with the GUVNL. The appellant agreed to sell the contracted capacity to the GUVNL for a period of 35 years at Rs. 3.29 per KWH for the year 2007-2008 at the base rate which is subject to escalation of 3% per annum till the commercial operation date and this rate was fixed in terms of an order dated 14.6.2007 passed by the Commission in Petition No. 853 of 2005 for Small Mini Micro Hydel Projects. The appellant's project was the first one in this type of the sector before which no other small Hydel Project was established by any private bidder. In terms of the PPA the appellant was to construct the projects including the interconnection facility at its own cost and the interconnection point was at a distance of 4 kms from the generating station. The maintenance of the interconnection facility was at the cost of the appellant and in terms of the tender document power was to be evacuated from the nearest erstwhile GEB 11/66KV sub-station at Rakholi which was 4 km off the switchyard of the appellant. The transmission line from the delivery point in the plant switchyard to the sub-station of Gujarat Electricity Transmission Company was to be constructed at the cost of the appellant.

3. Then a development took place. The Gujarat Electricity Transmission Company (GETCO) who is the respondent No. 3 in this Appeal informed the appellant at a later point of time that power could no longer be evacuated from Rakholi in Dadar and Nagar Haveli as the distribution in

that Union Territory was not under the jurisdiction of the Gujarat Electricity Board, as such the appellant was now required to lay down a transmission line of 66 KV for a distance of 23 Km instead of 11/33KV for 4 Km as is stated DPR passing through the Union Territory of Dadar and Nagar Haveli and then connecting to sub-station at Mota Pondha in Gujarat. The cost of laying down the transmission line of 23 Km was estimated at Rs. 8.5Crore which was increased to Rs. 10 Crore as for laying down the transmission facility for evacuation of power the appellant was to coordinate with GETCO and finalize the evacuation arrangement including the appropriate sub-station.

4. The construction of the project commenced on 24.11.2007 and the appellant requested for preliminary completion certificate on 25.8.2009 and finally after testing by the Independent Engineer the completion certificate was issued on 24.2.2010.

5. According to the appellant, it was under duress that it had to lay down the dedicated 66 KVDC transmission line for a stretch of 24 Km so as to connect to the sub-station of GETCO at Mota Pondha. The GETCO represented that either the appellant cold lay down their lines on their own after paying supervision charges of Rs.97, 76,000 to GETCO or they could get the same done through GETCO at a cost of Rs. 7 crore. For the sake

of economy of works the appellant opted to lay down the transmission line for evacuating power from the delivery point to the transmission network of GETCO under their supervision and the appellant was to pay the supervision charges Rs. 97,76,000 in three instalments. The total cost for laying down the transmission line came to be Rs. 10 crore. Although the appellant had already paid Rs.60 Lakh out of the total supervision charges of 97, 76,000 it was not allowed to connect to the sub-station of GETCO as the remaining amount was not paid. To resolve all pending disputes the appellant filled a Petition being No. 1025 of 2010 before the Commission. The appellant incurred an expenditure of Rs.61.00 Crore for the two projects.

6. JUVNL by letter dated 18.3.2010 asked the appellant to let it know the commercial operation date and in case the commercial operation was delayed the appellant would have to pay liquidated damages. The appellant replied on 24.3.2010 to the effect that liquidated damages should be waived because of unforeseen circumstances namely, non-existence of transmission facility and further requested to revise the tariff at Rs. 4.70 taking into consideration the increased cost of the projects. The appellant received another communication from GUVNL on 5.5.2010 whereby it rejected the proposal of the appellant to increase the tariff. It

further stated that the GETCO should allow the appellant to connect to its sub-station and remaining supervision charges should be adjusted towards the bill to be raised by GUVNL at the interest of Rs. 12% per annum. The suggestion of GUVNL for adjustment of the supervision charges was rejected by the appellant by a letter dated 10.5.2010.

7. Now, the appellant filled a petition before the Commission praying for increase in the power purchase cost up to Rs. 4.70. This Petition being No. 1024 of 2010 was heard by the Commission but was rejected by the order dated 3.9.2010 holding that the petition was not maintainable as the Commission could not re-open the PPA and re-determine the tariff by considering escalated cost of the project.

8. It is this order dated 3.9.2010 which is the subject matter of challenge in this appeal and the grounds advanced by the appellant, M/s Tarini Infrastructure Ltd. are as follows:-

a) The provisional power purchase agreement dated 29.1.2008 entered into by and between the appellant and the GUVNL was not approved by the Commission, as such the PPA cannot be acted upon.

b) Under section 86 (1) (b) the Commission is mandated to regulate the purchase price and procurement of distribution licensees including the price at which electricity should be procured from the generating companies.

c) In course of the hearing before the Commission it was represented by the GUVNL that the PPA dated 29.1.2008 was not placed before the Commission for approval.

d) In terms of the Electricity Act, 2003 the Commission has to review the PPA.

e) The Commission overlooked the fact that the tender document of the Government explicitly provided that power should be evacuated from a sub-station which was 4 Km off from the project site.

f) It was the responsibility of the appellant under the Concession Agreement to lay down the transmission facility and the appellant was praying for determination of tariff considering the escalation in the cost of the projects from Rs 35 Crore to Rs. 62 Crore and, importantly, the cost of power that had been agreed to by the two parties in the PPA at Rs. 3.29 Per KWH for the year 2007-2008

subject to escalation @3% per annum till the date of commercial operation did not take into account the increased cost of the project and the fact that the appellant was required to pay 23 paisa per unit as license fee. There has been an escalation of about 78% in the estimated total cost given in the DPR and the total cost as it stands as on the day. The increase in cost is due to steep increase in the cost of steel, cement and custom duty paid towards importing the hydro-Turbines, generators and stretching of transmission line of 24 Km and several underwater works and fluctuations in the foreign currency during recession. The increase in the cost of the projects amounting to Rs. 27 Crore was beyond the control of the appellant.

g) The Commission in its order itself observed that the generic tariff order was passed on 14.6.2007 on the basis of the Government policy and MNRE guidelines without going into the details of the capital cost. There should be at least 14 % return on equity.

h) Unless the tariff is revised the appellant would suffer the loss and would not be in a position to continue with the project.

i) The indicative price as was agreed to by the parties at the time of signing the PPA can not be regarded as tariff as it was not determined by the Commission.

j) The Commission over looked the decision of this Tribunal in Appeal No. 50 and 65 of 2008(Techman Infra Ltd Vs. Himachal Pradesh Electricity Regulatory Commission) where this Tribunal held that the Commission should take into account the variation in the capital cost so that the developers get its due and are attracted to the development of hydro power. The decision of this Tribunal in *Rithwik Energy Systems Vs. Transmission Corporation of Andhra Pradesh, 2008 ELR (APTEL) 237,* and the decision of the Hon'ble Supreme Court in *Transmission Corporation of A.P. and others Vs. Sai Renewable Power Pvt. Ltd.* have also been referred to.

k) The GUVNL is itself selling power to the neighbouring states at Rs. 4.30 paisa per unit. The price which was agreed to at the time of signing the PPA can not be allowed to nullify the purpose behind setting up the Small Hydro Electricity Project.

l) The Concession Agreement to the extent it contradicts or contravenes the provisions of the Electricity Act, 2003 and the

National Electricity Policy on the issue of sale of power to third parties under the Open Access system should be ignored and the Commission should take into account the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2009.(for short, the Regulations, 2009).

m) The Narmada Water Resources placed before the Commission the letter dtd. 16.11.2006 by which the Commission had approved the model Power Purchase Agreement for the mini energy project but there was no such model power purchase cost for small or mini hydro projects.

9. Of the four respondents it is the respondent No. 1, GUVNL who has filled a counter affidavit to contest the appeal and it contends as follows:

a) The Concession Agreement was a part of the tender document. Clause 5.1 of the Concession Agreement clearly provided that it was the responsibility of the appellant to verify the project site including the interconnection facilities.

b). Pursuant to the Petition No. 853 of 2005 filed by the Government of Gujarat the Commission had initiated the proceedings for determination of tariff for the Small Hydro Power Plants for supply

to GUVNL. On 14.6.2007 the Commission fixed the base tariff @ Rs. 3.29 per unit for the 2007-2008 with applicable escalation @ 3% per annum till the date of the commercial operation of the project. There was no objection on the part of the appellant to the execution of the PPA and now it is not open to the appellant to re-examine and / or review the Power Purchase Agreement.

c) The price fixed in the order dated 14.6.2007 and agreed to by and between the parties was neither provisional nor tentative.

d) The appellant was treated at par with other Hydro Projects similarly placed. The appellant had entered into the PPA with full knowledge of the terms and conditions contained in the order dated 14.6.2007 without any duress or coercion on the part of the GUVNL.

e) As the appellant accepted the price in the year 2008 by entering into PPA it is not open to the appellant to claim a new tariff after achieving financial closure of the project.

f) It was the responsibility of the appellant to lay the power evacuation line of appropriate voltage from generating station to the nearest sub-station of the State Transmission Utility. In case, augmentation of a

sub-station is necessary the entire cost for the same shall be paid by the appellant, and in terms of the PPA the cost of interconnection from the project to the nearest sub-station of the respondent No.3 namely, GETCO was to be borne by the appellant. There was no question of any assumption on the part of the appellant that the GUVNL would bear either directly or indirectly the cost of transmission line constructed form Hydro Power Project of the appellant to the sub-station of the respondent No. 3. The rate as was fixed by the State Commission by its order dated 14.6.2007 had also considered the transmission line costs to be incurred by the project developers.

g) It was not in the agreement that the transmission line would be not more than 4 Kms from the power project. Mistake in the Concession Agreement can not be taken advantage of by the appellant as there was a specific disclaimer to this effect in the tender document. There was no sub-station of the respondent No.3 at Rakholi, 4 Km away from the Hydro project as allegedly assumed by the appellant. The said area falls under the Union Territory of Dadra and Nagar Haveli and does not fall within the State of Gujarat.

h) It is not appropriate on the part of the appellant to seek increase in tariff which would be against the interest of the consumers.

i) The alleged force majeure conditions are misconceived. It was the obligation of the appellant to bear the charges for the transmission line from the plant to the interconnection of the respondent No. 3 who stopped the work on the transmission line due to non- payment of supervision charges by the appellant. The appellant cannot take advantage of its own default in fulfilling its obligations and claim the same to be force majeure.

j) It is incorrect to say that the power purchase agreement dated 29.1.2008 is not binding pending the approval of the Commission or that the tariff is merely indicative.

10. As said above, the respondent No. 2, 3 and 4, namely Narmada Water Resources, GETCO and the State Commission respectively did not file any counter affidavit, nor did they contest. Of course, the respondent No. 3's interest is not contradictory to that of the respondent No. 1. On the pleadings of the parties we frame the following points for our consideration:

a. Whether the appellant has cause of action to maintain the appeal?

b. Whether the Commission has Jurisdiction to reopen power purchase agreement and re-determine tariff?

c. Whether in the instant case, the Commission should examine and re-open the Power Purchase Agreement?

11. We have heard Mr. Sanjay Sen, learned Advocate appearing for the appellant and Mr. Anand K. Ganesan, learned Advocate for the respondent No.1.

12 Mr. Sanjay Sen, the learned Advocate for the appellant has submitted as follows:-

a) The tariff in respect of small hydro generating stations in the State of Gujarat was determined by the Commission after the MNRE guidelines issued in the year of 1994-95 for a control period of ten years. The Commission in the impugned order has admitted that while considering the generation tariff in its order dated 14.06.2007 it has not considered the various components of the tariff.

b) In the bid document it was clearly provided that the location of the nearest Gujarat Electricity Board sub-station is less than 4 KMs from the dam site. Thus, at the time of bidding, the evacuation /interconnection point was ex facie shown at 4 KMs from the

generating sites. The appellant had made all calculations towards cost of evacuation based on such representation.

c) In terms of clause 3.1.3 and 3.1.4 of the Concession Agreement the appellant had to submit a DPR to the grantor of the project (Narmada Water Resources) whereafter the Narmada Water Resources had to review and approve the DPR submitted by the appellant. Under the DPR the power would have to be evacuated to the existing 33KV sub-station by using two set-up transformer and a single circuit 33KV transmission line. The DPR also provided that the transmission voltage of 33KV single circuit with ACSR conductor is selected for power evacuation considering the quantum of power to be exported and the distance of transmission which is approximately 4 KMs.

d) After the PPA was executed on 29.01.2008 a system study was undertaken by the respondent no.3 (GETCO) where the base case was modified. At chapter 4 in paragraph 4.2.1 it was shown that the feasibility for evacuating power from the proposed 5.6. MW hydro station was the proposed 66 KV Mota Pondha sub-station of GETCO. It was proposed that the appellant should draw a 66 KV transmission line over a length of 24.5 KMs and connect its 5.6 MW generating station to GETCO's Mota Pondha sub- station. Based on the system study the

GETCO directed the appellant to construct the transmission line in variance with what was indicated in the bid document and confirmed with the approval of the DPR. The evacuation system was set up entirely by the appellant and had to be handed over to the GETCO free of cost after which the project was allowed to be commissioned.

e) Before the Commission the appellant gave details of the estimated project cost in terms of the DPR and the actual cost of the project which showed that there was significant escalation on account of various escalation in the costs of civil works, electro-mechanical works etc. Significant component is the increase in transmission cost which was estimated at Rs40lakh at the DPR stage but during construction in terms of GETCO's direction the same was raised to Rs.10 crore.

f) The Commission could not have adopted tariff suggested by MNRE without going into the parameters like capital costs etc.

g) The Commission admitted that the tariff order was based on the Government policy and after considering submissions made by the parties. In the year of 2005 when the proceedings for determination of tariff was initiated there was no small hydro project in the State of Gujarat. The jurisdictional facts required for exercise of tariff determination were non-existent. There was no scope for the

Commission to have come to any determination of tariff on regulatory principles established in section 61 and 62 of the Electricity Act, 2003.

h) There cannot be any agreement in relation to tariff, as such the Commission will at all times have the jurisdiction to determine tariff strictly in terms of sections 61 and 62 of the Act, the National Tariff Policy and the National Electricity Policy.

i) The order dated 14.6.2007 violates the provisions of sections 61,62(1),(2)&(5) of the Act as the Commission has obligation to seek specific details relating to costs before it can exercise jurisdiction for determination of tariff. Reliance has been placed on the decision in ***Reliance Airport Developers Pvt. Ltd. vs. AAI and others reported in (2006)10 SCC , and ChiranjilalShrilalGoenka (deceased) through LRs vs. Jasjit Singh and ors.(JT 1993(2)SC341).***

j) Redetermination, modification and change in the order of tariff is concomitant with the jurisdiction of the Commission in the matter of determination of tariff.

k) Determination of tariff is a statutory function to be discharged statutorily, and cannot be abrogated by a contract between the parties.

l) The Electricity Act, 2003 mandates to promote generation of electricity through non-conventional sources such as small hydro projects.

m) Reliance has also been placed on the decisions in ***Rithwik Energy Systems vs. Transmission Corporation of Andhra Pradesh , 2008 ELR(APTEL)237,India Thermal Power Ltd. Vs. State of MP &Ors. (AIR2000 SC1005), Techman Infra Ltd. Vs. Himachal Pradesh Electricity Regulatory Commission (Appeal No. 50 & 65 of 2008 of this Tribunal)***

13. Mr.Anand K.Ganesan, learned Advocate for the respondent- GUVNL has submitted as follows:-

a) As a part of tender process the bid document including the draft Concession Agreement was circulated by the Government of Gujarat to the prospective bidders but the GUVNL was not a party to the tender process.

b) In the tender process the Government of Gujarat provided various information and details to the bidders but also required the bidders to make independent assessment and investigations of the facts that might affect the bid including physical conditions.

c) The draft concession agreement to be entered with the successful bidder as contained in the tender documents also provided that the bidder would be deemed to have inspected and examined the site conditions and other circumstances which may influence or affect the bid and that the bidder will not be entitled to make any claim against the grantor on the grounds of insufficient or incorrect information relating to the project site being given by the grantor.

d) The appellant consciously executed the PPA with the GUVNL on 29.1.2008 and it was also placed before the Commission by the GUVNL on 24.3.2009.

e) The PPA further provided that the cost of constructing and maintaining the interconnection facilities from the project site to the nearest sub-station of the respondent no.3 would be borne by the appellant, and there was no objection whatsoever from the appellant at the time of execution of the PPA or thereafter regarding the terms of the order dated 14.6.2007 passed by the State Commission.

f) After an expiry of about 3 years from the signing the PPA the appellant filed a petition before the Commission for re-determination of tariff.

g) The contention that the Commission has not determined the tariff under section 62(1)(a) of the Act is misconceived.

h) Once tariff is determined there is no question of further determination of tariff.

i) There is no prohibition in the Act for generic tariff determination. Further, there is no mandate for determination on a cost plus basis taking into account the actual capital cost incurred by each project. The PPA executed between the parties only incorporates the tariff as determined by the State Commission.

j) Determination of tariff may be done by way of many processes, such as determination for a particular project based on costs and parameters, determination by way of generic order, or even by way of approval of the tariff mutually agreed between the parties.

k) The contractual rights and obligations cannot be avoided as a contract is binding on the parties.

l) Mere allegation of non-approval of the PPA does not constitute a ground for the contracting parties to avoid the contract unless the contract provides that the approval of the PPA shall be a condition precedent for the contract to come into force.

m) The contention that the Commission has the power and jurisdiction to reopen a concluded PPA wherein the Commission has approved the tariff for the life of the project is misconceived.

n) The basis of the claim of the appellant for increase in tariff, on account of increase in costs and expenses is misconceived. Financial

difficulties or duress does not constitute a valid ground for avoiding the performance of a contract.

o) The decisions in ***India Thermal power Ltd Vs. State of Madhya Pradesh, (2000)3 SCC 379,Transmission Corporation of Andhra Pradesh Ltd. & anr. VsSai Renewable Power Private Limited &others ,2010 ELR (SC)0697,Alopi Parshad s. Union of India (1960)2 SCR 793,Continental Construction Co Ltd. Vs. State of Madhya Pradesh, (1988)3 SCC 82, Rajasthan State Mines & Minerals Ltd vs. Eastern Engg. Enterprises, (1999)9 SCC .A.P. Devasthanam vs. SabapathiPillai, AIR 1962 Mad 132,Eacom's Controls (India) Ltd. Vs. Bailey Controls Co, AIR (1988)Del 365,andOcean Tramp Tankers Corporation Vs. V/O Sovfracht,(1964)1 ALL ER 161*** have been cited in support of the defence of the respondent no 1.

p) There thus cannot be any discharge from the contract or any variation from the terms of contract entered into between the parties on account of any alleged increase in costs of the project.

14. The Commission in the Impugned Order held as follows:

a). Article 5.2 of the PPA provides that the respondent shall pay the Tariff determined by the Commission. This Article further describes

the Tariff determined by the Commission in Petition No. 853 of 2005 and states that the Tariff would be applicable for the entire project life. Thus, the PPA is a concluded agreement between the parties and the Tariff decided by the Commission is in full force now.

b). The bid documents prepared by the Narmada Water Resources provide that the sub-station for evacuation of power from the generating station is less than 4 Kms from the dam site. The Transmission Line of 33 KVA is to be laid down up to the 66 KV sub-station at Rakholi sub-station of Gujarat Electricity Board which is about 4 Km from the power house site. The appellant himself has considered that the nearest sub-station of the GETCO is Rakholi sub-station which falls within the Jurisdiction of the Union Territory of Dadra and Nagar Haveli and not within the Jurisdiction of the GETCO.

c). It is the responsibility of the appellant for laying down evacuation line of appropriate voltage from the generating station to the nearest sub-station of the GETCO.

d). It is the responsibility of the appellant to verify the genuineness of the data and it shall not be entitled to recover any loss or damage that may arise from the data submitted by the Narmada Water Resources before or during the tender stage of the project. The

appellant should have verified the geographical location of the project vis-à-vis the nearest sub-station of the GETCO and in the bid document there is no mention of Rakholi sub-station. Thus, the appellant is not entitled to any compensation against the loss or damages occurred due to increase in the Transmission Line from 4 KM to 23 KM.

e). The GETCO had carried out system study on evacuation of power to be generated from the power project of the appellant and in the said report the GETCO clarified that the power is to be evacuated on 66KV Double Circuit Line from the generating station of the appellant to the Mota Pondha sub-station of the GETCO. This study report was not challenged by the appellant.

f). The appellant has assumed in the DPR that the power is to be evacuated to Rakholi sub-station. The Concession Agreement and the PPA stipulate that the appellant has to identify the evacuation sub-station in co-ordination with the GETCO

g). The Commission has decided the generic Tariff based on the Government Policy and the MNRE Guidelines without going into any parameters like capital cost etc. Narmada Water Resources have provided some of the facilities to the project developers for developing the projects.

e). The decisions cited by the appellant are not applicable and are distinguishable from the facts of the present case.

f). There is no compelling reason to modify the Tariff determined by the Commission.

15. Now, promotion of generation of electricity through renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity with specification of the price of the purchase is one of the fundamental objectives of the Act and section 86 (1) (a) (b) (c) (e) are relevant for the purpose and we quote the section in its entirety:-

"86. (1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State: Providing that where open access has been permitted to category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through 46 agreements for purchase of power for distribution and supply within the State;
(c) facilitate intra-state transmission and wheeling of electricity;
(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licence;
(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;
(g) levy fee for the purposes of this Act;
(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;
(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;
(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and
(k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any of the following matters, namely :-.
(i) promotion of competition, efficiency and economy in activities of the electricity industry;
(ii) promotion of investment in electricity industry;
(iii) reorganization and restructuring of electricity industry in the State;
(iv) matters concerning generation, transmission , distribution and trading of electricity or any other matter referred to the State Commission by that Government.

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3."

16. It is trite law that under the Electricity Act 2003 the jurisdiction vests with the Commission for determination of tariff. A contract entered into between the parties is definitely binding on the parties but only in so far as the conditions contained in a contract are not repugnant and do

correspond to the provisions of law. If the contract is the outcome of duress or coercion or where the contract does not conform to the law it is the latter that prevails over the former. Promotion of generation of electricity through renewable resources of energy is a laudable feature of the Act, 2003 and the Commission has a duty to ensure that the project developers intending to install power project through renewable resources of energy are encouraged in the enterprise, and while doing so it at the same time, does not sacrifice the interest of the ultimate end-users. It was in the year 2005 when the Government of Gujarat advertised a policy for promotion for the development of small hydel projects. Narmada Water Resources, an organisation of the Government of Gujarat invited bids from the private parties for building two small hydro power generation projects in river Daman Ganga. The appellant was awarded concession for building two small hydro power projects as mentioned in details in the preceding paragraphs. In the bid document it was clearly specified that the two power plants would be at a distance of 1Km from each and they were to be connected to the nearest sub-station of the erstwhile Gujarat Electricity Board and that the sub-station was 4 Km away from the dam. The Concession Agreement was executed on 27.8.2007.

17. Thus, under the Act, 2003 mandate has been given upon the Commission, *inter alia* to (a) determine the tariff for generation, supply, transmission and wheeling of electricity, (b) to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies, (c) to promote co-generation and generation of electricity from renewable sources of energy by providing adequate measures for connectivity with grid (d) to promote competition, efficiency, and economy in the activities of the electricity industry and promotion of investment in electricity industry. These functions together with the other functions of the State Commission as laid down in section 86 of the Act make it clear that so far as determination of tariff is concerned a power purchase agreement if to be concluded by and between a developer and a distribution licensee can not be the final say in the matter. A power purchase agreement is always subordinate to the provisions of the Act which empowers the State Commission to determine tariff, to promote generation from renewable sources of energy, to promote competition, efficiency and economy and to ensure transparency while exercising its functions. Section 61 lays down the broad philosophy in the matter of determination of tariff. We read section 61 as follows:

"61. The Appropriate Commission shall, subject to the provisions of

this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy: Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before

the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

18. In the light of the principles laid down in the statute we are to examine whether the appellant has any case to ventilate. It goes beyond dispute that it was first in the year of 2005 that the Government of Gujarat issued a policy for promotion of small hydel project in that State. It is also not in dispute that it is the first mini hydel project of the appellant that came into existence in Gujarat. It admits of no dispute that the generic tariff determined by the Commission through its order dated 29.6.2007 on the basis of MNRE Guidelines which were said to be issued in the year of 2002 i.e. well ahead of the Electricity Act, 2003, that came into force on 10th June 2003, as such, the provisions laid down in the Act, 2003 in the matter of determination of tariff were not followed in the generic tariff order dated 29.6.2007. The Commission was quite conscious that it could not consider the various components of the tariff which the appellant furnished before the Commission in course of the proceedings out of which the instant appeal has arisen.

19. It is the duty of the generating company to establish, operate and maintain generating stations and section 10 which is reproduced herein below is relevant:

"10. (1) Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made there under.
(2) A generating company may supply electricity to and licensee in accordance with this Act and the rules and regulations made there under and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer
(3) Every generating company shall -
(a) Submit technical details regarding its generating stations to the Appropriate Commission and the Authority;
(b) Co-ordinate with the Central Transmission Utility or the State Transmission Utility, as the case may be, for transmission of the electricity generated by it."

20. It is the basic case of the appellant that the appellant upon being declared as the successful bidder under the swiss challenge route was awarded the Concession for building two small hydro power projects of 3MW and 2.6MW at Daman Ganga. According to the appellant, the power plants are at a distance of 1Km from each other and were to be connected to the nearest sub-station of Gujarat Electricity Board which according to the tender document was less than 4 Km from the dam. The total cost estimate without including the IDC was according to the appellant Rs1443.00 lakh. On 14.6.2007, there was no small hydro power projects in Gujarat. It is the case of the appellant that the appellant was informed

by GETCO who after conducting a system study found that power could no longer be evacuated from Rakholi in Dadar Nagar Haveli as that point was no longer under the Gujarat Electricity Board and for connecting the delivery point of the appellant to the Gujarat grid the appellant had to lay down a transmission line of 66 KV Double Circuit Line as stated for 23Kms instead of 11/33 KV line for 4 Kms as was stated in the DPR. The Concession Agreement is dated 27.8.2007 between Narmada Water Resources and the appellant. Some important provisions of this Concession Agreement should be noted. Clause 3.1.3 provides for submission of DPR by the concessionaire to be prepared by competent and qualified Consultant in accordance with the provisions of the schedule 2 within in 4 months of signing of the agreement. Clause 3.1.4 speaks of review and approval of the DPR by the Grantor in case the DPR has been submitted in terms of Clause 3.1.3.Clause 4.1.3 of the Agreement provides as follows:

"Concessionaire shall be responsible for carrying out a DPR for the Project by the Independent DPR Consultant to be appointed by the Concessionaire. The costs and fees payable to the Independent DPR Consultant for the DPR would be payable by the Concessionaire. The DPR would, on it's approval and acceptance by Grantor (Or by CEA, as per the Electricity Act, 2003), from the Final technical specifications of the Project and would form an integral part of this agreement. The DPR shall be completed within a period of six months from the execution of this Agreement".

Chapter 5 of the Agreement deals with design, engineering and construction of the project. The company was required to achieve commercial operation of the project within scheduled commercial operation date and ensure that the project is capable of being dispatched delivering active and reactive power and of being operated in parallel with the grid system as per prudent utility practices. The company would have to enter into separate agreement with the State Transmission Utility within a period of six months from the effective date for execution, operation and maintenance of the interconnection facilities and also the charges and other terms and conditions for the execution, operation and maintenance of the interconnection facilities. Annexure A-3 is the extract of the bid document issued by the Narmada Water Resources, Water Supply and Kalpsar Department of the Government of Gujarat. In this document there are certain specifications to be taken note of by a bidder. Against the column of "Location of nearest G.E.B. sub-station" there is an information like this : "Nearest G.E.B. sub-station is less than 4 Km. From Dam Site." The dam site is Daman Ganga (Madhuban) Dam where the projects were to be installed. According to the appellant, the power can be stepped to 11/33KV level at the Switchyard of the generating station for further evacuation of the same to the nearest 66KV sub-station at Rakholi which is about 4 Kms from the proposed power house site. Annexure A-4 is the Detailed Project Report prepared in July, 2007, while bid document issued

by the Government of Gujarat was dated 9.11.2006. The essential information contained in the bid document have been carried out in the DPR. The chapter on 'salient features contain inter allia the location, estimated cost, cost per MW installed, Levelised Tariff etc. Point no. 11 is in relation to the description of transmission line (33KV) and against this item it has been written as "Existing GEB's Sub-station 66KV at Rakholi- 4 Km from 'Power House Site." It can not be said that this feature or information was without verification of the dam site. Now, chapter 2 deals with surveys and investigations. And, under this chapter there is Clause 2.6 dealing with power evacuation which reads as follows:

"Daman Ganga Power Project (SHP-1) shall generate 3000KW of power which shall be steeped up to 11/33KV level at the Switchyard of the generating station for further evacuation of the same to the nearest GEB's 66KV sub-station at Rakholi(about 4 Kms from the proposed powerhouse site)."

This feature is consistent with the information supplied by the Government in the bid document. The submission of the learned advocate for the appellant that the appellant had made all calculations towards cost of evacuation based on the representation made in the bid document can not be rejected out right. It also goes undisputed that the DPR which was prepared in terms of Clause 3.1.3 was approved by the Narmada Water Resources of the Government of Gujarat. In the DPR which was submitted to the Government there is Clause 6.14 dealing with power evacuation which runs thus:

"It is proposed to evacuate the power generate at Daman Ganga 1 Hydel Scheme to the existing 33 KV sub-station by using two no of step-up transformers and a single circuit 33KV transmission line."

"The transmission voltage of 33 KV single circuit with ACSR conducts is selected for power evacuation, considering the quantum of power to be exported and the distance of transmission (Approx. 4Km)."

It is beyond doubt that the DPR was approved accordingly on the basis of the tender document and the appellant proceeded towards implementation of the project after securing financial closure. Admittedly, in terms of the Concession Agreement (Clause 6.1 it has been provided as follows:

"The Concessionaire can use the electricity generated from the power for its own captive consumptions. If the Concessionaire does not want to use the electricity, generated for captive consumption or he has excess capacity available, he can sell the electricity generated from the power project to Gujarat Electricity Board (GEB) or any/ all of its successors. The sale of electricity and the tariff which can be charged shall be determined by Gujarat Electricity Regulatory Commission (GERC as per the power generated under the electricity Act, 2003 and the Gujarat Electricity Industry (Reorganisation and Regulation) Act, 2003. Third party sale of electricity is not permitted by the State Government as of now. The same shall be governed by the policy of Government of Gujarat from time to time."

Noticeably, though the Electricity Act, 2003 brings about a revolution in putting electrical energy for sale in open market through open access at the desire of a generator the Concession Agreement does nor permit third party sale and the validity of this Clause is of course not the subject matter of the challenge of this Appeal. What is to be emphasised upon is that this Concession Agreement signed by the Grantor namely the Executive

Engineer of Daman Ganga Project and Director on behalf of the appellant provides for determination of tariff by the Commission in terms of the Act, 2003, meaning thereby that the provisions of Section 61 & 62 read with section 86 have to be made applicable no matter whatever is provided for in the power purchase agreement dated 29.1.2008. No doubt, the provision of Section 86 (1) (b) permits execution of power purchase agreement between the licensee for distribution and supply with the generating companies but the right is not absolute in as much as the Commission has the statutory duty and power to regulate electricity purchase and procurement process of distribution licensees including the price at which procurement is proposed through agreements. It can not be gainsaid that a Power Purchase Agreement is subordinate to the provision of Section 86(1) which is again subject to and must correspond to the provision of 61 and 62 of the Act. The Act provides for determination of tariff on commercial principles with optimum investments reflecting the cost of supply of Electricity and at the same time safeguarding the interest of the consumers which must not be forgotten, that it is more so when it is generation of electricity through renewable sources of energy so that the developers get encouraged. The provisions of sub-section (2) of section 86 are reiteration of the provision of section 61.

21. Within five months from the date of the Concession Agreement the power purchase agreement was executed. The power purchase agreement also provides that GUVNL shall pay the tariff determined by the GERC. The GUVNL banks upon Clause 5.2 of the power purchase agreement wherein it has been stated that GERC has determined a tariff of Rs. 3.29 per KWH for the year 2007-08. This tariff is said to be the basis for the year 2007-08 and tariff will be subject to escalation at 3 % per annum till the Commercial Operation Date and would be applicable for the entire project life in terms of the order of the Commission dated 14.6.2007.At the cost of repetition it has to be said that the generic tariff order dated 14.6.2007 passed by the State Commission was in the light of the MNRE guidelines which were framed some time in the year of 2000 the Act, 2003 did not come into force until10.6.2003. MNRE guidelines were general guidelines to be taken cognizance of by the authorities concerned and the Commission while making the order dated 14.6.2007 had no occasion to take into consideration various components like capital cost etc, for determination of tariff. It must not be lost sight of the fact that though the power purchase agreement was executed on 29.1.2008 which was much after the Act, 2003 came into force the said agreement followed the features in the DPR which was approved by the Government of Gujarat and the DPR was based on the bid document. It was the GETCO which undertook a system study subsequently and that too importantly

after the execution of the Power Purchase Agreement. The study report had a forwarding letter with it dated 5.9.2008 addressed to the Appellant containing inter alia : "*it is recommended to evacuate the 5.6 MW hydro power from your proposed hydro project at Madhuban Dam to 66 KV Mota Pondha GETCO sub-station".* and Paragraph 4.2.1 of chapter 4 reads as follows:

> *"This is the base case for feasibility of evacuating the proposed Hydro generation of 5.6 MW through proposed grid connectivity to 66 KV Mota Pondha sub-station i.e.KV Tarini Generation station – Mota Pondha (GETCO) sub-station D/C lines (24.5 Kms)the lines flows are quite normal and within limits. The power flows are shown on the SLD marked as Annexure – 2."*

In the bid document it was provided that the location of the nearest Gujarat Electricity Board sub-station is less than 4 Km from the Dam Site and now, according to the study report of the GETCO, the distance between the generating station at the dam site to the sub-station of the GETCO would be 24.5 Km. The learned Advocate for the GUVNL refers to Clause 4.1 of the PPA. According to the PPA, the cost of constructing and maintaining the interconnection facilities from the project site to the nearest sub-station of the GETCO would be borne by the appellant and the appellant shall undertake at its own cost maintenance of the interconnection facilities in accordance with Prudent Utility Practices. The PPA further provided that the transmission line from the delivery point of the plant switchyard to the sub-station of GETCO shall be constructed by

the GETCO but at the cost of the power producer. It is not in dispute that interconnection facilities would be at the cost of the power producer. The point that must not be issued is that the PPA was in line with the DPR when GETCO's study did not originate. The argument of the learned counsel for the GUVNL that once the tariff has been determine and accepted by all the parties to the PPA there is no question for further determination of tariff by the State Commission is difficult to accept. This Tribunal in Appeal No. 35 of 2011 decided on 10th February 2012 observed as follows:

9. The main objection raised by the learned Senior Counsel for the 1st Respondent before us is that under the 2004 Regulations framed by the State Commission, the State Commission would fix the normative tariff for energy generated from different types of Renewable Sources of energy and sold to distribution Company. Accordingly, the State Commission, vide its Order dated 18.1.2005, fixed generic tariff for Biomass based plants. The tariff so fixed can be modified generally and not in individual cases. The Ld. Counsel for the Respondent -1 further submitted that if the argument of the Appellant that the power to modify tariff also enables the State Commission to take individual grievances and facts in to account to modify normative tariff is accepted, it would lead to utter chaos as the State Commission will have to decide thousands of applications by power consumers in regard to the supply of tariff and innumerable generators in regard to the tariff payable to the generating companies and this would render the normative tariff a dead letter apart from the whole exercise being impractical.

10. This above argument of the 1st Respondent Distribution Licensee is not tenable for the following reasons:
I. The State Commission has framed the KERC (Power Procurement from Renewable Sources by Distribution Licensee and Renewable Energy Certificate Framework) Regulations, 2011. These Regulations has repealed the 2004 Regulations. Regulation 9 of the new Regulations deals

with determination of tariff for electricity from renewable sources of energy. Regulation 9(1) is relevant:

"9. Determination of Tariff for electricity from Renewable sources of energy:- (1) The Commission may determine at any time the tariff for purchase of electricity from Renewable sources of energy by Distribution Licensees either suo motu or ***on an application either by generator or by Distribution Licensee;*** *Provided that the tariff approved by the Commission including the PPAs deemed to have been approved under sub-Section (2) of Section 27 of the Karnataka Electricity Reforms Act, 1999, prior to the coming into force of these regulations shall continue to apply for such period as mentioned in those PPAs. . Bare reading of clause 9.1 of these Regulations would reveal that the State Commission has power to determine at any time tariff for purchase of energy from renewable sources of energy by Distribution Licensee either suo motu or on an application by generator or by Distribution Licensee.*

II. It is incorrect to state that in case the plea of the Appellant is accepted and its tariff is fixed individually, then the State Commission would have to determine tariff for each consumer. The State Commission is required to determine the tariff under Section 62 of the 2003 Act. Section 62 of the 2003 Act reads as under:

62. Determination of tariff.*—(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for— (a) supply of electricity by a generating company to a distribution licensee: ... (b) transmission of electricity; (c) wheeling of electricity; (d) retail sale of electricity: ... (2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.*

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required. ... (5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

Thus as per Section 62(1)(a) of the Act, State Commission is required to determine tariff for ***a generating station****. State Commission is also required to determine tariff for retail supply of electricity in terms of Section 62(1)(d). Supply has been defined in Section 2(70) as sale of electricity. Thus a consumer cannot approach State Commission to determine its tariff.*

III. In this context it would be appropriate to refer to a case came before this Tribunal in Appeal No. 50 of 2008. In this case the Himachal Pradesh Electricity Regulatory Commission had determined generic tariff based on normative parameters for all small hydro power stations in its Order dated 12.8.2007. This Order of Himachal Pradesh Electricity Regulatory Commission was challenged before this Tribunal in Appeal No. 50 of 2008 in the matter of Techman Vs Himachal Pradesh Electricity Regulatory Commission. The relevant portion of the judgment of this Tribunal in this Appeal is reproduced below:

"The promoters of hydro-power generation in the State of Himachal Pradesh as well as the Himachal Pradesh State Electricity Board shall be entitled to apply to the Commission for fixing project specific capital cost for any project in case the normative capital cost is not suitable to either of them. Similarly, if Capacity Utilisation Factor (CUF) of 45% for a specific project is contested by either party, it may approach the Commission with the site specific CUF."

11. Thus from the above judgment of this Tribunal in Appeal No. 50 of 2011 and Section 62 of the 2003 Act, it would be clear that the State Commission has powers to determine the tariff for any generator supplying electricity to distribution licensee even if the concerned the State Commission had determined the generic tariff for certain class of generators.

15. The above guidelines would indicate that the Commission has to maintain a balance of interests so that the generators also may not suffer unnecessarily. It is not disputed that unit of the Appellant was shut down due to its becoming unviable at the existing tariff. The State as well as the Country has been facing power shortage and this fact has been accepted by the Government of Karnataka in its GO mentioned above. Under such circumstances it should be our endeavour to produce energy to the extent possible. It would not be desirable to keep any generating unit out of service for want of 'just' tariff more so when 70% of investment is funded

by Public Sector Banks or Financial Institutions as loan. In the context of prevailing power scenario in the country, it is well said that "No power is expensive power". In other words power at any cost is acceptable as the Cost of unserved energy (loss due load shedding) could be very high.

18. "The State Commission as indicated in the impugned order has power to modify the tariff for concluded PPA in larger public interest. The guiding principles laid down in Section 61 of the 2003 Act would indicate that the Commission has to maintain a balance so that the generators also may not suffer unnecessarily. In the context of prevailing power situation in the country, it would not be desirable to keep any generating unit out of service for want of 'just' tariff.

22. It is a fact that the appellant had to draw a 66 KV Transmission Line over a length of 24.5KMs and connect its 5.6 MW generating station to the GETCO's Mota Pondha sub-station in terms of the study report of GETCO that came into being after the PPA was signed between the appellant and the GUVNL. In the DPR, the total cost estimate as was given by the appellant was Rs.1692lakh for the SHP-I, while for the SHP-II, the total cost was estimated at Rs.1443.00lakh. Now, at the time of the filing of the petition before the Commission, the appellant projected cost of Rs.2700lakh for the SHP-I, and Rs.3400 for SHP-II but the transmission line was common to both the projects. It bears recall that the cost of transmission was originally estimated at Rs.40.00lakh in as much as in terms of the bid document the distance between the Gujarat Electricity Board sub-station was less than 4 km. from the dam site, but now in terms of the study of the GETCO, the transmission network from the project side to the sub-station at Mota Pondha belonging to GETCO is 24.5 km. as a

result of which the appellant submits that the cost of the transmission work came to Rs.10.00crore. At the time of hearing of the appeal, the learned advocate for the appellant has drawn our attention to the petition filed before the Commission by the appellant wherein at paragraph-17, there has been shown a differential amount of Rs.27.00crore which was on account of increase in the cost of the projects. The increase in the cost of the projects, according to the appellant, has been attributed to a) Power Evacuation b) Custom & Taxes c) IDC to Bank d) Foreign Exchange difference due to currency fluctuation e) Price of Steel f) Concrete 8,000 cubic metre. g) Under-water works due to old dam which was projected as nil in the original DPR while the actual cost incurred was Rs.80.00crore, h) Amount payable to GETCO i) Additional Equipment Cost and Fuel Cost. According to the learned advocate for the appellant, there has been an escalation of about 78% in the estimated total cost projected in the DPR and the total cost as it stands on the day. It is submitted that the increased cost is due to the steep increase in the cost of steels, cement and custom duty paid towards importing the hydro-turbines generators and the construction of 24.5 kms. of transmission line and several under-water works. This argument may not be without merit. The submission of the learned Advocate of GUVNL that the petition before the Commission was filed about three years from the date of the signing of the PPA does not carry much force because the PPA was signed on 29.1.2008 when the

project was not Commissioned and the petition before the Commission was filed on 10th of May, 2010. The argument of the learned advocate of GUVNL that by the order dated. 14.6.2007, the State Commission has determined the tariff for sale of electricity by Mini Hydel Power Plants to the GUVNL to purchase on behalf of the distribution licensees is faulty. Firstly, the Commission did not determine the tariff of the appellant viz.-a-viz. the GUVNL in terms of Section 61 and 62 read with Section 86 of the Act. The Commission, as said above, has power to accord a seal of approval to the Power Purchase Agreement executed between a Generating Company and a Licensee. But, according such seal of approval does not amount to determination of tariff. In this connection, we may refer to the decision of the Hon'ble Supreme Court in *Transmission Corporation of Andhra Pradesh Ltd. &Anr. Vs. Sai Renewable Power Pvt.& Others, Civil Appeal No. 2926 of 2006* where it has been held as follows :-

> *"The expression 'purchase price' has to be given its limited meaning, i.e. the price for purchasing a good and in the context of the present case, price at which generated electricity will be sold to the specified agencies. The term purchase price indicated in the PPAs, as such, would be a matter within the realm of contract but this is subject to the changes which are contractually and/or even statutorily permissible. Purchase price ultimately would form part of the tariff, as tariff relatable to a licensee or a consumer would have essentially taken into account, the purchase price. The purchase price may not include tariff but tariff would always or is expected to include purchase price".*

The function of determination of tariff vests with the Commission which has to be guided by the provisions of the law that strikes out a balance between conflicting interests. It is not claimed by the GUVNL that the Power Purchase Agreement in question was placed and approved by the Commission. The learned Advocate for the GUVNL has submitted that once the PPA was entered into the standard form and placed before the State Commission, there was nothing to be done by the State Commission with regard to such PPA. The matter of the fact is that the PPA was executed with reference to the Generic Tariff Order dated 14.6.2007 in terms of the MNRE guidelines which were initiated by the Government in the year of 2002. The proceedings for formulation of Generic Tariff Order is said to had been initiated in the year of 2005 when in fact no mini hydel power plant had really come into being in the state of Gujarat. Therefore, MNRE guidelines have by the passage of time lost its force and the Commission is solely to be governed by the provisions of the Act and the National Tariff Policy as formulated under the Act. The learned advocate of the GUVNL has referred to a decision in *India Thermal Power Limited Vs. State of Madhya Pradesh & Others (2000) 3 SCC 379* wherein it has been held that PPAs can be regarded statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements. This decision which was rendered

before the Electricity Act came into force, is not helpful to either of the parties because here it has been held that the agreement can be on such terms as may be agreed to by the parties except that the tariff is to be determined in accordance with it, the provisions contained in Section 43-A(2). The argument of the learned Counsel for GUVNL that PPA is a binding document and must be respected by the parties is a general proposition because it overlooks the fundamental fact that the PPA is subject to regulation by the Commission and it is the Commission which is a body supreme that has jurisdiction to determine tariff. If the PPA does not take cognizance of components of tariff including capital cost and if intervening circumstances do happen, the Commission has authority to re-open the PPA. The learned Advocate for the GUVNL has referred to the decision in *Transmission Corporation of Andhra Pradesh Ltd. & Another Vs. Sai Renewable Power Private Limited & Others, 2010 ELR (SC) 0697* wherein it has been held that documents executed by the parties and their conduct of acting upon such agreements over a long period of time bind them to the rights and obligations mentioned in the contract. The facts and the circumstances of the case are different and the ratio of the decision does not come into conflict with the legal proposition that it is the Commission that has jurisdiction to re-examine a PPA when it finds the terms and conditions to be unconscionable. The learned Advocate for the appellant has a point when he says that MNRE Policy cannot even be

considered to have a guideline of statutory nature for determination of tariff under Section 62 of the Act. Section 61 of the Act, 2003 only recognizes the National Electricity Policy and the National Tariff Policy which are obviously statutory policies under Section 3 of the Act. It goes disputed that the Commission has not asked for any specific details relating to costs before it could exercise jurisdiction for determination of tariff.

23. learned advocate for the GUVNL submitted that there cannot be any revision in the tariff already determined when the tariff has been applied for the life of the project and financial difficulties or duress does not constitute any valid ground for avoiding the performance of a contract. It is not a case where a contract is proposed or directed to be avoided. Increase/or revision in tariff has been prayed for on the ground of increase in the cost of construction of the plant which could not be conceived of to the extent it has been incurred because of extraordinary situations which the appellant is said to had been unaware of when the Power Purchase Agreement was executed. It is the settled principle of law that a PPA can be revisited with by the Commission which is statutorily enjoined with the duty of determination of tariff in the light of the principles laid down in Section 61 of the Act. *The decision in Aloopi Parshad Vs. Union of India (1960) 2 SCR 793* as has been cited by the

learned Advocate by the GUVNL cannot be applied here because it is not a case of the contract becoming void on the ground of impossibility or unlawfulness of being performed. It is true that in this decision it has been held that there is no general liberty reserved to the Courts to absolve a party from liability to perform his part of the contract merely because on account of an un-contemplated turn of events, the performance of the contract may become onerous. In fact, this is the general rule and this decision is in the context of Section 56 of the Indian Contract Act. The exact question that has arisen in the instant appeal is whether in the matter of determination of tariff, the principles governing Section 61 and 86 should be given good bye even when the parties enter into agreement by and between themselves with regard to purchase of price. This is where the jurisdiction of the Commission is considered to have not been lost by revisiting the PPA, more particularly when the agreement between the parties in relation to purchase price of energy is subject to scrutiny and regulation by the Commission. The learned Advocate for the GUVNL has referred to some other decisions of the judicial authorities namely, *Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, (1988) 3 SCC 82, Rajasthan State Mines & Mineral Ltd. Vs. Eastern Engineering Enterprises, (1999) 9 SCC 283, Travancore Devaswom Board Vs. Thanth International, (2004) 13 SCC 44, S.A.P. Devasthanam Vs. Sabapathi Pillai, AIR 1962 Mad. 132, Eacom's Controls (India) Ltd. Vs. Bailey*

Controls Col. AIR (1998) Del. 365 and Ocean Tramp Tankers Corporation Vs. V/O Sovfracht, (1964) 1 All ER 161. Each of the decisions is in respect of a fact situation not identical with the facts in the appeal before us. The Continental Construction Company Ltd. referred to the decision in *Aloopi Parshad Vs. Union of India (1960) 2 SCR 793* but this decision was in a fact situation where it was pleaded that the contract had been frustrated. Similarly, in Rajasthan State Mines & Minerals Ltd., the above two decisions have been referred to and the same principle has been reiterated. In Travancore case, the facts were somewhat different. In this case also, the decision in *Aloopi Parshad Vs. Union of India (1960) 2 SCR 793* has been referred to and it was held that the Contract Act does not permit a party to claim payment of consideration for performance of contract at rates different from stipulated rates on some vague plea of equity. It was further held that compensation *quantum meruit* is awarded when the price is not fixed by the contract and for the work done or service rendered pursuant to the terms of contract, compensation *quantum meruit* cannot be awarded. The other three decisions reiterate the same principles relating to frustration of contract. In the instant appeal, the question is exactly not of frustration of contract. The learned Advocate for the GUVNL has referred to the decision of this Tribunal in *Narayanpur Power Company Ltd. Vs. Karnataka Electricity Regulatory Commission & Others (Appeal No. 31 of 2011).* The facts of this case are

totally different from the facts of the present appeal. In the Narayanpur Case, the question was not whether the price fixation was lawfully arrived it or not. There, it was argued that one of the parties to the Contract had no legal competency to enter into the contract and that assignment of the contract was not lawful. In another case, relating to the same company out of which the Appeal No.195 of 2010 arose, PPA was held to be valid but the parties was directed to incorporate the corrections stipulated in the Commission's letter dated 21.4.2008 in the PPA. In this decision, the appellant prayed for option for third party sale which was negated because of the contract remaining subsisting. The question that has surfaced is whether the Commission has a legal mandate to promote non-conventional energy projects by giving tariff in accordance with the law and whether the law recognizes determination of generic tariff because it has been repeatedly argued not without un -justification that tariff should be determined on the basis of hard costs and according to the provisions of the Act. It is to be taken note of the fact that completion certificate was issued by an Independent Engineer entrusted with supervision of construction work on 18.2.2010, while the PPA was executed on 29.1.2008. The appellant was perhaps not unreasonable in arguing that the costs incurred till the date of the completion of the project could not get reflected in the agreement that basically followed the generic tariff order dated. 14.6.2007 in respect of which the proceedings really had

originated in the year of 2005 which again followed non-statutory guidelines of the year of 2000. It is argued by the learned Advocate for the appellant that increase in the total capital cost has to be regarded in determining the tariff for the two projects and the same should be taken as the basis of tariff determination along with the increase in reliability. A chart has been given in the Memo of Appeal where capital cost is shown to had gone up to Rs.62.00 crore as against Rs.35.00 crore as was shown in the DPR and the debt : equity ratio with escalation of cost has been shown at Rs.33.00 crores as debt and Rs29 Cr equity as against Rs.24 crore as debt & 11 crore as equity. There has also been a variation / increase in interest in term loan. It is argued that the indicated price, as agreed to by the parties at the time of execution of the PPA cannot be regarded as tariff as the same has not been determined by the Commission and the appellant is entitled to a tariff determined in terms of the guidelines fixed by Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2009. The learned Advocate for the appellant has referred to the decision of this Tribunal in *Techman Infra Ltd. Vs. Himachal Pradesh Electricity Regulatory Commission (Appeal No. 50& 65 of 2008)* where it has been held that the Commission should take into account the variation in the Capital Cost so that the developer gets its due and are attracted to the development of hydro-power. Reference has been also

made to the decision in *Rithwik energy Systems Vs. Transmission Corporation of Andhra Pradesh 2008 ELR (APTEL) 237* where this Tribunal held : " *Therefore, it is the bounden duty of the Commission to incentivise the generation of energy through renewable sources of energy. PPAs can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives".* In this decision, there has been made a reference to National Electricity Policy pertaining to non-conventional sources of energy that provides that adequate promotional measures will have to be taken for development of technologies and a sustained growth of the sources. Reference has also been made to *Transmission Corporation of A.P. and Others Versus Sai Renewable Power Pvt. Ltd. (Civil Appeal No.2926 of 2006).* This decision has also been relied upon by the learned Advocate for GUVNL. At paragraph 46 of this decision, it has been held that in the face of the contract between the parties, the Regulatory Commission is the Authority to fix the tariff which includes within its ambit the purchase price of the non-conventional energy under the Policy of the State.

24. The Govt. of India in order to meet its objectives under the National Electricity Policy have laid down certain aims and objectives which include financial turn around and commercial viability of electricity sector as also protection of Consumer's interest. The Concession Agreement to the

extent it is invariance with the provisions of the Electricity Act, 2003 and the National Electricity Policy may not be strictly adhered to. Determination of tariff is a statutory function and a contract cannot take away the jurisdiction conferred on the statute. In *India Thermal Power Ltd. Vs. State of Madhya Pradesh & Others (AIR2000SC1005),* it has been held that merely because a contract is entered into in exercise of an enacting power conferred by a statute that by itself cannot render the contract a statutory contract. In this decision, it has been held that an agreement can be on such terms as may be agreed to by the parties except that the tariff is to be determined in accordance with the provision of the Act. In *Techman Infra Ltd.,* it has been inter alia held that the Commission is required to leave due margin for variation in the capital cost so that the developers get their due and are attracted to invest in generation of hydro-power.

25. The facts and circumstances of the case and the analysis rendered above impel us to hold that the Commission was not justified in holding that since the PPA is a concluded agreement between the parties re-determination of the tariff sought by the petitioner is not permissible. The Commission itself admits that the Commission had not considered various components of tariff submitted by the appellant. The Commission overlooked the fact that the DPR was submitted and approved in line with

the bid document and after approval of the DPR the system study report prepared by the GETCO revealed that the distance between the dam site and the sub-station of the GETCO was a distance of 24.5 kms. Clause 5.4 of the Concession Agreement does not appear to have any relevancy and moreover though Rakholi sub-station was not specifically mentioned in the bid document, it was specifically mentioned in the bid document that the nearest sub-station of the GEB was less than 4 kms. from the dam site. Therefore, the appellant cannot be attributed with any evil design in averring that it was not revealed to it that it has to lay down a transmission line to 24 kms. from the dam site. GETCO's report is dated 5.9.2008 which is more than a year after the approval of the DPR and eight months after the signing of the PPA. When the DPR was approved by the Government, there is no point in saying that it was the duty of the project developer to verify the correctness of the bid documents data. The observation of the Commission that the appellant having availed itself of the facilities offered by the grantor cannot be allowed to escape from the obligations is misplaced because there is before us no question of finding any escape route from the Concession Agreement or from the PPA. What is being emphasized upon is re-examination of the PPA in the light of the data and materials which were not before the parties to the agreement while coming to the fixation of purchase price and which the Commission did not at all go through. There was thus no occasion on the part of the

Commission to examine and scrutinize the PPA and formally, though under the law required, it was not approved by the Commission. Therefore, there is no question at the moment of granting open access to the appellant in the matter of sale of electrical energy to third parties. The only course that appears to be legally permissible is examining the PPA since it has not been visited at all by the Commission under the law in the light of the materials furnished by the appellant. While saying so, we do not say for the moment as to whether the data furnished by the appellant before the Commission would justify its prayer for increase of tariff. We do not say for the moment that the data furnished by the appellant is beyond reproach. We do not suggest for the moment that the tariff in respect of the renewable source of energy supplied by the appellant should be at a particular price. What we mean to say is that the tariff fixation being the function of the Commission under the Act, the Commission should determine the tariff in case upon examination of the materials, it comes to find that the price fixation agreed to by and between the parties would require intervention of the Commission. Thus, what is being stressed upon is the necessary examination of the materials upon which it is the Commission that reserves to itself the jurisdiction to pass order in accordance with the Law.

26. The very thesis of the Commission that the Power Purchase Agreement was executed containing the tariff on the basis of the Commission's own order dtd. 14.6.2007 which remained un-assailed is open to criticism. It is the Commission's own finding in the Impugned Order that it followed the MNRE guidelines which were issued sometime in the year of 2002. What were the guidelines and how the guidelines were arrived at are not known. The pivotal point is that after the Electricity Act, 2003 came into being w.e.f. 10.6.2003 prior to which MNRE guidelines are said to have been issued some time in the year of 2002, the determination of tariff has to be made in accordance with the Act, 2003. After the enactment of Electricity Act, 2003, the Commission's power to determine tariff is guided by the Act itself. Section 61 of the Act mandates promotion of co-generation and generation of electricity from renewable resource of energy. Therefore, the determination of tariff pursuant to the provision of the Electricity Act, 2003 has to be such as to promote generation of electricity from renewable resource of energy. The Commission's observations that it did not go into the details of capital costs etc. makes its order vulnerable. Therefore, simply because of the fact that Power Purchase Agreement was executed voluntarily and in accordance with the generic tariff order of 2007, it cannot be said that the Power Purchase Agreement becomes sacrosanct on that account. It is not a question of fleeing away from the Power Purchase Agreement. It is

not a question of contract being impossible to perform because of frustration. The question is the question of jurisdiction namely whether a Power Purchase Agreement based on a generic tariff order which is again based on some non-statutory MNRE guidelines has to be regarded as valid and lawful for all time to come and in perpetually even after the enactment of the Act, 2003. Determination of tariff has to be made in accordance with the provision thereof and there is no question of determination of tariff under some guidelines having no force of law. If the generic tariff had been made strictly in accordance with the provisions of the Act, then the position might have been a different one but here in the Impugned Order itself, the Commission has expressly stated that in the present case the Commission has decided the generic tariff based on the Government policy and MNRE guidelines and has not gone into the question of capital cost Once, the Act came into force with effect from 10.6.2003, there is no question of following MNRE guidelines.. Herein lies the heart of the situation.

27. A conceptual analysis of what is called guidelines may not be out of context. The dictionary meaning of the guidelines connotes 'instructions' which are advisory in nature. The guidelines may be called a 'broader outline', a 'dimension', some 'parameters', some 'standards', some 'bottle lines' and some 'yardsticks' which require to be followed in

the attainment of a purpose. In other words, a guideline is a statement by which to determine a course of action. By definition, a guideline is never mandatory and is not enforceable in law. In this connection, we may refer to the decision of the Hon'ble Supreme Court in *Narendra Kumar Maheshwari Vs. Union of India 1990 Supp SCC 440* where the following observation has been made:-

> *"**However, it has to be borne in mind that the guidelines on which the petitioners have relied are not statutory in character. These guidelines are not judicially enforceable. The competent authority might depart from these guidelines where the proper exercise of his discretion so warrants. In the present case, the statute provided that rules can be made by the Central Government only."***

The decision in *Transmission Corporation of Andhra Pradesh Limited & Another Vs. Sai Renewable Power Private Limited and Others reported in (2011) 11 SCC 34* is also relevant. The Honourable Supreme Court observed as follows:

***"At this stage, we may notice that these guidelines are general guidelines and every State was required to act as per its own needs, convenience and by taking a general view, as to which are the most practical and affordable projects and how they should be carried on by the State. To give meaning to the guidelines that they were "absolutely mandatory", will not be in conformity with the law relating to interpretation of documents as well as according to the canons of exercise of executive and administrative powers. These guidelines were certainly required to be moulded by the State to meet their requirements depending on various factors prevailing in the State**".*

28. Reading between the lines of Section 86 (1) (b) , it appears that a Power Purchase Agreement does not by itself, make it binding on parties unless it gets approved up examination by the Commission. The Section 86 does not make a qualitative distinction between the determination of tariff by the Commission itself and determination through regulation of the price at which electricity should be procured from the generation companies through Power Purchase Agreement. Necessarily, the price agreed to by and between the parties must follow the principles and provisions of the law and where the price agreed or to arrived at the Power Purchase Agreement is not in consonance with the law but on the basis of some guidelines, the details of which are not known it is not too much to demand that the Power Purchase Agreement should be revisited within the terms of the principles laid down in the Act not in terms of the guidelines on the basis of which a general order was passed which again was not based on any State Regulation. What is more important is that the Power Purchase Agreement was not placed jointly by the parties for approval. In such circumstances, the fundamental principle that it is in the interest of encouragement and giving incentive to the co-generators that the Power Purchase Agreements could be modified upon revisit becomes of paramount importance.

29. To summarize: The Bid Document is dated 9.11.2006 and the Concession Agreement is dated 27.8.2007,while the DPR was submitted in July,2007.This is one aspect of the matter. The Power Purchase Agreement was executed on 29.1.2008, while the report and the letter of GETCO is dated 5.9.2008 so that at the time of finalisation of the Power Purchase Agreement the subsequent materials and developments could not be considered by the parties. After the enactment of the Electricity Act,2003 there is no scope of framing by the Commission generic tariff on the basis of pre-Act,2003 guidelines which hardly carries any force of law. The Power Purchase Agreement has to be subordinated to the Act,2003. If the Power Purchase Agreement is not in conformity with the Act,2003 then it loses its legal force. This is the broad principle which every statutory authority has to regard. The Commission has statutory power to examine, review and approve the Power Purchase Agreement. The Commission has itself noted in the impugned order that it did not examine the aspect of capital cost. What exactly were the MNRE guidelines are not known and in the impugned order the Commission does not explain it. The principles for determination of tariff as laid down in section 61 cannot be sacrificed even when parties go through Power Purchase Agreement. A Power Purchase Agreement based on MNRE guidelines, particularly in relation to generation through renewable sources of energy, and not after the principles laid down in the law are liable to be reopened and re-

examined. The Power Purchase Agreement has not been approved upon examination earlier by the Commission. The provision of Section -86 (1) has not been complied with so far. In Rithwik Energy Systems case, which we have already noted, it has been held that it is the bounden duty of the Commission to incentivize the generation of energy through renewable sources of energy. Power Purchase Agreements' can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentive.

30. Accordingly, we allow the appeal, set aside the Impugned Order and remand the matter back to the Commission for examination upon hearing the parties and perusal of the materials of the question as to what should be the tariff in case it upon examination of the data come to find that there is good reason to be in variance with the PPA. No costs.

(P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

Reportable/Not reportable

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