APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 518 OF 2023 & IA NO. 2015 OF 2024

Dated: 13th February, 2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

KERALA STATE ELECTRICITY BOARD LIMITED
Through its Resident Engineer
Vydyuthi Bhavanam,
Thiruvananthapuram, Kerala
PIN – 695004. … Appellant

VERSUS

1. **KERALA STATE ELECTRICITY REGULATORY COMMISSION**
Represented by its Secretary
K.P.F.C. Bhavanam,
C.V. Raman Pillai Road, Vellayambalam,
Thiruvananthapuram, Kerala – 695010. … Respondent No.1

2. **JHABUA POWER LIMITED**
Through its Managing Director
Unit No.307, Third Floor, ABW Tower,
M.G. Road, Gurugram,
Haryana – 122002. … Respondent No.2

3. **JINDAL INDIA THERMAL POWER LIMITED**
Through its Managing Director
Plot No.2, Pocket-C, Second Floor,
Nelson Mandela Road, Vasant Kunj,
New Delhi - 110070 … Respondent No.3

4. JINDAL POWER LIMITED
Through its Managing Director
Jindal Centre, 12, Bhikaji Cama Place,
New Delhi – 110066. … Respondent No.4

Counsel for the Appellant(s): Prabhas Bajaj

Counsel for the Respondent(s): Dhananjaya Mishra for Res.1

Anand K. Ganesan
Swapna Seshadri
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Matrugupta Mishra
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Mridul Chakravarty
Ankita Bafna
Lakshyajit Singh Bagdwal
Chetan Kumar Garg
Robin Kumar
Supriya Rastogi Agarwal
Harshit Singh
Lavanya Panwar
Alchi Thapliyal for Res.4

JUDGEMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

This Appeal is filed by the Kerala State Electricity Board Ltd (hereinafter referred to as the "Appellant"/KSEBL) against the order of the Kerala State Electricity Regulatory Commission ("KSERC" for short), in OP. No. 05 of 2021 dated 10.05.2023. By its order, in OP. No. 05 of 2021 dated 10.05.2023, the KSERC declined to grant approval to four Power Supply Agreements (PSAs) entered into by the Appellant pursuant to a Tariff Based Competitive Bidding Process under Section 63 of the Electricity Act, 2003. These four PSAs are (1) PSA dated 31.12.2014 with Jabhua Power limited, Respondent No. 2 for 115 MW; (2) PSA dated 22.12.2014 again with Jabhua Power limited, Respondent No. 2 for 100 MW; (3) PSA dated 29.12.2014 with Jindal India Thermal Power Limited (JITPL), Respondent No. 3 for 100 MW; and (4) PSA dated 29.12.2014 with Jindal Power Limited, Respondent No. 4 for 150 MW.

The Appellant has, however, restricted its challenge in the present Appeal only to non-approval by the KSERC of three PSAs, two with the 2nd Respondent, and the third with the 3rd Respondent. The PSA executed with the 4th Respondent is not under challenge on the ground that the KSERC, while allowing the Review Petition of the Appellant by its order dated 29.12.2023, had approved the said PSA; and, as the 4th Respondent Jindal Power Ltd chose not to challenge the said order, the Review Order dated 29.12.2023 has attained finality in so far as they are concerned.

II. FACTUAL MATRIX:

The Ministry of Power, Government of India, vide its Resolution dated 09.11.2013, notified the guidelines for procurement of electricity from Thermal Power Stations set up on DBFOO basis, and issued model documents comprising the Model Request for Qualification (MRFQ), the Model Request for Proposal (MRFP) and the Model Power Supply Agreement (MPSA) collectively known as the Standard Bidding Documents

(SBD) which was to be adopted by the distribution licensee for procurement of electricity from power producers through a process of open and transparent competitive bidding under Section 63 of the Electricity Act, 2003, based on the offer of the lowest tariff.

KSEBL had, hitherto, invited two separate bids for procurement of power, on DBFOO basis: (i) for procuring 450 MW power from December-2016 onwards for 25 years, and (ii) for procuring 400 MW power from October- 2017 onwards for 25 years. The first bid was invited on 05.03.2014, and the second on 25.04.2014. Financial bids, received in Bid-1, were opened on 31.10.2014. While ten bidders had submitted their bids, the L1 bidder in Bid-1 had offered to supply only 200 MW of power. Hence, KSEBL requested L2 to L4 bidders to match their tariff to the bid submitted by L1. However, none of the bidders were willing to do so. Bid- 2 was opened on 14-11-2014 and, while eleven bidders participated in the bid, M/s. BALCO, the lowest bidder in Bid-2, offered to supply 100 MW only as against the 400 MW for which bids were invited by KSEBL. Hence, KSEBL requested L2 to L6 bidders to match the quoted tariff with that of the L1 bidder. L2 to L5 bidders in Bid-2 conveyed their willingness to match the tariff quoted by the L1 bidder. After considering both the Bids, KSEBL held, in principle, that the tariff offered by L1 bidder in Bid-1 of @ Rs 3.60 per unit, for supplying 200 MW of power from December-2016 onwards for 25 years, appeared to be competitive. KSEBL issued LoA to the 'L1' bidder, M/s Jindal Power Limited, New Delhi for procuring 200 MW from December-2016 onwards for '25' years. KSEBL noted that L2 bidder in Bid-1, who had quoted a tariff of Rs 4.15 per unit for supplying 115 MW of power from December-2016 onwards for 25 years, had refused to match the L1 bidder's tariff. However, in deviation of its own offer, KSEBL accepted the quoted tariff of L2 bidder in Bid-1 ie at Rs. 4.15 per unit, justifying such acceptance on grounds that the

tariff offered by L2 bidder of Bid-1 was less than the tariff quoted by the L1 bidder in Bid-2, and the tariff "seemed to be competitive when compared to the cost-plus tariff of the recently commissioned NTPC projects, though it was contrary to KSEBL's offer to match the tariff of L1 bidder in Bid-1. Pursuant thereto, KSEBL issued LoA to 'L2' bidder of Bid-1 ie M/s Jhabua PowerLimited, Gurgaon for procuring 115 MW from December-2016 onwards for '25' years @ Rs 4.15 per unit. Since the tariff quoted by the remaining bidders (other than L1 and L2) in Bid-1 was equal to or more than the tariff derived in Bid-2, KSEBL did not consider the remaining offers from Bid-1. Thus in Bid-1, from out of the tendered quantity of 450 MW, KSEBL issued LoA for 315 MW (200 MW +115 MW) to L1 and L2 bidders. In so far as Bid-2 was concerned, as against the tendered quantity of 400 MW, KSEBL, in violation of the tendered quantity, issued LOA for 550 MW to L1, L2, L3, L4 and L5 bidders @ Rs 4.29 per unit for 25 years from October-2017 justifying it on the ground that the tariff offered 'appeared to be competitive', when compared to the present cost- plus tariff of the recently commissioned stations of NTPC Ltd, considering the competitive tariff of Rs 4.29 per unit derived through Bid-2, and the likely power shortages in the forthcoming years. Hence, KSEBL decided to procure 550 MW through Bid-2 @ Rs.4.29 per unit for twenty-five years from October-2017 onwards.

The Government of Kerala accorded sanction for procuring 865 MW of power, on DBFOO basis, vide G.O(MS) No.45/2014/PD dated 20.12.2014. Subsequently, KSEBL entered into Power Supply Agreements for long- term procurement of 865 MW of electricity for a period of 25 years from 1st December 2016 and 1st October 2017 with L-1 and L-2 bidders of Bid-1, and L-1 to L-5 bidders of Bid-2 respectively, and filed a petition before the KSERC on 21.04.2015 requesting it to adopt the tariff under Section 63 of the Electricity Act for 865 MW of power tied up with various generators as per

the tariff detailed in the petition.

After examining the petition and the report furnished by KSEBL, KSERC found certain irregularities/ deviations in the bidding guidelines and observed that KSEBL had not obtained prior approval of the Commission and the Central Government with respect to the PSAs and the deviations from the guidelines. In Para 32 of its Order, in OP No.13 of 2015 dated 30.08.2016, the KSERC noted the following deviations from the standard bidding documents and guidelines issued by the Government of India on 08.11.2013 and 09.11.2013, and the KSERC Tariff Regulations, 2014:

> *"(i) KSEBL has awarded power purchase contract to the second lower bidder at its quoted rate of Rs.4.15 / kWh which is higher than the lowest rate of Rs.3.60/kWh in Bid-1, whereas the guidelines issued by the Government of India are only for the selection of the lowest bidder.*
>
> *(ii)KSEBL has not invited all the remaining bidders other than L1 to revalidate or extend their respective bid security and to match their rates with that of L1.*
>
> *(iii)KSEBL has purchased 550 MW of power in Bid-2 as against the tendered quantity of 400 MW*
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> *(iv)KSEBL has obtained only 200 MW from the lowest bidder in Bid-1at a rate of Rs.3.60 / kWh. Thereafter 115 MW power from L2 has also been purchased at a higher rate of Rs.4.15 / kWh. Thus a total quantity of 315 MW was purchased as against the tendered quantity of 450 MW leaving a balance of 135 MW. KSEBL has purchased more quantity of power than the tendered quantity in Bid- 2 stating the reason that it could not get the full tendered quantity in Bid-1. Such purchase of more than the tendered quantity is not in accordance with the general principles of tender process.*

(v) Even if the above 135 MW is considered for procurement from Bid-2, the total quantity that can be purchased is only 535 MW (400 MW + 135 MW). However, KSEBL has purchased 550 MW deviating from the conditions prescribed by Government of India in para 3.3.3 in the guidelines notified by Government of India on 5th May 2015, which has been relied upon by KSEBL to justify award of power purchase contracts to bidders other than the lowest bidder in Bid-2.

(vi)KSEBL has not obtained prior approval from Government of India for the deviations from the standard bidding documents and the guidelines.

(vii)KSEBL has not obtained approval from the Commission before executing the power purchase agreements.

(viii)KSEBL has not included any clause in the impugned PPAs to the effect that the PPA shall have effect only with the approval by the Commission as specified in sub-regulation (1) of regulation 78 of the Tariff Regulations, 2014".

Considering the aforesaid facts, documents and legal position, KSERC disposed of OP No.13 of 2015 vide Order dated 30-08-2015 holding that (i) the purchase of 200 MW of power by KSEBL from M/s Jindal Power Ltd, New Delhi at the rate of Rs.3.60 / kWh, as per Bid -1 dated 05.03.2014, which was opened on 31.10.2014, was approved; (ii) purchase of 100 MW of power by KSEBL from M/s Bharat Aluminium Company Ltd, Chhattisgarh at the rate of Rs.4.29/ kWh, as per Bid-2 dated 25.05.2014 which was opened on 14.11.2014, was approved; (iii) approval of the following purchases of power by KSEBL from bidders, other than the lowest bidder (L1), would be considered on getting approval from the Government of India for the deviations from the guidelines, and on getting the views from the Government of Kerala on the issues raised in paragraphs 34 and 38 of this order.

The KSERC further directed that a copy of the order dated 30-08-2015 be submitted to the Government of Kerala with a request to communicate their views after duly considering the relevant facts and legal provisions in view of the Government Order GO (MS) No. 45/2014/PD dated 20.12.2014 sanctioning the purchase of 865 MW of power by KSEBL on DBFOO basis. KSEBL was further directed to follow up the matter with the Government of India and the Government of Kerala, and to submit the results to the Commission as early as possible, considering the fact that power purchase as per Bid-1 will have to commence with effect from December, 2016.

Pursuant to the order of the KSERC dated 30-08-2016, the Government of Kerala, vide letter dated 15-09-2016, sought clarifications from the Govt. of India on the long-term procurement of 865 MW of power. In response, the Govt of India, vide letter dated 18.11.2016, informed them that approval of the deviations, pointed out by KSERC, should have been obtained from the Central Government before issuance of RFQ, RFP and PSA, and not at this stage; as per the guidelines, deviation from the provisions of the bidding documents was approved if necessary, and not the action taken by the utility as per practice or precedent; and, in view of the above, the Government of Kerala / KSEBL may take action as appropriate in consultation with KSERC.

Thereafter KSEBL vide letter dated 15.11.2016, while informing KSERC that purchase of 115 MW power from M/s Jhabua Power Ltd was inevitable, requested them to accord approval for scheduling power from M/s Jhabua Power Ltd from December, 2016, and informed them that they would approach them later with approval from the Ministry of Power once the same was received. KSERC, vide letter dated 28.11.2016, directed KSEBL to submit approval from both the Government of India and the Government of Kerala. KSEBL, while submitting a copy of GO dated 30.11.2016 issued

by the Government of Kerala granting them permission to procure 115 MW from M/s Jhabua Power Ltd from 01.12.2016, informed KSERC that no formal communication had been received in respect of approval of the Government of India.

In view of the decision of the Government of Kerala, vide GO dated 30.11.2016, KSERC, vide Order in OP No.13 of 2015 dated 22.12.2016, provisionally approved purchase of 115 MW of power by KSEBL from M/s Jhabua Power Ltd at Rs.4.15 / kWh as per the power purchase agreement dated 31.12.2014, subject to clearance from the Government of India.

Thereafter KSEBL, vide letter dated 25.10.2017, informed KSERC that they were forced to schedule 350 MW power under Bid-2 from 1-10- 2017, and could not defer scheduling this power because of the precarious power scenario, and in anticipation of getting approval from the Commission upon clarification/direction from the Govt. of Kerala, they be granted approval. They also produced G.O. dated 21.10. 2017 whereby the State Govt had permitted them to draw the contracted power from 01.10.2017, and had informed them that the Govt order dated 21.10.2017 was not a final order, and final orders in the matter would be issued in due course.

KSERC, vide its letter dated 22.12.2017, allowed KSEBL to schedule 100 MW power from Jindal India Thermal Power Ltd, 100 MW from M/s Jhabua power limited and 150 MW from M/s Jindal Power Limited in view of G.O dated 21.10.2017, approving the power purchase proposal, including the rate for the pending approvals only after the State Government accords final approval for the entire power purchase under DBFOO.

In view of stoppage of supply of 350 MW power by RLDCs, the consequent adverse impact on the state power system due to non-establishment of LC as PSM for the DBFOO contracts under Bid-2, and to

avoid denial of purchase of power from exchanges, KSEBL, vide letters dated 20.07.2019 and 02.08.2019, requested KSERC to grant final approval of the PSAs. KSERC, vide letter dated 26.09.2019, declined to grant approval stating that it had, vide its Order dated 30.08.2016, directed KSEBL to get approval of the Govt. of India for the deviations in the standard bidding guidelines and, in view of G.O dated 20.12. 2014, to obtain the views of t h e Govt of Kerala; and, since the said approvals were yet to be submitted, the Commission could not consider the request of KSEBL for grant of approvals for the PSAs entered into with L2, L3 and L4 in Bid-2 under DBFOO.

The Government of Kerala, vide letter dated 20.01.2018, requested the Ministry of Power, GOI for its advice as to whether it would be irregular to confirm the said purchase of power under PSAs executed with bidders other than L-1 bidder under Bid 1 and Bid 2. In reply, the Central Government, vide letter dated 11.12.2019, informed that the matter had been further examined; the views of the Ministry of Power as communicated earlier vide letter dated 18.11.2016 were read; the deviations pointed out by KSERC should have been got approved by the Central Government before issuance of RFQ, RFP and PSA, and not at this stage; and the Government of Kerala / KSEBL may take action as appropriate in consultation with KSERC.

While approving the ARR and Tariff for the MYT period 2018-19 to 2021- 22, the KSERC stated that it had considered scheduling power from the three projects of Bid-2, ie., 100 MW of power from M/s Jindal India Thermal Power Ltd, New Delhi, 100 MW of power from M/s Jhabua Power Limited and 115 MW of power from M/s Jindal Power Limited, for the limited purpose of estimating the ARR & ERC for the control period; since the required approvals from GoI and State Government was still awaited, the Commission was constrained to use the rate equivalent to the cost of power from BALCO which was L1 of Bid 2 for Rs.4.25 per unit; this consideration

was only for the purpose of estimating the cost of power provisionally in the ARR, and shall not be construed as an approval of the power purchase rate or of the PPA itself as per Section 63 of the Act which could be considered only after fulfilment of the conditions specified by the Commission in its order dated 30-8-2016.

The KSERC reiterated that, during the truing up of accounts for the respective financial years, excess amount, if any, incurred for procuring power from these three generators shall not be considered, unless KSEBL gets approval of power purchase from the Government of India for the deviations from the guidelines, and on getting approval of the Government of Kerala on the entire power purchase under DBFOO.

On 06.04.2020, KSEBL wrote to Jindal India Thermal Power Ltd stating that, in the absence of regulatory approval to pass the entire power procurement cost against the unapproved PSAs, KSEBL would have to limit payment to the generators in accordance with the orders of the KSERC. In O.A.No.29 of 2019, filed on 14.2.2020 seeking approval of fuel surcharge for the period April 2019 to June 2019, and in O.A.No.02 of 2020 filed on 27.4.2020, seeking approval of fuel surcharge for the period July 2019 to September 2019, KSEBL claimed fuel surcharge for the electricity purchased from the three unapproved DBFOO contracts in Bid-2 namely: (1) 100 MW power from M/s Jindal India Thermal Power Ltd ,New Delhi, (2) 100 MW from M/s Jhabua Power Ltd and (3) 150 MW from M/s Jindal Power Ltd. The KSERC, vide Orders dated 14.02.2020 and 27.4.2020, did not approve the fuel surcharge, claimed from the above three unapproved DBFOO contracts, as fixed charges and variable cost of these stations had not been specifically approved. Instead, KSERC directed KSEBL to limit payment of these stations at the rate of BALCO, i.e, the L1 rate of Bid-2.

KSEBL filed Review Petition Nos. 2 and 4 of 2020 against the orders of the KSERC dated 14.02.2020 and 27.04.2020 respectively and, vide common order dated 14.08.2020, the review petitions were dismissed.

On 08.09.2020, KSEBL informed Jindal India Thermal Power Ltd that a petition for approval of the PSAs was being filed by them before the KSERC. On 07.10.2020, M/s Jindal India Thermal Power Ltd filed an appeal in DFR No. 369 of 2020, under Section 111 of the Electricity Act, 2003, before this Tribunal praying that the order passed by KSERC, in OA No. 29 of 2019 and OA No. 2 of 2020 dated 14.02.2020 and 27.04.2020 respectively, be set aside, and procurement of power be approved as per the tariff in the PSA signed with KSEBL. This Tribunal passed an interim order, and posted the case to 20.11.2020. In the meanwhile, on 12.11.2020, KSEBL filed OP No.05 of 2021, as a fresh petition under Section 63 of the Electricity Act, for adoption of tariff of the unapproved PSAs signed by them.

On 20.11.2020, this Tribunal passed an interim order holding that, as approval of the State Commission for the PSA and the prayer for tariff adoption was still awaited, there shall be stay of operation of the orders dated 14.02.2020 and 27.04.2020 passed by the KSERC on the subject of fuel surcharge, as a consequence status quo ante shall be restored to the dispensation prevailing immediately anterior thereto, and the ad-interim order would continue till the application for stay and appeal are adjudicated upon after final hearing. The appeal, and the application filed therewith, were to be taken up for final hearing after the decision on the fresh petition for approval/adoption has been rendered by the State Commission.

Challenging the interim Order of APTEL dated 20.11.2020, KSERC filed Civil Appeal No. 41 of 2021 on 04.01.2021 and, by Order dated 27.01.2021, the Supreme Court granted stay of further proceedings before

this Tribunal. However, in compliance with the Order passed by this Tribunal on 20.11.2020, KSERC scheduled a public hearing on 09.02.2021 at Ernakulam and on 19.02.2021 at Thiruvananthapuram in OP No. 05 of 2021. Based on the objections raised by the participants in the public hearings, and in view of the Interim Order of Stay passed by the Supreme Court in Civil Appeal No. 41 of 2021 dated 27.01.2021, KSERC decided to await the final disposal of Civil Appeal No. 41 of 2021.

KSEBL, vide letter dated 28.04.2022, informed KSERC that the Govt. of Kerala had issued a G.O. on 27.10.2021 constituting a Committee with the Additional Chief Secretary (Finance) as the Chairman, the Principal Secretary (Power) as the Convenor, and the Law Secretary and CMD KSEBL as members to examine the bidding process and purchase agreements entered into by KSEBL based on the comments of the statutory agencies, and the possibility of terminating/re-negotiating the power purchase agreements in the best interests of the State; and, in the meeting held on 19.01.2022, the Committee recommended that the prudent course of action would be that the deviations in the standard bidding process not be agreed to by the Government of Kerala in respect of the subject PSAs.

By its order, in Civil Appeal No. 41 of 2021 dated 10.02.2023, the Supreme Court directed KSERC to take a call and decide O.A. No. 05 of 2021 (OP No. 05 of 2021) as expeditiously as possible, but in no case later than three months; both parties shall co-operate in expeditious disposal of the pending O.P; and the present interim arrangement shall continue up to the date of disposal of O.P No. 05 of 2021 and for a further period of three weeks thereafter.

In its order, in O.P No.5 of 2021 dated 10.05.2023, KSERC examined three issues. On issues (i) and (ii), ie whether the tariff had been determined

as per the guidelines issued by the Central Government through competitive bidding in a fair, transparent and equitable process under Section 63 of the Electricity Act, 2003 or not?, whether any deviations were made in the bidding process from the guidelines dated 09.11.2013, if so whether the deviations were fair and transparent and to protect the public interest?, and what were the deviations and its long- term financial implications?, the KSERC concluded that the tariff determined by KSEBL, in these unapproved PSAs, was not in a fair, transparent and equitable process, and they had grossly deviated from the guidelines issued by the MoP, Government of India under Section 63 of the Electricity Act, 2003. Further, the deviations made by KSEBL were against public interest and created long term financial implications to the consumers and the State. Hence the petition filed by KSEBL, for final approval of the four un-approved PSAs, was liable to be rejected.

On Issue No.3, ie whether provisional approval given by the Commission for drawing power from the un-approved PSAs amounts to deemed approval?, the KSERC observed that the Central Government had not approved the deviations made by KSEBL in the Standard Bidding Documents and guidelines issued by the MoP dated 09.11.2013, and the Commission had not yet issued final approval; and, in view of the legal and statutory provisions, the contention raised by KSEBL, regarding “deemed approval” was not legally sustainable and was liable to be rejected. The KSERC rejected the Petition in OP No. 05 of 2021 filed by KSEBL seeking issuance of final orders with respect to drawal of power from generators of the fo**ur** un-approved PSAs**.**

Considering the precarious power situation in the State, the State Government, in the exercise of the powers vested under Article 55 of the Articles of Association of KSEBL, and vide its letter dated 01.06.2023,

directed KSEBL to take urgent steps to file an appropriate petition before the KSERC praying for continuation of the interim arrangement for drawal of power. In compliance with the said directions, KSEBL filed OP No. 24

Of 2023 on 02.06.2023 seeking continuation of the interim arrangement (drawal of power from the 4 PSAs at the L1 rate of Bids), till KSEBL was able to make alternative arrangements for procurement of power, or till the decision in the application for interim relief filed by KSEBL before APTEL, whichever was earlier; or, in the alternative, to grant permission to KSEBL to procure / generate power from alternate sources, at the tariff available through such sources, for meeting the power deficit in the State of Kerala.

KSERC, vide its order dated 07.06.2023, (1) permitted KSEBL to make arrangements for power procurement by continuing the interim arrangement, of scheduling power from the four unapproved DBFOO, which was in force for a period of two weeks from 10.05.2023 as per the directions of the Supreme Court, for a further period of 75 days from the date of the Order, or till alternate arrangements of procuring 500MW RTC power on medium term basis, whichever was earlier; (2) payment for the power supply during the interim arrangement shall be as per the interim Orders of APTEL dated 21.10.2022, 16.12.2022, 10.02.2023 and 17.04.2023 ie to make payment at L1 rate of Bid-2 subject to the final disposal of the pending appeal petitions before APTEL. (3) the interim arrangement shall be subject to the final decision of APTEL in IA 1183/2023 filed by KSEBL in DFR No. 325/2023, against the Order of the KSERC in OP No. 05 of 2021 dated 10.05.2023.

M/s. JITPL and Jhabua Power Ltd filed Appeal Nos. 572 of 2023 and 583 of 2023 respectively before this Tribunal challenging the said order

dated 07.06.2023. There was zero scheduling of power from all the 4 PSAs till 20.06.2023. From 21.06.2023 onwards, Respondent Nos. 1 and 3 commenced supply / scheduling of power, Respondent No. 2 (JITPL) did not resume scheduling of power to KSEBL. However, Respondent No. 1 - Jhabua Power Ltd and Respondent No. 3 - Jindal Power Ltd continued with the scheduling of power only upto 20.07.2023, and thereafter discontinued scheduling of power to KSEBL.

On 24.07.2023, the Appeals filed by Respondent Nos. 1 and 2, against the order passed by the Commission dated 07.06.2023, were disposed of by this Tribunal recording the submission, made on behalf of the Commission, that the order dated 07.06.2023 could not be construed as compelling the generators to sell power to KSEBL at L1 rates, and it was for the respective generators to decide whether or not to supply power to KSEBL, in terms of the order dated 07.06.2023 passed by the Commission.

Pursuant to the order passed by KSERC, in OP No. 05 of 2021 dated 10.05.2023, the generators viz. M/s Jhabua Power Ltd. (215 MW) stopped supply of power from 01.06.2023 onwards, M/s JITPL (100 MW) from 03.06.2023 onwards and M/s Jindal Power Ltd. (150 MW) from 06.06.2023 onwards.

Appeal No. 518 of 2023 filed by KSEBL before this Tribunal, against the Order passed by KSERC in OP No. 05 of 2021 dated 10.05.2023, was disposed of by order dated 31.10.2023 granting them liberty to file a Review Petition before the KSERC. In terms of the liberty granted by this Tribunal, KSEBL filed the Petition, in RP No. 03 of 2023, seeking review of the Order passed by the KSERC in OP No.05 of 2021 dated 10.05.2023. On the KSERC passing an order, in RP No. 03 of 2023 dated 29.12.2023, the Respondent generators filed Appeal Nos. 38 and 47 of 2024 before this

Tribunal. By its judgement dated 26.07.2024, this Tribunal set aside the impugned order passed by the KSERC dated 29.12.2023 holding that it was not in accordance with law. Both the Appeals were allowed.

Aggrieved thereby, KSEBL filed Civil Appeal Nos. 10046-10047 of 2024, and the Supreme Court, by its order dated 30.09.2024, expressed its agreement with the judgment of this Tribunal dated 26.07.2024, in so far as it held that the direction issued by the State Government under Section 108 could not have displaced the adjudicatory function entrusted to the KSERC. The Supreme Court held that the State Government, while issuing a policy directive under Section 108, could not impinge on the adjudicatory discretion vested in an authority under the Electricity Act; the State Regulatory Commission was not bound by the directions of the State Government or the Central Government; the scope of review was limited and the power to review could not have been exercised on the subsequent directions issued by the State Government.

After having so held, the Supreme Court noted that in its earlier order dated 31.10.2023, while permitting Appeal No. 518 of 2023 to be withdrawn, this Tribunal had made it clear that the order passed did not disable the appellant, if need be later, from availing their appellate remedy against the original order passed by the KSERC on 10.05.2023. While making it clear that they did not find fault with the impugned order passed by APTEL in so far as it set aside the order passed by the KSERC, the Supreme Court observed that the appropriate course of action would be to allow for restoration of the original appeal filed against the order of KSERC dated 10.05.2023, and Appeal No. 518 of 2023 shall stand restored to the file of APTEL. The Supreme Court, however, clarified that issues which were covered by the impugned order of APTEL (i.e. the order passed in Appeal Nos. 38 and 47 of 2024 dated 26.07.2024) shall not be re-agitated; and

Appeal No. 518 of 2023 which has been restored to the file of APTEL shall be considered on any other ground that were raised before APTEL prior to withdrawal of the appeal.

Consequent on Appeal No. 518 of 2023 being restored to file, the enquiry therein would relate, mainly, to the validity of the order of the KSERC in OP No. 05 of 2021 dated 10.05.2023. It is necessary for us, therefore, to note the contents of the said order albeit in brief.

III. CONTENTS OF THE ORDER OF KSERC IN OP No. 05 of 2021 DATED 10.05.2023:

O.P. No. 05 of 2021 was filed on 12.11.2020 by KSEBL under Section 86(1) (b) and Section 63 of the Electricity Act, 2003, for adoption of tariff of the PSAs signed by them; seeking final orders with respect to drawal of 350 MW of power (Jindal Power Ltd-150MW, Jhabua Power Ltd.-100MW and Jindal India Thermal Power Ltd – 100MW) contracted by them through the second bid invited under DBFOO Guidelines-2013, during 2014 in the light of various orders issued by the KSERC (Order dated 30-8-2016 in OP No. 13 of 2015, Order dated 8-7-2019 in OA No. 15 of 2018, Order dated 14-2-2020 in OA No. 29 of 2019, Order dated 27-4- 2020 in OA No. 02 of 2020, Order dated.14-8-2020 in RP No. 02 of 2020 and RP No. 04 of 2020, and directions contained in the letter dated 22.12.2017). KSEBL had also filed IA No. 05 of 2023 dated 22.03.2023 amending the prayer seeking final orders for drawal of 115 MW of contracted power under Bid-1 from Jhabua Power Ltd in view of the orders on approval of ARR, ERC and tariff of KSEBL for the control period 2022-23 to 2026-27 in O.P. No.11 of 2022 dated 25.06.2022. KSERC allowed IA No.05 of 2023, filed by KSEBL on 24.03.2023 seeking approval for amending the relief portion of OP No. 05 of 2021, in view of the Order passed by it on 25.06.2022 in OP No.11 of 2022.

In the light of the directions issued to it, by the Supreme Court in Civil Appeal No. 41/2021 dated 10.02.2023, KSERC examined the following issues: (i) Whether the tariff has been determined as per the guidelines issued by the Central Government through competitive bidding in a fair and transparent and equitable process under Section 63 of the Electricity Act, 2003 or not?; and (ii) Whether any deviations were made in the bidding process from the guidelines dated 09.11.2013 and if so, whether the deviations are fair and transparent and to protect the public interest? What are the deviations andits long-term financial implications?; and (iii) Whether provisional approval given by the Commission for drawing power from the un approved PSAs amounts to deemed approval?

Issues (1) and (2), being interconnected and inter-related, were considered together by the KSERC. After taking note of Sections 63 and 86(1)(b) of the Electricity Act, 2003, Regulation 78 of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2014, the judgement of the Supreme Court in **Energy Watchdog and Ors. vs. Central Electricity Regulatory Commission and Ors.** and ***The TATA Power Company Limited Transmission vs. Maharashtra Electricity Regulatory Commission and Ors,*** the judement of this Tribunal in **Essar Power Limited vs. Uttar Pradesh Electricity Regulatory Commission and Ors,** the 2013 Govt of India Guidelines, more particularly clauses 2.1.1, 3.3, and 4 thereof, and to its earlier orders in O.P No.13 of 2015 dated 30.08.2016, the KSERC observed that, based on the estimated demand forecast and power shortage, KSEBL had decided to procure 850 MW of power for a period of 25 years through open tender, as per the DBFOO Guidelines issued by the Ministry of Power on 08-11- 2013, and notified by the Government of India on 9-11-2013, in two bids; the 1st tender was floated on 5.3.2014 and the 2nd tender was floated on 25.04.2014; the first

delivery of 450 MW was to commence in December, 2016 and the balance 400 MW in October, 2017; instead of inviting a single tender, KSEBL had decided to split the procurement tenders, and had floated two separate tenders within a span of 50 days**;** and the reason stated by them, for splitting of bids, was that DBFOO guidelines provided for only one delivery date, and two delivery dates were necessary.

The KSERC noted the following important deviations in the tendering process, the selection process, L1 matching, enhancement in fixed charges etc. from the bidding guidelines in the present power purchase under DBFOO Scheme:

(1) Deviation in tendering process:

There was no provision in the 2013 bidding guidelines for splitting up the bids; without prior approval of the Central Government; without obtaining prior permission from the Commission, KSEBL had decided to invite two bids for procurement of 850 MW; they had intimated this decision to the Commission only on 18.12.2014, after completion of the bidding process; it was also informed to the Commission that KSEBL shall file a formal petition for adoption of tariff under Section 63 of the Electricity Act, 2003 once they entered into a Power Supply Agreement; splitting up of tenders enabled the same bidders to participate, and to submit two separate bids quoting two different tariff rates in two tenders for power generated from the same plant to the procurer; thus, the generators could quote different tariff in the two tenders and to attain additional financial benefit which, ultimately, resulted in huge loss to KSEBL; if they had floated one tender, instead of splitting it into two, the bidders would have lost their chance to submit two separate bids quoting two different tariffs from the same plant; further, KSEBL would not have lost the chance to get 850 MW of power @ Rs. 3.60 per kWh for the entire period of 25 years; hence this significant deviation made by

KSEBL, to bypass the Bidding guidelines, created huge financial implications on the State and the general public.

(2) Deviations in selection process (Selection of lowest bidder):

As per Clause 3.3 of the Request for Proposal (RFP), which is the provision for selection of the bidder, the bidder, who quotes the lowest tariff offered to the Utility in conformity with the provisions of Clause 3.5, shall be the "Selected Bidder"; as per the guidelines, if two or more bidders quote the same tariff, the bidder is to be selected through drawal of lots; thus, only one bidder can be selected in this process; but KSEBL had selected the L2 bidder in addition to L1, and also five bidders in Bid-2, thereby violating the guidelines issued by the MoP; and had entered into PSAs without approval of the State Commission.

(3) Deviations in L1 matching: MM

As per Clause 3.3.3. of the RFP guidelines, L1 matching is provided only in the event the Lowest Bidder withdraws or is not selected. For this purpose, the Utility may invite all the remaining bidders to revalidate or extend their respective bid security as necessary, and match the Bid of the aforesaid Lowest Bidder. If, in the second round of bidding, only one Bidder matches the Lowest Bidder, it shall be the Selected Bidder. But KSEBL, in addition to selecting the L1 bidder in Bid-1, also selected the L2 bidder, and entered into Power Sale Agreement (PSA) with the L2 Bidder, that too without matching the L1 tariff. KSEBL also agreed to pay a higher tariff of Rs. 4.15 for kWh in Bid-1 which was higher than the L1 rate of Rs. 3.60/ kWh by Rs.0.55/unit. This irregular decision was taken by them stating that the L2 tariff of Bid-1 at Rs. 4.15/kWh was lower than L1 tariff of Bid-2 (Rs.4.29/kWh). The monetary loss sustained to the consumers, for the

purchase of 115 MW, was estimated at Rs 59.08 crores per annum, and Rs1477 crores for 25 years.

In Bid-2, KSEBL, instead of inviting all the remaining bidders to revalidate or extend their bid security as specified in paragraph 3.3.3 of the RFP document for fresh bids, selectively invited L2 to L4 bidders only. In Bid -2 also, after selecting the L1 bidder (Rs.4.29/kWh), KSEBL, instead of inviting all the bidders, selectively invited bidders L2 to L5 to match the L1 bid tariff. This was in violation of para 3.3.3 of the RFP.

(4) Changes made in purchase of bid quantity:

KSEBL invited two bids for the purchase of 450 MW and 400 MW respectively. Instead of contracting the bid quantity as mentioned in the bid, the petitioner contracted 315 MW in Bid-1 and 550 MW in the tendered quantity of Bid-2. The reason given by them for such deviation was that they could procure 315 MW only in Bid-1. KSEBL contracted for purchase of additional tendered quantity of 150 MW at a higher rate of Rs. 4.29 per kWh instead of exploring the possibility to get power @Rs.3.60 per kWh in Bid-1. This deviation also created additional liability of about Rs 77.06 crores per annum and Rs 1926.50 crores for 25 years on the consumers.

(5) Enhancement in fixed charges:

In Bid-1, M/s Jhabua Power Ltd, Gurgaon had quoted Rs.2.39/kWh as fixed charge and Rs. 1.76/kWh as variable charge, whereas in Bid- 2 M/s Jhabua Power Ltd increased the fixed charge from the quoted fixed charge of Rs.2.65/kWh to Rs.2.97/kWh during the L1 matching i.e., increased the fixed charge by Rs 0.32/unit in Bid-2. This deviation/irregular action created huge monetary loss to KSEBL and the consumers of the State, estimated at Rs 23.83 crores per annum and Rs.595.75 crores for 25 years. KSEBL or the generator could not satisfactorily explain the reason for such an increase

in the tariff during the L1 matching. Likewise, M/s Jindal Power Ltd, who was the L-1 bidder in Bid -1, had quoted the tariff @Rs.3.60/kWh comprising of fixed charge @ Rs.2.74/kWh and variable charge @ Rs.0.86 per unit. The same M/s Jindal Power Ltd had also offered to supply 150 MW @ Rs.4.29/kWh comprising fixed charge @ Rs.3.43/kWh and variable charge @ Rs.0.86/kWh. The Commission also noted that, in both the bids, M/s. Jindal Power Ltd had offered to supply power from the same plant, but had quoted different fixed charges i.e., Rs.2.74/kWh in bid-1 whereas fixed charges quoted in bid-2 was @Rs.3.43/unit. The Commission could not understand what was the reason for quoting higher fixed charge of Rs.3.43/kWh per unit in bid-2, ie. Rs. 0.69/kWh more than the quoted amount of Rs.2.74/kWh in Bid-1. The bidder offered to supply power from the same plant, same location and using the same machinery. If the bidder, M/s Jindal Power Ltd offered to supply power from bid-2 also at the same fixed charge of Rs.2.74/unit quoted in bid-1, KSEBL could have annual savings of Rs.77.10 crores, and savings for the entire period of 25 years would be Rs.1927.50 crores. KSEBL, being well aware of the fact that since the fuel charge is determined by the coal price determined by the Ministry of Coal and coal transportation cost through rail fixed by the Ministry of Railways and should be paid at these rates depending upon various factors, should not have permitted the “matched bidders” to enhance their fixed charge.

(6) Additional quantity of power procurement:

KSEBL proceeded to purchase additional quantity (865 MW) of power in excess of the tendered quantity (850). There is no provision in the 2013 MoP guidelines for the purchase of additional quantity of power in excess of the tendered quantity. This is also a deviation from the MoP guidelines. KSEBL had followed the procedures stipulated in the repealed RFP guidelines notified by the Ministry of Power, Govt. of India dated 22.07.2010

while selecting the bidders other than L1. In the bidding process, KSEBL has not invited all the remaining bidders other than L1 to revalidate or extend their respective bid security and to match their rate with that of L1.

As per Regulation 78 of the 2014 Tariff Regulations, prior approval of the commission is mandatory for entering into PPA with generators by the distribution licensee including KSEBL under Section 86(1)(b) of the Electricity Act, 2003. However prior approval of the Commission was not obtained before entering into PPA with generators in the DBFOO contract.

In response to the clarification sought by the Commission regarding the date of willingness sought by the petitioner from the L1 bidder in Bid- 1 for the supply of additional quantity of power, KSEBL had clarified that the date was 15.11.2014, Bid-1 was opened on 31.10.2014 and Bid-2 was opened on 14.11.2014. But, on 15.11.2014, the very next day of opening Bid-2, and after realizing the higher rates in Bid-2, KSEBL had asked the L1 Bidder (Jindal Power Ltd.) to convey its willingness to increase the quantum offered by it in Bid -1, on the same tariff. But the generator did not express their willingness to match with L1 tariff @ Rs.3.60/unit quoted by M/s Jindal Power Ltd who quoted L1 bid in Bid-1. If KSEBL had sought willingness to match L1 rate with other bidders in Bid- 1, prior to the opening of Bid-2, they could have secured sufficient power at L1 rate, and KSEBL lost their chance to secure procurement of power to the extent of 115 MW from the L2 Bidder in Bid-1, at the L1 rate of Bid- 1, by disclosing the bid amount in Bid-2 in advance. Public interest was violated when KSEBL selected the bidders other than L1 in bid-1 and bid- 2, deviating from the SBD guidelines. The deviation noted by the Commission alone would create an additional liability of Rs.237.07 crores per annum and Rs. 5926.75 crores for 25 years.

KSERC observed that the above-mentioned deviations were

significant and the process was not fair and transparent, which required prior approval of the Central Government. Under Section 63 of the Electricity Act, 2003, the Commission could adopt tariff, if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government. KSEBL had not submitted

any evidence to substantiate that the deviations noted by the Commission would come within the purview of the project specific modifications expressly permitted in the SBD. In this case, KSEBL had significantly deviated and blatantly violated the guidelines issued by the MoP, which required prior approval of the Central Government. Further, as per Section 86(1)(b) of the Electricity Act, 2003, the State Commission is competent to regulate electricity purchase and procurement process. In addition, KSEBL had executed the PSAs without obtaining approval of the Commission as stipulated in Regulation 78 of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 which came into force with effect from 14.11.2014. They had executed the PSAs during the period 26.12.2014 to 02.02.2015, blatantly violating the said Regulations issued by the Commission. The settled position was that the Commission can adopt the tariff under Section 63 of the Electricity Act, 2003, only if the tariff is adopted through a fair and transparent process of bidding in accordance with the guidelines notified by the Central Government. The deviations noted by the Commission from the bidding guidelines would clarify the lack of transparency which required prior approval of the Central Government.

Clause 1.1.4 of RFP was part of the bidding documents, which conferred discretion on the bidders to bid up to 25 percent of the capacity. But the Utility could accept only those bids which matched the lowest Bid. As per this clause, the Utility had the discretion to accept only those bids which

matched the L1 bid. Here the word “accept” meant to receive the bids and not selection of the bidder. Evaluation of bids and selection of Bidder etc. were clearly specified in Clause 3.1 and Clause 3.3 of the RFP. The whole process seemed to lack transparency and objectivity, and failed at the touch stone of public interest.

The Ministry of Power, vide its letter dated 18.11.2016, had clarified that, ***“the deviations as pointed out by the KSERC would have been got vetted and approved by Central Government, before the issuance of RFQ, RFP and PSA and not at this stage****. As per the Guidelines, deviations on the provisions of the bidding documents are approved, if necessary and not the actions taken by the utility as per practice or precedent. In view of the above Government ofKerala/ KSEB Ltd may take action as appropriate in consultation with KSERC****.***” The Central Government, vide letter dated 11th December 2019, reiterated the same position and clarified that “*the views of Ministry of Power as communicated earlier vide letter dated 18.11.2016 are reiterated.* ***The deviations as pointed out by KSERC would have been got vetted and approved by the Central Government before issuance of RFQ, RFP and PSA and not at this stage****. Government of Kerala/ KSEB Ltd may take actions as appropriate in consultation with KSERC****.”***

The above-mentioned replies would show that the Central Government had rejected the request for approval of the deviations in the DBFOO guidelines made by KSEBL. The State Government had neither approved the deviations pointed out by the Commission nor accorded final approval for purchase of the unapproved DBFOO contracts. As per Clause 4 of the Resolution dated 9.11.2013, issued by the Central Government under Section 63, ***any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government****.*

Hence the Central Government alone was competent to approve the deviations from the SBD guidelines. Further, the law laid by the Supreme Court in ***Bajaj Hindustan Ltd. vs. State of U.P. and Ors. (14.03.2016 - SC) : MANU/SC/0476/2016*** *would clarify that* if the words used were "with the prior approval" for getting validity of any such action taken ….prior approval shall be obtained and subsequent ratification is not possible.

In view of the above observations, the Commission came to the conclusion that, in this case, the tariff determined by KSEBL in these unapproved PSAs was not in a fair, transparent and equitable process and they had grossly deviated from the guidelines issued by the MoP, Government of India under Section 63 of the Electricity Act, 2003. Further, the deviations made by KSEBL were against public interest and created long term financial implications to the consumers, and the State. Hence the petition filed by KSEBL, for final approval of the four un-approved PSAs, were liable to be rejected.

On Issue No.3, KSERC noted the submission that it had approved to draw contracted power from these four generators and had been allowing to pass through portion of the cost of power, and through this action it had granted deemed approval for the PSAs and all the pre-requisites for conclusion of a binding contract as per the Indian Contract Act,1872 are satisfied. The KSERC thereafter observed that it had, vide Order dated 22-12-2016, provisionally approved purchase of 115 MW of power from M/s Jabhua Power Ltd, L2 bidder of Bid 1, in view of the facts, circumstances and urgency explained by KSEBL vide their letter dated 15.11.2016, and in view of the decision of the Government of Kerala in GO dated 31.11.2016; in the said Order, the Commission had specifically mentioned that the approval was provisional only and had stated “that the Commission hereby approves provisionally the purchase of 115 MW of power by KSEB Ltd. from

M/s. Jhabua Power Limited @ Rs.4.15/kWh as per the power purchase agreement dated 31.12.2014, subject to the clearance from the Government of India and subject to the final decision of the Hon'ble High Court in WP (C) 33100/2014" and final approval was subject to the clearance from Government of India; further the Commission, vide its letter dated 22.12.2017, had allowed KSEBL to draw power provisionally from three un-approved PSAs of the generators namely, M/s Jindal India Thermal Power Ltd, M/s Jhabua Power Ltd and M/s Jindal Power Ltd, clarifying that the Commission may approve the power purchase proposal including the rate for the pending approvals only after the Government of Kerala accords final approval for the entire power purchase under DBFOO.

In response to the request of KSEBL, sought vide Letters dated 20.07.2019 and 02.08.2019 to grant approval for the unapproved PSAs, the Commission, vide letter dated 26.08.2019, had clarified that it could not consider the request of KSEBL to grant approval for the PSAs entered into with L2, L3 and L4 in Bid-2 under DBFOO.

While approving the ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22, the Commission had emphasized that this consideration was only for the purposes of estimating the cost of power provisionally in the ARR, and shall not be construed as an approval of the power purchase rate or of the PPA itself as per Section 63 of the Act which can be considered only after fulfilment of the conditions specified by the Commission in its order dated 30-8-2016; similarly, while approving the ARR & ERC and tariff for the MYT period 2018-19 to 2021-22, the Commission had reiterated that, during the truing up of accounts for the respective financial years, excess amount, if any, incurred for procuring power from these three generators shall not be considered, unless KSEBL gets approval of power purchase from the Government of India for the deviations from the guidelines, and on getting

the approval of the Government of Kerala on the entire power purchase under DBFOO; hence the arguments raised by KSEBL, regarding deemed approval, were not acceptable; the concept of deemed approval was explained by the Supreme Court in various decisions. *(**Sushila Mafatlal Shah MANU/SC/0482/1988: (1988) 4 SCC 490. Ankit Ashok Jalan vs. Union of India (UOI) and Ors. (04.03.2020 - SC): MANU/SC/0276/2020.**);* the settled position was that the principle "deemed approval" was applicable only if there was a specific provision in the Act/Rules or Regulations; KSEBL had not pointed out any provision either in the Electricity Act, 2003, Rules or Regulations framed thereunder by the Commission to substantiate their contentions to that effect.

As clarified above, the Central Government had not approved the deviations made by KSEBL in the Standard Bidding Documents and guidelines issued by the MoP dated 09.11.2013, and the Commission has not yet issued final approval. In view of the legal and statutory provisions, the contention raised by KSEBL regarding "deemed approval" was not legally sustainable and was liable to be rejected. Issue No.3 was answered accordingly

The KSERC rejected the Petition in OP No.5/2021 filed by KSEBL seeking issuance of final orders with respect to drawal of power from generators of the following un-approved PSAs: (1) 115 MW of power from Jhabua Power Ltd (L-2 of Bid-1). (2) 150 MW of power from Jindal Power Ltd (Bid-2). (3) 100 MW of power from Jindal India Thermal Power Ltd (Bid-2). (4) 100 MW of power from Jhabua Power Ltd (Bid-2).

IV. WRITTEN SUBMISSIONS FILED BY THE APPELLANT DURING THE HEARING BEFORE KSERC:

In Para 19 of the Written Submissions filed in the present appeal, it is submitted on behalf of the Appellant, that, during the proceedings before the State Commission in OP No. 5 of 2021, specific queries were raised by the State Commission in regard to the alleged deviations from the bidding guidelines, and the same were replied to by KSEBL, including by way of Columnar Statement at **Pages 633 to 651**; KSEBL Is not making submissions on the basis of the said document, except to place of record that submissions were made before the State Commission on the aspect of deviations, based on the above; thus, the observation in Para 30 of the Impugned Order that KSEBL had not submitted any factual evidence or raised any conclusive arguments during the hearing is entirely erroneous.

Again in Para 23 of the Written Submissions filed in the present appeal, it is submitted on behalf of the Appellant, that the process of inviting other bidders to match the L1 bid for the balance quantum of power which was not covered under L1 bid is ipso facto in public interest to avoid another Bidding process to be adopted afresh; it is also clear from the subsequent amendment in the Standard Bidding guidelines of allowing bucket filling to clarify the position **[Page 605];** and if such stipulation has been made in the subsequent amendment, the process adopted by KSEBL cannot be termed as arbitrary, non-transparent, unfair, etc.

As we were under the impression that, though no submissions were made during the hearing of the present appeal, with respect to the written submissions filed before the KSERC, yet the written submissions filed in the present appeal makes a reference thereto, we sought clarifications from Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, whether we were expected to deal with those Written submissions though no contentions were put forth on these aspects during the hearing of the present appeal.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would fairly state that reference was made by the Appellant to the written submissions filed by them during the course of hearing of OP No. 5 of 2021, during the course of hearing of the present appeal, only to contend that elaborate submissions were made before the State Commission on the aspect of deviations; and the observations in Para 30 of the Impugned Order that the Appellant had not submitted any factual evidence or raised any conclusive arguments during the hearing was wholly unjustified; and it would suffice for this Tribunal to consider the written submissions filed by them in the appeal. It is un-necessary for us, therefore, to refer to the contents of the written submissions filed before the KSERC, during the course of hearing of OP No. 5 of 2021. We shall confine our examination in this appeal only to the submissions urged, by Learned Senior Counsel and Learned Counsel on either side, in the present appeal.

V. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were made by Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant and Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators. It is convenient to examine the rival submissions, urged by Learned Senior Counsel and Learned Counsel on either side, under different heads.

Before examining the validity of impugned order on its merits, and in considering whether the KSERC was justified in refusing to grant approval for the 3 PSAs executed by the Appellant with Respondents 2 and 3, it is necessary for us to first consider both the preliminary objections, the first

raised on behalf of Respondent Nos. 2 and 3, and the other put forth on behalf of the Appellant.

VI. SUBSEQUENT AGREEMENTS ENTERED INTO BY RESPONDENT NOS. 2 TO 4: ITS EFFECT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that it is not open to Respondents 2 to 4 to raise issues of their having entered into agreements for sale of their capacity to others as a ground at this stage or in support of the Impugned Order; undisputedly, the Appellant requires the power for distribution and supply to the consumers of the State of Kerala; and, therefore, approval of the PSAs is in public interest.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would submit that, in relation to the power contracted by the 2nd Respondent, electricity from their plant is already tied up with other sources, and there is severe uncertainty as to how the huge recoveries along with carrying cost for the power already supplied by the Respondents to the Appellant, for the last 7 seven years, have to be made; any reversal at this stage will lead to an absurd position namely that the finding of this Tribunal in its judgment dated 26.07.2024, to the effect that the Respondents are free to contract and sell electricity to third parties stands upheld by the Supreme Court, but the Respondents have to violate those agreements and supply

electricity to the Appellant under unapproved PPAs at a rate found neither fair nor transparent.

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would further submit that the present appeal has been restored for a limited hearing by the judgment of the Supreme Court in CA No. 10046 and 10047 of 2024 dated 30.09.2024; in the said judgement, the Supreme Court specifically approved the earlier judgment of this Tribunal in Appeal No. 38 of 2024 dated 26.07.2024, but restored the original Appeal No. 518 of 2023 to the file of this Tribunal; the Supreme Court also clarified that the issues, which were covered by the judgment of this Tribunal in Appeal No. 38 of 2024 dated 26.07.2024, shall not be re-agitated; and any submission by the Appellant, finding fault with the subsequent PPAs entered into by the Respondent-Generators or requiring them to supply electricity to it, would not therefore merit acceptance.

C. ANALYSIS:

It is not in dispute that the agreements, which Respondent Nos. 2 and 3 have executed with third parties, is subsequent to the order of this Tribunal dated 31.10.2023 whereby the Appellant was permitted to withdraw Appeal No. 518 of 2023. In its order in Appeal No. 518 of 2023 dated 31.10.2023, this Tribunal had noted the submissions urged on behalf of the Appellant that, subsequent to the order passed by the KSERC which was impugned in Appeal No. 518 of 2023, the Government of Kerala had issued directives under Section 108 of the Electricity Act; in the light of said directives, the Appellant intended to move a petition before the KSERC seeking review of the impugned order; and as the review jurisdiction of the KSERC could not be invoked after the appellate remedy was availed, they be granted

permission to withdraw the appeal with liberty file a review petition before the KSERC; and, if need be later, to again approach this Tribunal against the original order passed by the KSERC.

The said order, of this Tribunal dated 31.10.2023, also records the consent of the counsel for the KSERC for such an order to be passed, and the objections put forth on behalf of Respondent Nos. 2 to 4 that grant of liberty should not be construed as obligating KSERC to entertain the review petition on merits. It was also requested that the Respondent be permitted to put forth all such contentions as were available to them in law including on the maintainability of the review petition. It is, thereafter, that this Tribunal permitted Appeal No. 518 of 2023 to be withdrawn with liberty to the Appellant to invoke the review jurisdiction of the Commission. This Tribunal made it clear that the said order would not disable the Appellant, if need be later, of availing their appellate remedy against the original order passed by the Commission dated 10.05.2023.

It is after Appeal No. 518 of 2023 was dismissed as withdrawn, and before the KSERC passed the order in the review petition, that Respondent Nos. 2 and 3 had entered into arrangement with third parties. As noted hereinabove against the order passed by the KSERC allowing the review petition, Respondent Nos. 2 and 3 had preferred Appeals and this Tribunal had, by its judgment dated 26.07.2024, allowed the said appeals and had set aside the review order passed by the KSERC.

Aggrieved by the judgment of this Tribunal dated 26.07.2024, the Appellant herein filed Civil Appeal Nos. 10046 and 10047 of 2024 and, by its judgment dated 30.09.2024, the Supreme Court, while expressing their agreement with the impugned judgment passed by this Tribunal, noted the contents of the earlier order passed by this Tribunal in Appeal No. 518 of

2023 dated 31.10.2023, and held that, while they did not find fault with the order of this Tribunal, in so far as it set aside the review order passed by the KSERC, the appropriate course of action would be to allow for restoration of the original appeal filed against the order of the KSERC dated 10.05.2023.

It was, therefore, held that Appeal No. 518 of 2023 shall stand restored to the file of this Tribunal. The Supreme Court clarified that the issues, which were covered by the order of this Tribunal dated 26.07.2024, shall not be re-agitated, and the appeal which had been restored to the file of APTEL shall be considered on any other grounds that were raised before APTEL prior to withdrawal of the appeal.

As noted hereinabove, Appeal No. 518 of 2023 was preferred by the Appellant herein against the order of the KSERC in OP No. 05 of 2021 dated 10.05.2023, whereby the petition filed by the Appellant, seeking final orders to procure power from the generators for the unapproved PSAs, was rejected. In other words, by the said order, KSERC refused to grant approval both to the PSAs executed by the Appellant with Respondent Nos. 2 and 3, and for the Appellant to procure power in terms of the said PSAs.

In case Appeal No. 518 of 2023 were to be allowed, and the subject PSAs approved, Respondent Nos. 2 and 3 would be obliged to comply with the terms and conditions of the said PSAs, and the mere fact that they had entered into third party arrangements later would be of little consequence. Restoration by the Supreme Court of Appeal No. 518 of 2023 to the file of this Tribunal would mean that Appeal No. 518 of 2023 was pending when Respondent Nos. 2 and 3 had executed agreements with third parties. As despite pendency of Appeal No. 518 of 2023, the order impugned therein, ie the order of the KSERC in OP No. 05 of 2021 dated 10.05.2023, continued to remain in force, Respondents 2 and 3 were free to enter into

arrangements with third parties, subject, however, to the result of Appeal No. 518 of 2023. The mere fact that they have entered into third party arrangements later, does not mean that Appeal No. 518 of 2023 should not be adjudicated on its merits.

In case Appeal No. 518 of 2023 were to be allowed, and the impugned order passed by the KSERC in OP No. 05 of 2021 dated 10.05.2023 were to be set aside, Respondents 2 and 3 would be required, in compliance with the order passed by this Tribunal in Appeal No. 518 of 2023, to supply electricity to the Appellant in terms of the PSAs executed by them, and the fact that they have entered into third party arrangements later, would not absolve them of their obligation to do so. This objection, raised on behalf of the Respondent Nos. 2 and 3, therefore, necessitates rejection.

VII. RESPONDENT NOS. 2 TO 4 HITHERTO SUPPORTED THE APPELLANT'S PETITION FOR APPROVAL OF PPA: ITS EFFECT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, on 09.11.2020, KSEBL filed O.P. 05 of 2021 before the KSERC, under Section 86(1)(b) of the Electricity Act, seeking approval for such procurement of power; in the proceedings before the KSERC, Respondents 2,3 and 4 supported the above approval sought by KSEBL; during the pendency of proceedings, KSERC permitted the Appellant to procure, and they did procure, the above capacity from Respondents 2,3 and 4; such procurement continued, though there were some issues on the tariff terms and conditions payable in view of certain orders of the KSERC; and, by Order dated 25.06.2022, the KSERC, for the

first time, did not approve procurement of power of 465 MW (i.e. the 4 PSAs mentioned in para 2 above), on the ground that it had not yet approved the PSAs.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would further submit that it is a matter of record that, until the Impugned Order was passed, Respondent Nos. 2, 3 and 4 had contended that the State Commission ought to grant approval to the PSAs; it was never the case of any of the said Respondents that the State Commission ought not to grant the approval sought by the appellant on any ground, including on the ground that a substantial period had elapsed after the signing of the PSAs; till Appeal No. 518 of 2023 was filed by the Appellant before this Tribunal on 25.05.2023, no plea was raised by Respondent Nos. 2 to 4 supporting the Impugned Order of the KSERC; in fact, Respondent Nos. 2 to 4 had also filed appeals before this Tribunal against the earlier order dated 25.06.2022 whereby the State Commission, for the first time, had observed that the 4 PSAs of 465 MW could not be approved; in their Appeals, Respondent Nos. 2 to 4 had contended, before this Tribunal, that the PSAs deserved to be approved; further, the Appeals of Respondent Nos. 3 (Appeal No. 253 of 2023) and 4 (Appeal No. 359 of 2023) are pending even as on date before this Tribunal, wherein the prayer is for approval of their respective PSAs; in addition, as on the date of the filing of the present Appeal, no third party interest in the contracted capacity was claimed to have been created by Respondent Nos. 2 to 4; and the entire issue has been sub-judice before this Tribunal.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would submit that the Appellant has relied heavily on the pleadings filed by the Respondent Generators till the passing of the Order dated 10.05.2023; the Appellant is also not entitled to rely on any submissions made by the Respondent Generators while the proceedings in OP No. 05 of 2021 was ongoing before the State Commission, since much water has flown under the bridge; and, in any event, the Respondent Generators are entitled to support the Impugned Order under Order 41 Rule 22 of the Code of Civil Procedure, 1908 before this Tribunal.

C. ANALYSIS:

The other preliminary objections which necessitate consideration is that put forth on behalf of the Appellant that, since Respondent Nos. 2 to 4 had supported the Appellant's petition in OP No. 05 of 2021, seeking grant of approval of the PSAs, it is impermissible for them to raise any objections to the submissions urged on behalf of the Appellant in Appeal No. 518 of 2023, or in support of the impugned order passed by the KSERC in OP No. 05 of 2021 dated 10.05.2023.

The question which this Tribunal is required to consider, in the present appeal, is whether the KSERC was justified in refusing to grant approval to the PSAs executed by the Appellant with Respondent Nos. 2 and 3 on the ground that the tests stipulated in Section 63 of the Electricity Act have not been fulfilled in the present case. What this Tribunal is required to consider is whether such a conclusion reached by the KSERC accords with law or not. The validity of the impugned order passed by the KSERC, in OP No. 05 of 2021 dated 10.05.2023, necessitates examination on its merits, and the stand taken by Respondent Nos. 2 and 3, both before and after Appeal No.

518 of 2023 was filed before this Tribunal, is of no consequence and is of little relevance.

While Order 41 Rule 22 of the Code of Civil Procedure, 1908 may not apply, the mere fact that Respondent Nos. 2 to 4 had supported the Appellant's petition in OP No. 05 of 2021 before the KSERC would not, by itself, necessitate the impugned order dated 10.05.2023 being set aside, for this Tribunal is required to consider whether KSERC was justified in refusing to grant approval to the subject PSAs, and in holding that the Appellant was disentitled from procuring power in terms of the unapproved PSAs from Respondent Nos. 2 and 3, for non-fulfilment of the tests stipulated by Section 63 of the Electricity Act. This objection, raised on behalf of the Appellant, necessitate rejection.

Let us now examine the rival submissions, put forth by Learned Senior Counsel and Learned Counsel on either side, on the merits of the impugned order.

VIII. DEVIATIONS FROM THE CENTRAL GOVERNMENT GUIDELINES:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the KSERC, in the Impugned Order dated 10.05.2023, has erroneously rejected grant of approval to the PSAs primarily on the ground of deviation from the 2013 Central Govt guidelines and the Standard Bidding Documents in the tendering process; the findings recorded by the KSERC is that there have been deviations in the tendering process, selection process, L1 matching, enhancement in fixed charges, etc;

the above deviations are not in public interest; under clause 1.1.4 of the RfP, the Appellant has no power to accept the bids of the bidders other than L1 bid by asking them to match L1 Bid; such a process adopted by the Appellant lacks transparency and objectivity, and is not in public interest; the process adopted by the Appellant was not fair, transparent and equitable, and provisional procurement did not give any right to the Appellant to seek approval.

Sri M.G. Ramachandran, Learned Senior Counsel, would submit that the KSERC failed to consider that the procedure followed by the Appellant was not expressly prohibited by the Central Govt guidelines; in the absence of any material deviations, the Appellant was not required to seek prior approval from the Central Government; and, in the absence of any such explicit prohibition, it was open to the Appellant to adopt a fair, transparent and reasonable process of bidding to ensure that the bid quantum, in both the bids put together, is procured at the best possible price to protect the interests of the consumers of the State.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would submit that the contentions of the Appellant, if accepted, would do violence to the plain words used in Section 63 of the Electricity Act, 2003; the requirements of Section 63 are that the bidding process must be transparent and "*in accordance with the guidelines issued by the Central Government*"; in its arguments, the appellant has accepted that the RfP/RfQ and other bid documents prepared by it were not in accordance with the Standard Bidding Documents issued by the Government of India; when the

bid was prepared, the Central Government had issued guidelines dated 09.11.2013; Para 4 thereof requires prior approval of the Central Govt for deviation from the Guidelines; since these bids were floated in September and October 2014, the Appellant ought to have taken approval, for any deviation, from the Central Government; this would also apply in case there was a lack of clarity in the Bidding Guidelines as to how a situation needs to be dealt with; it is not open to the appellant to contend that, since there were no material deviations, it was not required to take any approval from the Central Government; as a matter of fact, as the KSERC did not grant approval to the process adopted by the appellant, it approached the Central Government seeking post facto approval of the deviations; however, the same was not granted, since bidding was already done; and the applicable Guidelines only gave power of approving the deviation to the Central Government, obviously because the best judge of whether the deviation ought to be permitted would be the Central Government itself.

C. ANALYSIS:

The subject bidding process, initiated by the Appellant, was under Section 63 of the Electricity Act which relates to determination of tariff by a bidding process, and stipulates that, notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government.

The Ministry of Power, Government of India, by its resolution dated 09.11.2013 notified the Design, Build, Finance, Own and Operate ("DBFOO") guidelines which were published in the Gazette of India dated 09.11.2013. The said notification records that the Central Government is engaged in creating an enabling policy and regulatory environment for the

orderly growth of generation of electricity in accordance with the provisions of the Electricity Act, 2003; it is incumbent upon the Central Government, State Governments, Electricity Regulatory Commissions and the distribution licensees to promote competition in the procurement of electricity through competitive and transparent processes; the Central Government has, after extensive consultations with various stakeholders and experts, evolved a model contractual framework for procurement of electricity by the distribution licensees from power producers who agree to construct and operate thermal power generating stations on a 'Design, Build, Finance, Own and Operate (DBFOO) basis; the Central Government, vide letter dated 08.11.2013, issued the model documents comprising the Model Request for Qualification (the 'MRFQ"), the Model Request for Proposals (the "MRFP") and the Model Power Supply Agreement (the "MPSA") (collectively, the "Standard Bidding Documents") to be adopted by distribution licensees for procurement of electricity from the aforesaid power producers through a process of open and transparent competitive bidding based on offer of the lowest tariff from thermal power generating stations constructed and operated on DBFOO basis; in exercise of the powers conferred under Section 63 of the Electricity Act, 2003, the Central Government was notifying these guidelines to be known as the 'Guidelines for Procurement of Electricity from Thermal Power Stations set up on DBFOO Basis' (the "Guidelines"); and these Guidelines shall come into effect from the date hereof subject to the following terms and conditions. As these guidelines were notified in the Gazette of India on 09.11.2013, the said guidelines came into effect from that date.

Clause 3 of the said guidelines stipulated that the tariff determined through the bidding process, based on these guidelines comprising the Standard Bidding Documents, shall be adopted by the Appropriate Commission in pursuance of the provisions of Section 63 of the Electricity

Act. Clause 4 stipulates that any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government. Under the proviso to Clause 4, any project specific modifications, expressly permitted in the Standard Bidding Documents, shall not be construed as deviations from the Standard Bidding Documents.

It is evident, from a plain reading of Clause 4 of the Central Govt Guidelines dated 09.11.2013, that no deviations from the Standing Bidding Documents is permissible except with the prior approval of the Central Government. In other words, it is only after obtaining approval of the Central Government was it impermissible for the Appellant to deviate from the Standard Bidding Documents, and not to seek approval after such deviations had occurred.

As noted hereinabove, the Central Govt Guidelines dated 09.11.2013 stipulates that the Model RFQ, the Model RFP and the Model PSA shall collectively be called the Standard Bidding Documents. Consequently, any deviation from the conditions stipulated in the Model RFQ, the Model RFP and the Model PSA would require prior approval of the Central Government. The proviso to Clause 4 also makes it clear that, if the modifications sought to be made are not those expressly permitted in the Standard Bidding Documents, they must be construed as deviations from the Standard Bidding Documents. In other words what has not been expressly permitted in terms of the Model RFQ, the Model RFP and the Model PSA must be held to be a deviation from the Standard Bidding Guidelines, and as falling foul of the 2013 Guidelines issued by the Government of India.

It is only when the tariff adoption petition, originally filed by the Appellant in OP No. 13 of 2015, was pending, that the Central Government amended the Guidelines on 05.05.2015. Para 3 (i) of the amended

Guidelines stipulated that any deviation from the Standard Bidding Documents shall be made by the Distribution Licensees with prior approval of the Appropriate Commission instead of the Central Government.

Bearing these provisions in mind, let us now examine the deviations which the KSERC has held, in the impugned order, to be in violation of the 2013 Guidelines issued by the Central Government.

In its order, in OP 5 of 2021 dated 10.05.2023, KSERC, after relying on the judgments of the Supreme Court in **Energy Watchdog** and **Tata Power Company Limited,** the judgment of this Tribunal in **ESSAR Power Limited,** the 2013 Government of India guidelines, and to its earlier order in OP 13 of 2015 dated 30.08.2016, noted that the appellant had decided to procure 850 MW of power in two bids, the first for 450 MW and the second for 400 MW; the bidding process and the selection of the bidders was in violation of the Government of India guidelines; and the deviations, in the bidding process from the Central Govt guidelines, as classified under different heads, were (i) deviation in the tendering process; (ii) deviation in the selection process ie selection of the lowest bidder; (iii) deviation in L 1 matching; (iv) deviation for changes made in purchase of bid quantity; (v) enhancement in fixed charges; and (vi) additional quantity of power procurement.

The deviations found by KSERC, under the first head ie deviation in the tendering process, was that there was no provision in the bidding guidelines for splitting up of the bids without prior approval of the Central Government, and without permission from the Commission, despite which the Appellant had invited two separate bids; it was only after completion of the bid process that the Appellant had informed the Commission, and had filed a petition for adoption of tariff; and some of the bidders had quoted two

different tariffs, in the two separate bids, for supply of power from the same plant.

Under the second head, ie deviation from the selection process, KSERC noted that the bidding guidelines required that, if more bidders quoted the same tariff, the bidder was to be selected through drawl of lots, and thus one bidder could be selected in this process, despite which the Appellant had selected L 2 bidder in addition to L 1 in Bid 1, and 5 bidders in Bid 2, violating the said guidelines; and the Appellant had also altered the PSAs without approval of the Commission.

Under the third head, ie deviation in L 1 matching, KSERC noted that the bidding guidelines required bidders to match the lowest bidder; however, the Appellant-KSEBL, in addition to selecting L 1 bidder in Bid 1, had also selected L 2 bidder even though L 2 did not match the tariff of L 1; further, KSEBL had agreed to take their tariff of Rs. 4.15 per kWh which was higher by Rs. 0.55 per kWh than L 1's rate of Rs. 3.60 per kWh; this had resulted in a monetary loss to KSEBL of Rs.1477 Crores over 25 years; and, similarly in Bid-2, KSEBL, instead of replying to all the remaining bidders, had selectively invited L 2 to L 4 to match L 1 bid which was in violation of para 3.3 of the RfP.

Under the fourth head, ie changes in purchase of bid quantity, KSERC noted that, while the bids invited was for purchase of 450 MW and 400 MW respectively in Bids 1 and 2, KSEBL had contracted for 315 MW in Bid 1 and 550 MW in Bid 2; 150 MW was contracted to be purchased at a higher rate of Rs. 4.29 per kWh as against the lowest bid of Rs. 3.60 per kWh which resulted in additional liability of Rs. 1926.50 Crores on the consumers over 25 years.

With respect to the fifth head, regarding enhancement in fixed charges,

KSERC noted that Jhabua Power Limited had quoted Rs. 2.39 per kWh as fixed charges in Bid 1 whereas, in Bid 2, Jhabua Power Limited had increased the fixed charges from the quoted Rs. 2.65 per kWh to Rs. 2.97 per kWh during L1 matching, resulting in increase in fixed charges by Paise 32 per kWh in Bid 2; this resulted in consumers suffering a monetary loss of Rs. 595.75 Crores for 25 years; likewise, M/s. Jindal Power Limited, which had quoted a fixed charge of Rs. 2.74 per kWh and variable charge of Rs. 0.6 per kWh as L 1 in Bid 1, had offered to supply 150 MW at Rs. 4.29 per kWh comprising of fixed charges of Rs. 3.43 per kWh and variable charges of Rs. 0.86 per kWh; both the bids of M/s Jindal Power Limited was for supply of power from the same plant at different fixed charges; no reasons were forthcoming as to why Jindal Power Limited, which had quoted a fixed charge of Rs. 2.74 per kWh in Bid 1, should be quoting a higher fixed charge of Rs. 3.43 per kWh in Bid 2, though power was to be supplied from the same plant, the same location and using the same machinery; and this had resulted in KSEBL suffering additional expenditure of Rs. 1927.50 Crores.

With regards the sixth head, ie additional quantity of power procurement, KSERC opined that KSEBL had proceeded to purchase 865 MW power which was in excess of the tendered quantity of 850 MW, though the 2013 guidelines did not provide for purchase of additional quantity in excess of the tendered quantity.

While noting that the aforesaid deviations were significant, and the process was not fair and transparent, KSERC observed that it could adopt the tariff, under Section 63 of the Electricity Act, only if such tariff had been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government; KSEBL had significantly deviated from, and had violated, the guidelines issued by the Ministry of Power which required prior approval of the Central Government; KSEBL had

executed the PSAs without obtaining approval of the Commission as stipulated in Regulation 78 of the 2014 Regulations; the deviations noted in the order showed lack of transparency which required prior approval of the Central Government; the letters of the Ministry of Power dated 18.11.2016 and 11.12.2019 showed that the Central Government had rejected the request for approval of the deviations made by KSEBL; clause 4 of the guidelines expressly stipulated that any deviation from the standard bidding documents shall be made only with the prior approval of the Central Government; and what was stipulated was *"prior approval"* and not subsequent ratification.

KSERC concluded by holding that the tariff determined by KSEBL, with respect to these unapproved PSAs, was not in a fair, transparent and equitable process, and they had grossly deviated from the guidelines issued by the Government of India under Section 63 of the Electricity Act; such deviations were against public interest and created long term financial implications on the consumers and the State, and hence the petition for approval of the unapproved PSAs was liable to be rejected. The petition filed by KSEBL in OP. No. 5 of 2021, seeking approval of the four unapproved PSAs for procurement of power, was rejected.

Section 63 of the Electricity Act obligates the Appropriate Commission to adopt only such tariff as has been determined through a transparent process of bidding and in accordance with the guidelines issued by the Central Government. Section 63 begins with a non obstante clause, but it is a non obstante clause covering only Section 62. Unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not "determine" tariff but only "adopts" the tariff, already determined, under Section 63. Such "adoption" is only if such tariff has been determined through a transparent process of bidding, and this transparent process of bidding must be in

accordance with the guidelines issued by the Central Government. The appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. **(Energy Watchdog v. CERC, (2017) 14 SCC 80; Jaipur Vidyut Vitran Nigam Ltd. v. MB Power (M.P.) Ltd., (2024) 8 SCC 513).**

In **Tata Power Co. Ltd. Transmission v. Maharashtra Erc, (2023) 11 SCC 1),** the Supreme Court summarized the observations in **Energy Watchdog v. CERC, (2017) 14 SCC 80,** as under: (i) the appropriate Commission while "adopting" the tariff determined through bidding is not a mere "post office"; (ii) the Commission is mandated by Section 63 to adopt the tariff determined through bidding only if the bidding process was transparent, and such a process has been held in accordance with the guidelines issued by the Central Government under Section 63. If the bidding process does not satisfy the two checks, then the Commission shall not adopt the tariff so determined. (iii) the appropriate Commission is not mandated to adopt the tariff determined through the bidding process irrespective of the fulfilment of the statutory requirements. The Commission can reject the tariff determined through the bid if the tariff process is not : (*i*) transparent; and (*ii*) in accordance with the guidelines issued by the Central Government. Thus, if the Commission does not adopt the tariff determined through bidding, and if the decision is challenged, the bidding process can be reviewed substantively (on the ground of transparency) and procedurally (on the ground of compliance with the Central Government guidelines) to determine if the Commission could have rejected

Section 63 of the Electricity Act has five significant features: (*i*) Section 63 begins with a non obstante clause. The non obstante provision overrides

Section 62 alone and not all the provisions of the Act; (*ii*) as opposed to Section 62 where the Commission is granted the power to *determine* the tariff, under the Section 63 route, the bidding process *determines* the tariff; (*iii*) the Commission is mandated to *adopt* such tariff that is determined by the bidding process; (*iv*) the Commission has the discretion to not adopt the tariff determined through the bidding process only if the twin conditions as mentioned in the provision are not fulfilled; and (*v*) the twin conditions are that (*a*) the bidding process must have been transparent; (*b*) the bidding process must have complied with the guidelines issued by the Central Government. **(Tata Power Co. Ltd. Transmission v. Maharashtra Erc, (2023) 11 SCC 1)**

Section 63 indicates that the provision would be invoked *after* the tariff has been determined by the bidding process. The non obstante clause in Section 63 must be read in the context of Sections 61 and 62. Section 62 bestows the Commission with wide discretion to determine tariff. Section 63 seeks to curtail this discretion where a bidding process for tariff determination has already been conducted. Section 63 contemplates that, in such situations where the tariff has been determined through the bidding process, the Commission cannot, by falling back on the discretion provided under Section 62, negate the tariff determined through bidding. This interpretation of Section 63 is fortified by the use of the phrase “such” in Section 63 — the Commission is bound to “adopt” “such” tariff determined through bidding. **(Tata Power Co. Ltd. Transmission v. Maharashtra Erc, (2023) 11 SCC 1)**

The appropriate Commission has the jurisdiction to look into whether the tariff determined through the process of bidding accords with the Central Govt Guidelines. **(Energy Watchdog v. CERC, (2017) 14 SCC 80).** The regulatory powers of the State Commission, so far as tariff is concerned, are

specifically mentioned in Section 86(1). When the Commission adopts tariff under Section 63, it does not function dehors its general regulatory power under Section 86(1)(*b*). Such regulation takes place under the Central Government's guidelines. **(Energy Watchdog v. CERC, (2017) 14 SCC 80; Jaipur Vidyut Vitran Nigam Ltd. v. MB Power (M.P.) Ltd., (2024) 8 SCC 513).**

The TBCB Guidelines issued by the Central Government under Section 63 of the Act prescribe the mechanism of the bidding process. **(Tata Power Co. Ltd. Transmission v. Maharashtra Erc, (2023) 11 SCC 1).** In a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 86(1)(*b*), only in accordance with those guidelines. **(Energy Watchdog v. CERC, (2017) 14 SCC 80).**

As noted hereinabove, the first deviation, which the KSERC has highlighted, relates to splitting up of the bid, for procurement of 850 MW of power, into two separate bids. Instead of inviting one composite bid for 850 MW, the Appellant invited two separate bids, the first for 450 MW and the second for 400 MW of power. While the first bid was invited on 05.03.2014, the second bid was invited on 25.04.2014. Financial bids, received for Bid-1, was opened on 31.10.2014 and the Financial Bids, for Bid-2, were opened on 14.11.2014. The last date for submission of Bid-II was after the Financial Bids for Bid-1 were opened on 31.10.2014. This resulted in the bidders being aware, when they submitted their bids for Bid-2, of the Financial Bids quoted by the bidders for Bid-1. Details of the bids received, through Bid-1 and Bid-2 as detailed in Tables-1 and 2 recorded in the impugned order, are as under:

Table-1

Details of bids received through Bid-1opened on 31.10.2014

	Name of Bidder	Quantum, MW	Quoted Tariff, Rs.			ation of Power Station	Rank
		Offered	Fixed charge	Variable charge	Tariff		
1	Jindal Power Limited, New Delhi.	200	2.74	0.86	3.60	Chhattisgarh	L1
2	Jhabua Power Limited, Gurgaon.	115	2.39	1.76	4.15	Seoni, MP	L2
3	Bharat Aluminium Co. Ltd., Chhattisgarh.	115	3.25	1.04	4.29	Chhattisgarh	L3
4	Jindal India Thermal Power Limited, New Delhi.	200	3.64	0.75	4.39	Angul, Odisha	L4
5	R.K.M. Powergen Pvt. Ltd., Chennai.	150	3.24	1.96	5.20	Chhattisgarh	L5
6	Adani Power Ltd., Gujarat.	300	3.85	1.69	5.54	Kutch, Gujarat	L6
7	Lanco Power Ltd., Gurgaon.	450	3.43	2.19	5.62	Lanco Vidarbha Thermal Power Ltd	L7
8	Vandana Vidyut Ltd., Raipur.	114	4.70	1.48	6.18	Chhattisgarh	L8
9	Thermal Powertech Corporation India Ltd., Hyderabad.	120	4.93	2.07	7.00	Nellore, Andhra Pradesh	L9
10	India bulls Power Limited, Gurgaon.	450	5.15	2.14	7.29	Nashik Thermal Power Station	L10

Table-2

Details of bids received through Bid-2 opened on 14.11.2014

Sl.No	Name of Bidder	Quantum Offered MW	Quoted Tariff (Rs.Ps)			Rank
			Fixed charge	Fuel Charge	Tariff	
1	Bharat Aluminium Co Ltd, Chhattisgarh 495684	100	3.25	1.04	4.29	L1
2	Jindal India Thermal Power Limited, New Delhi 110066.	100	3.62	0.75	4.37	L2
3	Jhabua Power Limited, Gurgaon-122001	100	2.65	1.76	4.41	L3
4	Jindal Power Limited, New Delhi	150	3.57	0.86	4.43	L4
5	East Coast Energy Private Limited, Andhra Pradesh	100	2.95	1.5	4.45	L5
6	Monnet Power Company Limited, New Delhi	100	3.61	0.88	4.49	L6
7	SKS Power Generation (Chhattisgarh)Ltd.	122	3.96	0.87	4.83	L7
8	Lanco Power Limited, Gurgaon,122016	400	3.67	1.52	5.19	L8
9	Adani Power Limited; Gujarat 380009	300	3.95	1.69	5.64	L9

10	*MB Power (Madhya Pradesh) Limited; New Delhi 110020*	*374.15*	*3.50*	*2.43*	*5.93*	*L10*
11	*NCC Power Projects Limited, Andhra Pradesh 500082.*	*100*	*3.88*	*2.07*	*5.95*	*L11*

It is clear from the aforesaid tables that Jindal Power Limited, New Delhi, which had quoted a tariff of Rs.3.60 per unit in Bid-1, quoted Rs.4.43 per unit for Bid-2. Even more curious is that, though Jindal Power Limited had quoted its tariff to supply power, from the very same generating station for both the bids, it had quoted a fixed charge of Rs.2.74 per unit in Bid-1, and Rs.3.57 per unit in Bid-2. Jabhua Power Limited, which had quoted Rs.4.15 per unit in Bid-1, quoted Rs.4.41 per unit for Bid-2.

Prior approval of the Government of India was not sought by the Appellant for splitting up of the total procurement of 850 MW into two separate bids, the first for 450 MW and the second for 400 MW. Further, the Appellant had communicated its decision to invite two bids, to the KSERC only on 18.12.2014, after completion of the entire bid process and after having entered into PSAs with the identified bidders. In the impugned order, the KSERC had held that, if one composite bid had been invited, the Appellant could have procured 850 MW of power at Rs.3.60 per unit i.e. L1 price in Bid-1 instead of accepting bids for significantly higher amounts.

The second deviation, pointed out by the KSERC in the impugned order, is with respect to violation of Clause 3.3 of the Request for Proposal. As noted hereinabove, the Standard Bidding Documents which formed part of the 2013 Government of India Guidelines included the model Request for Proposal (ie “MRfP), the model RfQ and the model PSA). Clause 3.3.3 of the RfP, issued by the Appellant with respect to both the bids, stipulated that, in the event the lowest bidder withdrew or was not selected for any reason in the first instance (the “first round of bidding”), the Utility may invite all the

remaining bidders to revalidate or extend their respective Bid Security, as necessary, and match the Bid of the aforesaid Lowest Bidder (the “second round of bidding”). If, in the second round of bidding, only one Bidder matched the Lowest Bidder, it shall be the Selected Bidder. If two or more Bidders matched the said Lowest Bidder in the second round of bidding, then the Bidder whose Bid was lower, as compared to other Bidder(s) in the first round of bidding, shall be the Selected Bidder. For example, if the third and fifth lower Bidders, in the first round of bidding, offered to match the said Lowest Bidder in the second round of bidding, the said third lowest Bidder shall be the Selected Bidder.

Clause 3.3.4 of the Rfp stipulated that, in the event no Bidder offered to match the Lowest Bidder in the second round of bidding as specified in Clause 3.3.3, the Utility may, in its discretion, invite fresh Bids (the “third round of bidding”) from all Bidders except the Lowest Bidder of the first round of bidding, or annul the Bidding Process, as the case may be. In case the Bidders were invited in the third round of bidding to revalidate or extend their Bid Security, as necessary, and offer fresh Bids, they shall be eligible for submission of fresh Bids provided, however, that in such third round of bidding only such Bids shall be eligible for consideration which are lower than the Bid of the second lowest Bidder in the first round of bidding.

A conjoint reading of the afore-said two clauses of the Rfp (ie Clauses 3.3.3 and 3.3.4) make it amply clear that they relate to a situation where the lowest bidder withdraws or is not selected. Such a situation did not arise in the present case, since not only was the bid of L1 in both the bids accepted, but the KSERC also accorded its approval to the PSAs which the Appellant had executed with the lowest bidders in both the bids.

We find considerable force in the submission urged on behalf of the Appellant that, as against the bid quantity stated in the RfP of 450 MW of power for Bid-1, and 400 MW of power for Bid-2, Clause 1.1.4 of the RfP enabled the applicants to bid for the capacity specified in Clause 1.1.1, or a part thereof, not being less than 25% of such capacity. In other words, as long as the bidders had submitted their bids for a quantity of more than 112.5 MW of power for Bid-1, and 100 MW of power for Bid-2, their bids would be required, in accordance with the RfP, to be treated as a valid bid. The natural corollary thereto would be that the bid documents itself envisaged the possibility of one bidder not submitting a bid for the entire capacity as detailed in the bid. Consequently, Clause 3.3.3 of the RfP could not have envisaged only a situation where the lowest bidder withdraws or is not selected.

Even if Clause 3.3.3 of the RfP were held to apply in cases where the lowest bidder does not withdraw and is selected, the requirement of the said Clause is for the other bidders to match the bid of the lowest bidder.

With respect to Bid-1, the Appellant executed a PSA with Jabhua Power Limited at the rate quoted by them of Rs.4.15 per unit, and not at the tariff quoted by the lowest bidder (Jindal Power Limited) of Rs.3.60 per unit. The justification put-forth by the Appellant, for this deviation, is that this rate quoted by them at Rs.4.15 per unit was more than the tariff quoted by the lowest bidder (BALCO) in Bid-2 of Rs.4.29 per unit. Table 3 in the impugned order gives details of the tariff matched by L2 to L5 in Bid-2 with that of L1 in Bid-2, and reads as under:

Table-3

Details of tariff matched by L2 to L5 in the Bid-2 with that of L1

Rank	*Name of Bidder*	*Quantum Offered MW*	*Quoted Tariff (Rs. Ps/ kwh*			*Matched tariff (Rs. Ps)/ kwh*		
			Fixed charge	*Fuel Charge*	*Tariff*	*Fixed charge*	*Fuel Charge*	*Tariff*

L1	*BALCO Ltd, Chhattisgarh*	*100*	*3.25*	*1.04*	*4.29*			
L2	*Jindal India Thermal Power limited, New Delhi 110066.*	*100*	*3.62*	*0.75*	*4.37*	*3.54*	*0.75*	*4.29*
L3	*Jhabua Power Limited, Gurgaon-122001*	*100*	*2.65*	*1.76*	*4.41*	*2.97*	*1.32*	*4.29*
L4	*Jindal Power Limited, New Delhi*	*150*	*3.57*	*0.86*	*4.43*	*3.43*	*0.86*	*4.29*
L5	*East Coast Energy Private Limited, Andhra Pradesh*	*100*	*2.95*	*1.5*	*4.45*	*3.14*	*1.15*	*4.29*
	Total	***550***						*4.29*

It is relevant to note that BALCO Ltd, which was L1 in Bid-2 and L3 in Bid-1, had submitted its bid in Bid-1 to supply 115 MW of power at Rs.4.29 per unit, and to supply 100 MW of power in Bid-2 again at Rs.4.29 per unit. Though BALCO had quoted the same tariff both in Bid-1 and Bid-2, curiously, no PSA was executed with BALCO with respect to the bid submitted by them in Bid-1 for 115 MW of power, and it is only their bid for 100 MW in Bid-2 which was accepted. L2 to L5 in Bid 2 were permitted to match the tariff quoted by BALCO in Bid-2 without offering them 115 MW of power in Bid-1, though BALCO had quoted the same rate of Rs. 4.29 per unit in both the bids.

As contentions, with respect to BALCO's bid have been raised separately, we shall examine these aspects in greater detail when we consider the rival contentions under the said head. Clause 3.3.3 of the RfP required the Appellant to invite all the remaining bidders to match the bid of the lowest bidder. None of the bidders in Bid-1 matched the bid of Rs.3.60 per unit quoted by Jindal Power Limited which was L-1 in Bid-1. It is only L2 to L5 in Bid-2 who were called upon to match the bid of L1 therein, and L6 to L11 were not even invited to match the said bid. This is again a deviation, from the 2013 Central Govt guidelines, which the KSERC has highlighted in the impugned order.

The third deviation, referred to in the impugned order of the KSERC, is with respect to L1 matching. What has been faulted by the KSERC is acceptance by the Appellant of the bid of Jabhua Power Limited in Bid-1 at Rs.4.15 per unit which tariff was far more than the lowest bid of Jindal power Limited at Rs.3.60 per unit. While the bid of Jabhua Power Limited at Rs.4.15 per unit in Bid-1 may have been less than the lowest bid of BALCO as L-1 in Bid-2 at a tariff of Rs. 4.29 per unit, the very object of inviting two separate bids was lost on the bids in Bid-1 being extra-polated to the bids in Bid-2 for, in such an event, a composite bid ought to have been invited by the Appellant for procurement of the entire quantity of 850 MW.

Even more curious is that, while Jabhua Power Limited had quoted a tariff of Rs.4.15 per unit in Bid-1, they had quoted a tariff of Rs.4.41 per unit in Bid-2, and were permitted to match the L1 Bid in Bid-2 of Rs.4.29 per unit which was far more than the bid quoted by Jabhua Power Limited in Bid-1 of Rs.4.15 per unit.

Yet another deviation, highlighted by KSERC in the impugned order, is with respect to the changes made in the bid quantity. Clause 1.1.1 of the RfP required the Appellant to furnish brief particulars of the project relating to the capacity required in Mega Watts, and the period from when the supply must commence. For Bid-1 the capacity required in Mega Watts was shown as 450 MW in the RfP, and for Bid-2 the capacity required in Mega Watts was shows as 400 MW. Curiously, the Appellant only procured 315 MW as against the capacity required in Bid-1 of 450 MW, thereby procuring 135 MW less in Bid-1. As against the capacity required for Bid-2 of 400 MW of power, the Appellant procured an additional quantity of 150 MW i.e. it procured 550 MW in Bid-2. In effect, not only was the shortfall in the quantity of 135 MW of power in Bid-1 transferred by the Appellant to Bid-2, they had procured an additional 15 MW of power in Bid-2. As against the capacity required for

Bid-2 of 400 MW, the Appellant had procured 550 MW in Bid-2, and as against 450 MW of power in Bid-1, they had procured a quantity of 315 MW of power. Over-all the Appellant had procured 865 MW of power in both the bids put together, as against the total capacity required of 850 MW of power (i.e. 450 MW in Bid-1 and 400 MW in Bid-2).

The 5th deviation, pointed out by the KSERC in the impugned order, is the enhancement in fixed charges claimed by M/s Jabhua Power Limited which had quoted Rs.2.39 as fixed charges for Bid-1 but had quoted Rs.2.65 as fixed charges in Bid-2. However, during the negotiation/matching process, Jabhua Power Limited had increased the fixed charges quoted by them in Bid-2 of Rs.2.65 per unit to Rs.2.97 per unit, ie an increase of 32 paise per unit as fixed charges. Likewise, M/s Jindal Power Limited which had quoted Rs.2.74 per unit as fixed charges in Bid-1, had quoted Rs.3.43 per unit as fixed charges while matching L1 bid in Bid-2, though power was being supplied, with respect to both the bids, from the very same generating station. The difference in fixed charges between the price matched by Jindal Power Limited in Bid-2 of Rs.3.43 per unit vis-à-vis the fixed charges quoted by them in Bid-1 of Rs.2.74 per unit is of 69 paise per unit (i.e Rs.3.43 minus Rs.2.74). The KSERC had expressed its disquiet, in the impugned order, at the bidder offering to supply power from the same plant, from the same location, and using the same machinery, but claiming two different fixed charges in the two bids invited by the Appellant.

The 6th deviation, pointed out by KSERC in the impugned order, relates to the additional quantity of power procurement which, as noted hereinabove, was a total of 865 MW of power procured as against the total quantum required to be procured in terms of the RfP, of both the bids put together, of 850 MW.

Besides the afore-mentioned deviations, the KSERC has also referred, in the impugned order, to the Appellant's non-compliance with Regulation 78 of the 2014 Tariff Regulation which shall be examined later in this order. None of the above mentioned significant and substantial deviations had the prior approval of the Government of India, though they were in flagrant violation of standard bidding document which formed part of the 2013 Guidelines issued by the Central Government.

IX. BUCKET FILLING METHOD:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, since the aggregate capacity from L1 bidders under the two bids was only for 300 MW, and there remained 550 MW to be finalized; this could only be done by the bucket filling method under the respective two bids from L2, L3, L4, L5, L6 and so on bidders, till the entire capacity was exhausted; bidders L2 to L4 under Bid I, and L2 to L6 under Bid II, were invited to match the tariff of L1 Bidder in the respective bids for the balance quantum of power, and PSAs were signed with such bidders who matched the tariff of L1 Bidder, including a capacity of 135 MW that was shifted from Bid I to Bid II, and a small excess quantum of 15 MW was added in Bid II to get the full quantum from the Bidders; the total capacity under the two Bids became 865 MW, and the PSAs were signed with the said Bidders; admittedly, the capacity covered by L 1 bidders was only 300 MW, and the balance 550 MW was remaining; bucket filling is the natural course available to select L2, L3, L4 bidders, etc. till the envisaged quantum of 850 MW is reached; the State Commission has completely misconstrued the scope of clause 1.1.4 of the RfP which speaks about matching the lowest

bid; and the State Commission was wrong in holding that approval of the PSAs, based on matching, is not in public interest.

Sri M.G. Ramachandran, Learned Senior Counsel, would further submit that the Model Request for Proposal ('RfP') and PSA were issued by the Central Government, besides the guidelines; the RfP provides for the following: (i) the usual provision that the utility reserves the right to reject all or any of the bidders or bids without assigning any reason whatsoever; (ii) in Clause 1.1.1- the capacity required in MW terms and the period when the supply must commence is given; (iii) at Clause 1.1.2- execution of the PSA has been referred to; (iv) at Clause 1.1.3- the scope of the Work is given; (v) in Clause 1.1.4- the capacity envisaged at 1.1.1 or a part thereof (not less than 25% of such capacity) can be given; (vi) inherent in the above, is the concept of bucket filling; for example, as in Bid II, the L1 bidder bid only for 100 MW; the appellant was not required to abandon the tendering process with 100 MW; the selection could go on till L2, L3, L4, etc for achieving 400 MW; thus, bucket filling is envisaged, and is not expressly prohibited; the Appellant was, therefore, right in adopting bucket filling; clause 1.2.7 provided that generally L1 bidder should be selected; this also is in furtherance of the right of the appellant not to select the L1 bidder if there are reasons; Clause 3.3.1 onwards of Clause 3.3 deals with a situation where L1 bid does not fructify for any reason, and the process to be adopted; and it does not, in any manner, invalidate the concept of bucket filling.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONEDENT GENERATORS:

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would submit that the primary argument of the Appellant, in the

present appeal, is that the bidding inherently provided for bucket filling, and that Clause 1.1.4 of the RfP specifically provides for bucket filling; on a plain reading, the said clause does not deal with bucket filling; while the first line gives an option to bidders to apply for part capacity, provided the minimum would be 25% of the capacity specified in Clause 1.1.1, the proviso applies to the Appellant and gives them discretion to accept only those bids which match the lowest bid; no other clause in the RfP either directly or indirectly deals with bucket filling; in any event, the Appellant did not fill the bucket in Bid 1 since it accepted bids only up to 315 MW; to the contrary, in Bid 2, the Appellant widened the bucket and procured 550 MW capacity, which is beyond the tendered quantity of 400 MW; and neither had the Appellant followed the filling the bucket principle nor any other consistent principle while awarding either of the Bids.

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel, would further submit that, in ***Jaipur Vidyut Vitran Nigam v MB Power & Ors (2024) 8 SCC 513***, the Supreme Court considered a case where the generators argued that there was a mandate on the distribution licensee to keep on filling the bucket to ensure that the total capacity bid out gets completed; this argument was rejected by the Supreme Court holding that: (a) in **Energy Watchdog v CERC, (2017) 14 SCC 80**, it had already held that the State Commission was not a mere post office under Section 63, but was bound by the guidelines and must exercise its regulatory functions albeit under Section 79(1)(b) only in accordance with those guidelines; (b) Section 86(1)(b) gives ample power to the State Commissions to regulate matters relating to the procurement process of distribution licensees including the price of procurement; (c) the Bidding Guidelines notified by the Central Government on 19.01.2005 are to facilitate transparency and fairness in the procurement process and protecting

consumer interests; (d) clause 5.1.5 of the Bidding Guidelines empowered the Commission to reject any price bids if found not aligned to market forces; (e) even if a bidding process is found transparent generally, and in accordance with the Guidelines, there is no mandate to accept all bids that have emerged in the process; (f) the State Commission has full power to go into the question of the prices quoted being aligned to market prices; (g) the State Commission is also not bound to accept the bids quoted by the Bidders till the bucket gets filled; there is no such provision either in Section 63 or in Section 86(1)(b) or in the Bidding Guidelines; the present case is much worse, since the KSERC has found the bid to be neither transparent nor in accordance with the Bidding Guidelines; and, even if the above two criteria are met, the Supreme Court has preserved the regulatory jurisdiction of the State Commission to decide whether to accept or reject the power procurement through competitive bidding.

C. ANALYSIS:

What the bucket filling system entails can be better understood from the facts noted in, and the observations of the Supreme Court in, ***Jaipur Vidyut Vitran Nigam Ltd. v. MB Power (M.P.) Ltd., (2024) 8 SCC 513*****.** As noted in the said judgement, in various meetings, the Bid Evaluation Committee had placed the bids received in ascending order, from lowest to the highest tariff as follows:

Rank	*Qualified Bidder Name*	*Levelised tariff (Rs/kWh)*	*Capacity Offered*	*Cumulative Capacity Offered*	*Average Cumulative Tariff (Rs/kWh)*
L-1	PTC — Maruti Clean Coal and Power Ltd.	4.517	195	195	4.517
L-2	PTC — DB Power Ltd.	4.811	311	506	4.698
L-3	LPL — Lanco Babandh Power Ltd.	4.943	100	606	4.738
L-4	PTC — Athena Chhattisgarh Power Ltd.	5.143	200	806	4.839

L-5	SKS Power Generation (Chhattisgarh) Ltd.	5.300	100	906	4.890
L-6	LPL — Lanco Vidarbha Thermal Power Ltd.	5.490	100	1006	4.949
L-7	PTC — MB Power (Madhya Pradesh) Ltd.	5.517	200	1206	5.043
L-8	KSK Mahanadi Power Company Ltd.	5.572	475	1681	5.193
L-9	Jindal Power Ltd.	6.038	300	1981	5.321
L-10	LPL — Lanco Amarkantak Power Ltd.	7.110	100	2081	5.407

The Board of Directors of RVPN had directed that LoI be issued in favour of L-1, L-2 and L-3 bidders as under, subject to the approval of the State Commission while adopting the tariff.

"*Sl. No.*	*Bidder*	*Quoted tariff (Rs/kWh)*	*Capacity offered in bid (MW)*	*Additional capacity offered (MW)*
1.	M/s PTC India Ltd. (through developer M/s Maruti Clean Coal and Power Ltd.)	4.517	195	55
2.	M/s PTC India Ltd. (through their developer M/s DB Power Ltd.)	4.811	311	99
3.	M/s Lanco Power Ltd. (Generation Source — M/s Lanco Babandh Power Ltd.)	4.892	100	250
	Total		*606*	*404*
G. Total (A+B)			*1010 MW*"	

In consonance with the LoI, PPAs were signed with L-1, L-2 and L-3 bidders. Thereafter, RVPN filed a Petition before the State Commission under Section 63 of the Electricity Act read with Clause 5.16 of the 2005 Bidding Guidelines for adoption of tariff for purchase of long-term base load power of 1000 MW (±10%) as quoted by the successful bidders (being L-1, L-2 and L-3) under Case I bidding process. The Energy Assessment Committee ("EAC" for short), constituted by the Government of Rajasthan, recommended that there was no requirement for long term procurement of

1000 MW (±10%) power under Case I for which PPAs had been executed and tariff adoption petition had been filed before the State Commission. The Government of Rajasthan approved the purchase of a quantum of 500 MW power on long term basis as against the quantum of 1000 MW for which PPAs had already been executed.

On the basis of the decision/recommendation of the EAC and the direction issued by the Government of Rajasthan, RVPN filed an application to bring on record the EAC decision/recommendation and the Government of Rajasthan approval. In the said application, inter alia, it was prayed for adoption of tariff and approval of the reduced quantum of 500 MW of power to be purchased as against the original 1000 MW of power for which PPAs had already been executed with the successful bidders.

The State Commission held that the quantum of only 500 MW power was liable to be approved considering the demand in the State as recommended by the EAC. The State Commission also approved the tariff quoted by L-1 to L-3 bidders. Aggrieved by the reduction of quantum by the State Commission, L-2 and L-3 bidders preferred appeals before this Tribunal which allowed the Appeals filed by L-3 and L-2 bidders, holding that the reduction of quantum by the State Commission from 1000 MW to 500 MW was incorrect. The State Commission was directed to pass consequential orders for approving the PPAs for L-2 and L-3 bidders for the higher quantum which was negotiated.

Before the Supreme Court, it was contended on behalf of the Appellant that the theory of “filling the bucket”, as put forth by Respondent 1 MB Power, had no basis either in the RFP or in the Bidding Guidelines; the said theory is a dangerous proposition inasmuch as it is expected that the procurer would be obliged to accept the bids of lower ranked financial bids,

irrespective of the exorbitant tariff quoted by them; in a bid to procure 1000 MW, 2 bidders can be put forward as stalking horses who would bid lower tariffs and are ranked as L-1 and L-2; thereafter, L-3 onwards can quote exorbitant tariffs which are not aligned to market prices; this specious theory of “filling the bucket”, which would oblige the procurer to go to the last bidder, irrespective of their tariffs being completely exorbitant, is very dangerous; and, in any case, Clause 3.5.12 of the RFP enables the procurer to reject any bid where the quoted tariff is not aligned to market prices.

On the other hand, it was contended on behalf of the Respondent-Generators that the State of Rajasthan needed 1000 MW of power when it invited the bids in question; the DISCOMs had admitted that they were still in need of power; even in the larger public interest and consumer interest, the appellants should procure the power from Respondent 1 MB Power; and as the RFP provides for bucket filling, the appellants were required to procure power going down the ladder from the bidders starting from L-1 to the one till procurement of 906 MW of power is complete.

The Rajasthan High Court, in the impugned judgment, came to the conclusion that, applying the test of “filling the bucket”, the procurers were bound to take supply from Respondent 1 MB Power at the rates quoted by it; and Respondent 1 MB Power had a right to supply power since there was a gap of 300 MW between the power procured by the procurers and the ceiling of 906 MW. The Rajasthan High Court issued a mandamus directing the appellants to take supply of 200 MW electricity/power from Respondent 1 MB Power at the rates quoted by it. In appeal, the Supreme Court held that the State Commission was not bound to accept the bids as quoted by the bidders till the bucket was filled; and no such direction can be issued.

In the present case, the Appellant has neither followed the bucket filling method nor is the bucket filling method permissible under the 2013 Guidelines issued by the Central Government. What was under consideration before the Supreme Court, in the aforesaid judgment, were the 2005 bidding guidelines issued by the Government of India, and not the 2013 guidelines to which the present bidding process relates to.

Adopting the bucket filling method would have required the Appellant to procure 200 MW of power from L1 in Bid-1 at Rs. 3.60 per unit, 115 MW from L2 in Bid-1 at Rs. 4.15 per unit, 115 MW from L3 in Bid-1 at Rs. 4.29 per unit, and 20 MW from L4 at Rs. 4.39 per unit ie at the rates quoted by them in Bid-1. Likewise for Bid-2, the Appellant, if it had followed the bucket filling method, ought to have procured 100 MW of power from L1 at Rs.4.29 per unit, 100 MW from L2 at Rs. 4.37 per unit, 100 MW from L-3 at Rs.4.41 per unit, and 100 MW of power from L4 at Rs.4.43 per unit ie at the rates quoted by them in Bid-2. The very fact that the Appellant had chosen not to procure any power in Bid-1 from L3, though the bid offered by L3 in Bid-1 of Rs. 4.29 per unit was the bid they had offered as L1 in Bid-2, also goes to show that the Appellant did not follow the “bucket filling system”.

L2 to L4 in Bid-2 were permitted to match the L1 bid in Bid-2 of Rs. 4.29 per unit, though they were permitted to change the fixed charges and variable charges within this tariff. The procurement of power from L2 in Bid-1 of Rs.4.15 per unit did not even match that of L1 in Bid-1 of Rs.3.60 per unit. The Appellant has, evidently, not followed the bucket filling system. In any event, the 2013 Central Government Guidelines do not permit the bucket filling system to be adopted. On the other hand, it required the bids submitted by the other bidders to match the lowest bid of L1 which has also not been adhered to in the present case.

In this context, it is useful to note that the proviso to Clause 1.1.4 of the RfP enables the Appellant, in its sole discretion, to accept only those bids which matched the lowest bid. The discretion conferred on the Appellant, by the aforesaid proviso, was only to accept such bids, submitted by the other bidders, if they matched the lowest bids. No discretion was conferred on the Appellant, in terms of the said Clause, to procure power at a tariff higher than that quoted by the lowest bidder. On the other bidders refusing to match the lowest bid of L-1 in Bid-1, the Appellant had no choice, in view of the Rfp, but to cancel the bids and invite fresh bids by commencing the bid process all over again.

Clause 1.2.7 of the RfP makes it clear that, while the Lowest Bidder shall generally be the Selected Bidder, the remaining Bidders shall be kept in reserve and may, in accordance with the process specified in Clause 3 of the RFP, be invited to match the Bid submitted by the Lowest Bidder. It also makes it clear that, in the event that none of the other Bidders match the Bid of the Lowest Bidder, the Appellant may, in its discretion, either invite fresh Bids from the remaining Bidders or annul the Bidding Process. This Clause also places fetters on the discretion conferred on the Appellant, and disables them from accepting bids from the remaining bidders at a tariff higher than what the lowest bidder had quoted. The only alternative for the Appellant, in such a situation, was to annul the entire bidding process, and go in for a fresh bidding process under Section 63 of the Electricity Act.

The afore-said clauses in the RfP makes it abundantly clear that the bidding process, undertaken by the Appellant, was not in terms of the “bucket filling system”; it was in deviation of the standard bidding guidelines issued by the Central Government in November 2013; and, consequently, it was in violation of Section 63 of the Electricity Act.

X. REGULATION 78 OF THE KSERC 2014 REGULATIONS:

A. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would submit that, as an alternative, the Appellant could have, at the very least, followed Regulation 78 of the KSERC (Terms and Conditions for Determination of Tariff Regulations), 2014 which came into force on 14.11.2014; these Regulations require approval of the KSERC to be obtained for every agreement for procurement of power; and obligates the Commission to examine an application for approval of power purchase agreement/arrangement having regard, among others factors, to adherence to a transparent process of bidding in accordance with the guidelines issued by the Central Government under Section 63 of the Act.

B. REGULATION 78: ITS CONTENTS:

Regulation 78 of the KSERC (Terms and Conditions for Determination of Tariff Regulations), 2014, which came into force on 14.11.2014, related to approval of power purchase agreement/arrangement. Regulation 78(1) stipulated that every agreement or arrangement for procurement of power by the distribution business/licensee, from the generating business/company or licensee or from other source of supply entered into after the date of coming into effect of these Regulations, shall come into effect only with the approval of the Commission. Under the first proviso thereto, the approval of the Commission shall be required in accordance with this regulation in respect of any agreement or arrangement for power procurement by the distribution business/licensee from the generating business/company or licensee or from any other source of supply on a standby basis. Under the

second proviso, the approval of the Commission shall also be required in accordance with this regulation for any change to an existing agreement or arrangement for power procurement, whether or not such existing agreement or arrangement was approved by the Commission.

Regulation 78(2) provided that the Commission shall examine an application for approval of power purchase agreement/arrangement having regard to the approved power procurement plan of the distribution business/licensee and the following factors:- (a) requirement of power under the approved power procurement plan; (b) adherence to a transparent process of bidding in accordance with guidelines issued by the Central Government under Section 63 of the Act; (c) adherence to the terms and conditions for determination of tariff specified under chapter VI of these Regulations where the process specified in clause (b) above has not been adopted; (d) availability (or expected availability) of capacity in the intra-State transmission system for evacuation and supply of power procured under the agreement/arrangement; and (e) need to promote co-generation and generation of electricity from renewable sources of energy.

Regulation 78(3) stipulated that, where the terms and conditions specified under chapter VI of these Regulations are proposed to be adopted, the approval of the power purchase agreement/arrangement between the generating business/company and the distribution business/licensee for supply of electricity from a new generating station may comprise of the following two steps, at the discretion of the applicant:- (a) approval of a provisional tariff, on the basis of an application made to the Commission at any time prior to the application made under clause (b) below; and (b) approval of the final tariff, on the basis of an application made not later than three months from the cut-off date.

C. ANALYSIS:

Regulation 78 relates to approval of Power Purchase Agreement, and makes it clear that any agreement or arrangement, for procurement of power by the Appellant from generators, would be valid only with the approval of the KSERC. Regulation 78(2)(b) requires the Commission to examine an application for approval of the Power Purchase Agreement, among other factors, as to whether the Appellant had adhered to a transparent process of bidding in accordance with the guidelines issued by the Central Government under Section 63 of the Electricity Act. It is evident therefore, as has been pointed by the KSERC in the impugned order, that the Appellant has also not fulfilled the requirement of Regulation 78 of the 2014 Tariff Regulations of the KSERC as it has not adhered to a transparent process of bidding in accordance with the guidelines issued by the Central Government under Section 63 of the Electricity Act.

XI. FAILURE TO SELECT BALCO UNDER BID I:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that BALCO had quoted Rs. 4.29 per unit both in Bid I and Bid II; when the negotiation was in the quoted tariff to L1 level, BALCO emerged as L1 bidder in Bid II; BALCO accepted the same quantum of 100 MW under Bid II; there was no complaint from BALCO that they should also be selected under the bucket filling in Bid I; in so far as the Appellant is concerned, it got, under Bid II, L2 to L5 Bidders to reduce the bid to Rs. 4.29; irrespective of the entity which is supplying, the appellant achieved its purpose of getting the required quantum at Rs. 4.29; and, unless there is arbitrariness or unfairness or lack of transparency in the process as

per the legal principles laid down, the State Commission ought not to have interfered with the same, even assuming, in a given situation, the State Commission may have wisely adopted another course.

B. ANALYSIS:

As noted hereinabove, while BALCO was L3 in Bid-1, it was L1 in Bid-2 quoting the very same tariff of Rs.4.29 per unit. No explanation is forthcoming as to why the Appellant chose not to accept the bid of BALCO for supply of 115 MW of power in Bid-1, while accepting their bid for supply of 100 MW of power in Bid-2, though the tariff quoted by them, in both the bids, were the same. Even more curious is that, while the other bidders were permitted to match the lowest bid of BALCO in Bid-2 of Rs.4.29 per unit, BALCO was not called upon to supply 115 MW of power in Bid-1,(though they had quoted the very same tariff of Rs.4.29 per unit), and instead 135 MW of power sought to be procured in Bid-1 was transferred to Bid-2 and L2 to L5 bidders in Bid-2 were called upon to match the said bid.

The defence taken by the Appellant that there was no complaint from BALCO in this regard does not merit acceptance, for what Section 63 of the Electricity Act requires is for the Appellant to adhere to the Central Government Guidelines and not to deviate therefrom. While it is not known under what circumstances BALCO chose not to complain, their complaint or otherwise matters little, since it is the Appellant which was required to adhere to the 2013 Government of India Guidelines while inviting bids from the eligible bidders.

XII. ARE DEVIATIONS, IN THE BIDDING PROCESS, PERMISSIBLE IF IT NOT EXPRESSLY PROHIBITED BY THE GUIDELINES:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, firstly, the Guidelines issued by the Central Government and the Standard Bidding Documents are not to be considered as prohibiting a thing if it is not expressly prohibited or is excluded by the guidelines by clear implication; the bidding process, which is a commercial process, can always be adjusted in a manner so as to achieve the objective; if, in doing so, there is no arbitrariness in the action of the Appellant, the same should not be considered as deviations from the Guidelines; the Guidelines, as well as the RfP documents, cannot per se provide for each and every thing to deal with the dynamic situations which may occur from time to time; the basic flaw in the approach of the KSERC was to look for specific approval for the consideration of bucket filling method matching it to L1 bid, instead of considering the opposite as to whether there was any express or implied prohibition to achieve the purpose; and the principle of law is that, if a thing is not prohibited, there is nothing wrong in adopting the process so long it is not against public interest. Reliance is placed in this regard on **Rajendra Prasad Gupta -v- Prakash Chandra Mishra, (2011) 2 SCC 705; State of A.P. -v- Vallabhapuram Ravi, (1984) 4 SCC 410; American Home Products Corpn. -v- Mac Laboratories (P) Ltd., (1986) 1 SCC 465;** and **Chandramohan -v- Sarojbai Subhash Chandra Agarwal, 2005 SCC OnLine Bom 497.**

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-

Generators, would submit that, apart from pointing out Clause 1.1.4 of the RfP, the Appellant has not referred to any other provision in the Bidding Documents permitting it to vary the quantity, negotiate with the selected bidders, or engage in bucket filling; the alternate submission of the Appellant, that all these aspects are inherent since there is no prohibition in the guidelines, is also erroneous; and absence of a provision does not accord approval to the process followed by the Appellant or align the same to the guidelines issued by the Central Government.

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would further submit that the judgements relied on behalf of the Appellant in (1) **Rajendra Prasad Gupta v. Prakash Chandra Mishra, (2011) 2 SCC 705; (2) State of A.P. v. Vallabhapuram Ravi, (1984) 4 SCC 410; (3) American Home Products Corpn. v. Mac Laboratories (P) Ltd., (1986) 1 SCC 465; and (4) Chandramohan v. Sarojbai Subhash Chandra Agarwal, 2005 SCC OnLine Bom 497** only lay down that a process can be adopted if it is not against public interest; this, however, does not mean that the Appellant could have prepared its bid documents in variance to the documents prescribed by the Standard Bidding Guidelines, and then contend that, since there is no prohibition in its own document, it is free to follow any procedure whatsoever, and claim the same to be inherent in the bidding process.

C. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT UNDER THIS HEAD:

1. In **Rajendra Prasad Gupta -v- Prakash Chandra Mishra, (2011) 2 SCC 705,** the appellant, the plaintiff in the Suit, filed an application to withdraw the said suit; subsequently, it appears that he changed his mind

and, before an order could be passed in the withdrawal application, he filed an application praying for withdrawal of the earlier withdrawal application. The second application was dismissed, and that order was upheld by the High Court which was of the view that, once the application for withdrawal of the suit is filed, the suit stands dismissed as withdrawn even without any order on the withdrawal application, and hence, the second application was not maintainable.

It is in this context that the Supreme Court, while expressing its disagreement with the views expressed by the High Court, observed that the rules of procedure are handmaids of justice; Section 151 of the Code of Civil Procedure gives inherent powers to the court to do justice; that provision should be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted; and there is no express bar in filing an application for withdrawal of the withdrawal application.

2. In **State of A.P. v. Vallabhapuram Ravi, (1984) 4 SCC 410,** the question involved in the appeal before the Supreme Court was whether, on the coming into force of Section 433-A of the Code of Criminal Procedure, 1973 an adolescent offender who was sentenced to imprisonment for life on being convicted of an offence for which death is also one of the punishments prescribed by law, and who later on was, by an order made by the State Government, directed to be sent to a Borstal School under Section 10-A of the Andhra Borstal Schools Act, 1925 was liable to be kept in a Borstal School or in a prison at least for a period of fourteen years.

It is in this context that the Supreme Court referred to its earlier decision in **Maru Ram v. Union of India: (1981) 1 SCC 107,** where the question which arose for consideration was whether, after the coming into

force of Section 433-A of the Code, it was open to the State Governments to reduce the sentence of imprisonment for life imposed on a person convicted of a capital offence to any period they liked on the basis of the remission rules framed by the State Governments which were traceable to Section 432 or Section 433 of the Code or Acts which authorised the State Governments to modify the sentence of imprisonment for life imposed by courts.

It was contended by the petitioners in **Maru Ram** that Section 5 of the Code saved all remissions, short sentencing schemes as special and local laws and, therefore, they would prevail over the Code including Section 433-A. Repelling that contention, Justice Krishna Iyer proceeded to observe thus:

> "……***A thing is specific if it is explicit. It need not be express. The antithesis is between 'specific' and 'indefinite' or 'omnibus' and between 'implied' and 'express'. What is precise, exact, definite and explicit, is specific. Sometimes, what is specific may also be special but yet they are distinct in semantics. From this angle, the Criminal Procedure Code is a general Code. The remission rules are special laws but Section 433-A is a specific, explicit, definite provision dealing with a particular situation or narrow class of cases, as distinguished from the general run of cases covered by Section 432, CrPC.*** *Section 433-A picks out of a mass of imprisonment cases of specific class of life imprisonment cases and subjects it explicitly to a particularised treatment……"*
>
> *(emphasis supplied)*

3. In **American Home Products Corpn. -v- Mac Laboratories (P) Ltd., (1986) 1 SCC 465,** the Supreme Court referred with approval to **East End Dwellings Co. Ltd. v. Finsbury Borough Council: 1952 AC 109,** wherein it was held thus:- “If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.

The Supreme Court then referred to its earlier judgement in **State of Bombay v. Pandurang Vinayak Chaphalkar: AIR 1953 SC 244,** wherein it was held that when a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.”

4. In **Chandramohan v. Sarojbai Subhashchandra Agarwal, 2005 SCC OnLine Bom 497,** the question referred to the Division Bench was whether the Rent Controller, exercising the powers under the provisions of the Central Provinces and Berar Letting of Premises and Rent Control Order, 1949, had the power to consider and decide the application for setting aside the ex parte order passed by him?”

It is in this context that the Division Bench, following the judgements of the Supreme Court in **Grindlays Bank Limited v. The Central Government Industrial Tribunal; Chief Executive Officers and Vice Chairman v. Haji Harun Abu;** and **New India Assurance Co. Ltd,** observed that Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for, but on the

converse principles that every procedure is to be understood as permissible till it is shown to be prohibited by the law; as a general principle, prohibition cannot be presumed and in the present case therefore, it rests upon the respondents to show that power and jurisdiction of the Rent Controller to set aside an order to proceed ex parte is prohibited by the rules of procedure applicable to the Tribunal; in the absence of any prohibition for the exercise of said power by the Rent Controller in the Rent Control Order, the power shall be presumed to be vested in the Rent Controller, as incidental and ancillary power which is in furtherance of effective exercise of the substantive power i.e..to adjudicate lis between landlord and tenant; and that the Rent Controller exercising the powers under the provisions of Central Provinces and Berar Letting of Premises and Rent Control Order 1949 had the power to consider and decide the application for setting aside the Ex parte order passed by him.

None of the afore-said judgments, relied on behalf of the Appellant under this head, arise under the Electricity Act, much less under Section 63 thereof, nor does the doctrine of legal fiction, as elucidated by the Supreme Court in **American Home Product Corporation,** have any application to the case on hand. While, on general principles, it can possibly be contended that rules of procedure are merely handmaids of justice, and that a procedure unless expressly prohibited should be understood as being permitted, what is left unsaid by the Appellant is that Section 63 of the Electricity Act obligates the Appropriate Commission to adopt a tariff only if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government. Further, in none of the aforesaid judgments, is there any reference to a clause similar to that of Clause 4 of the Government of India Guidelines dated 09.11.2013.

As the guidelines issued by the Central Government must, in law, be held to stipulate a transparent process of bidding, strict adherence to the said guidelines is a must. As noted hereinabove, Clause 4 of the 2013 Central Government Guidelines stipulates that any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government. In terms of the proviso thereto, it is only project specific modifications, expressly permitted by the Standard Bidding Documents, which shall not be construed as deviations from the Standard Bidding documents. Consequently, all modifications, which are not expressly permitted by the Standard Bidding Documents, must be held to be deviations therefrom and, for such deviations, prior permission of the Central Government is required. In other words no deviations, from those stipulated in the Standard Bidding Documents, are permissible unless the Central Government has, before such deviations are effected, accorded its approval thereto.

It is not in dispute that the Appellant had not even sought approval of the Central Government before it had deviated from the 2013 Government of India Guidelines. The approval it sought from the Central Government was long after it had completed the bidding process undertaken by it, and had executed Power Supply Agreements with the Respondent generators. In any event, no such approval has been granted by the Central Government to the deviations made, to the Standard Bidding Documents, by the Appellant herein. As the deviations, as referred to hereinabove, are not merely procedural but also substantive, It is impermissible for the Appellant to read the aforesaid judgments out of context to justify its deviating from the 2013 Central Govt guidelines. Reliance placed, on behalf of the appellants, on the aforesaid judgments is therefore of no avail.

D. ANALYSIS:

Clause 4 of the Central Government Guidelines for procurement of electricity from Thermal Power Stations set up on Design, Build, Finance, Own and Operate (DBFOO) basis, issued by the Central Government on 09.11.2013, stipulates that any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government. Under the proviso thereto, any project specific modifications expressly permitted in the Standard Bidding Documents shall not be construed as deviations from the Standard Bidding Documents.

In terms of the proviso to Clause 4, it is only such project specific modifications, which are expressly permitted in the Standard Bidding Documents, which are required be construed as not amounting to a deviation from the Standard Bidding Documents. In other words, if the Standard Bidding Documents do not expressly permit any project specific modification, then such a modification must be held as amounting to a deviation from the Standard Bidding Documents. As noted hereinabove, the Standard Bidding Documents not only include the Guidelines notified by the Central Government on 09.11.2013 but also the model RfP, the model RfQ, and the model PSA notified by the Central Government on 08.11.2013.

It is only the modifications specifically permitted by the Central Government Guidelines dated 09.11.2013, or by any of the aforesaid documents, which can be accepted as permissible deviations and as not requiring prior approval of the Central Government. For all modifications, which are not expressly permitted by the Standard Bidding Documents, prior approval of the Central Government is a must. In other words, approval of the Central Government is required, for any deviations to be made to the Standard Bidding Documents, prior to issuance of the RfP and the RfQ by the Appellant inviting bids. The word “prior” is used as a prefix to the word “approval” and, consequently, no post facto approval, of a decision taken by

the Appellant, to deviate from the Standard Bidding Documents, is permissible. The submissions, urged on behalf of the Appellant under this head, necessitate rejection.

XIII. IS NEGOTIATION WITH BIDDERS PERMISSIBLE UNDER THE GUIDELINES?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, if the appellant could have completed such bidding process by contracting the required quantum at higher prices from L2, L3, L4 bidders, etc, there was no reason why the Appellant, as a prudent utility, could not negotiate and ask such bidders to match the L1 Bid; in regard to the above, reference is made to:- **(a) Food Corporation of India -v- M/s Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71; (b) Tata Cellular -v- Union of India, (1994) 6 SCC 651; (c) Air India Limited -v- Cochin International Airport Limited, (2000) 2 SCC 617; and (d) Jaipur Vidyut Vitran Nigam Limited -v- MB Power (Madhya Pradesh) Limited and others, (2024) 8 SCC 513.**

Sri M.G. Ramachandran, Learned Senior Counsel, would further submit that, if bucket filling is allowed, there is no reason why the Appellant could not negotiate and bring L2, L3 and L4 to L1 price level; clause 1.2.6 provides for evaluation to be done on cumulative of fixed charges and fuel charges quoted; the adjustment at the time of negotiation in fixed charges is not, therefore, contrary to the RfP, nor is it otherwise expressly prohibited by the RfP; and if higher fixed charges and lower variable charges could be given in the first instance, while seeking reduction in tariff in L1, such adjustment cannot be excluded.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would submit that reliance placed by the Appellant. on certain judgments, on the scope of interference in tendering by public instrumentalities, is misplaced; the judgements in **(1) Food Corporation of India v M/s Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71, (2) Tata Cellular v. Union of India, (1994) 6 SCC 651, (3) Air India Limited v. Cochin International Airport Limited, (2000) 2 SCC 617, and (4) Jaipur Vidyut Vitran Nigam Limited v. MB Power (Madhya Pradesh) Limited & Ors, (2024) 8 SCC 513,** have no application to Section 63 proceedings; as stated above, specific guidelines have been framed under Section 63; and the requirements specified therein have to be satisfied for the power procurement to be approved by the State Commission.

C. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANTS:

1. In **Food Corporation of India v. Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71,** the appellant had invited tenders for sale of stocks of damaged foodgrains in accordance with the terms and conditions contained in the tender notice; the respondent submitted its tender for a stock of damaged rice which was admittedly the highest; the appellant was not satisfied about the adequacy of the amount offered in the highest tenders for purchase of the stocks of damaged foodgrains and therefore, instead of accepting any of the tenders submitted, the appellant invited all the tenderers to participate in negotiations; the respondent refused to revise the rates offered in its tender of Rs 245 per quintal; the highest offer made during the

negotiations was Rs 275.72 per quintal. On this basis, the appellant was to receive an additional amount of Rs 8 lakhs by accepting the highest offer made during the negotiations over the total amount offered by the respondent for the stock of damaged rice. Overall, the appellant was offered an excess amount of Rs 20 lakhs for the entire stock of damaged foodgrains in the highest offer made during negotiations.

The respondent filed a writ petition challenging the appellant's refusal to accept the highest tender submitted by it for the stock of damaged rice claiming that the appellant having chosen to invite tenders, it could not thereafter dispose of the stocks of damaged foodgrains by subsequent negotiations rejecting the highest tenders on the ground that a higher bid was obtained by negotiations. The High Court by its impugned order accepted this contention of the respondent and allowed the writ petition. Hence, the appeal to the Supreme Court.

It is in this context that the Supreme Court held that, according to the terms and conditions on which the appellant had invited tenders, the appellant had reserved the right to reject all the tenders and, therefore, the highest tender was not bound to be accepted; even though the highest tenderer can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action; the object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete; procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund; accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view

to obtain the highest available price; retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest; a procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement.

2. In **Tata Cellular v. Union of India, (1994) 6 SCC 651,** the Supreme Court laid down certain principles which are:- (1) The modern trend points to judicial restraint in administrative action; (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made; (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible; (4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts; (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides; and (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

3. In **Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617,** the Supreme Court held that the law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty* v. *International Airport Authority of India* (1979) 3 SCC 489, *Fertilizer Corpn. Kamgar Union (Regd.)* v. *Union of India* (1981) 1 SCC 568 , *CCE* v. *Dunlop India Ltd.* (1985) 1 SCC 260 : 1985 SCC (Tax) 75 , *Tata Cellular* v. *Union of India* [(1994) 6 SCC 651 , *Ramniklal N. Bhutta* v. *State of Maharashtra* (1997) 1 SCC 134, and *Raunaq International Ltd.* v. *I.V.R. Construction Ltd.* (1999) 1 SCC 492; the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction; in arriving at a commercial decision considerations which are paramount are commercial considerations; the State can choose its own method to arrive at a decision; it can fix its own terms of invitation to tender and that is not open to judicial scrutiny; it can enter into negotiations before finally deciding to accept one of the offers made to it; price need not always be the sole criterion for awarding a contract; it is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation; it may not accept the offer even though it happens to be the highest or the lowest; but the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them, and cannot depart from them arbitrarily; though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness; the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned; even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not

merely on the making out of a legal point; the court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not; and only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

4. In **Jaipur Vidyut Vitran Nigam Ltd. v. MB Power (M.P.) Ltd., (2024) 8 SCC 513,** the Supreme Court, while holding that the Rajasthan High Court was not justified in issuing the mandamus in the nature which it has issued, referred to its earlier decisions in **Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617;** and **Tata Cellular v. Union of India, (1994) 6 SCC 651,** and held that, in the case before it, the decision-making process, as adopted by the Bid Evaluation Committee, was totally in conformity with the principles laid down by the Supreme Court from time to time; the BEC, after considering the competitive rates offered in the bidding process in various States, came to the conclusion that the rates quoted by SKS Power (L-5 bidder) were not market aligned; the said decision had been approved by the State Commission; since the decision-making process adopted by the BEC, which had been approved by the State Commission, was in accordance with the law laid down by the Supreme Court, the same ought not to have been interfered with by APTEL; in any case, the High Court, by the impugned judgment and order, could not have issued a mandamus to the instrumentalities of the State to enter into a contract, which was totally harmful to the public interest inasmuch as, if the power/electricity is to be procured by the procurers at the rates quoted by Respondent 1 MB Power, which was even higher than the rates quoted by SKS Power (L-5 bidder), then the State would have been required to bear the financial burden in thousands of crore rupees, which would have, in turn, passed on to the consumers; and the mandamus issued by the High Court failed to take into

consideration the larger consumers' interest and the consequential public interest.

In **Food Corporation of India**, negotiations were held with the bidders to secure a higher price for sale of the stock of damaged foodgrains lying with the FCI, and the price received during negotiations was higher than the highest bid quoted by the Respondent. In the present case, the proviso to Clause 1.14 of the RfP permits the utility to accept only those bids which match the lowest bid. Negotiations may, therefore, have been permissible only to ensure that the other bidders quoted a tariff which was either equivalent to or lower than the lowest bid. In the present case, while the negotiations undertaken by the Appellant with the other bidders was to match the lowest bid, the fact remains that among the deviations, which the KSERC has pointed out, is that the Appellant has accepted the bid of L-2 in Bid-1 even though the tariff quoted by them was far higher than that quoted by L-1 in Bid-1.

Clause 1.2.7 of the RFP also makes it clear that, in case none of the other bidders match the lowest bidder, the only choice available to the utility is to invite fresh bids from the said bidders calling upon them to match the lowest bid or annul the bidding process. Neither the RfP nor the Standard Bidding Documents or, for that matter, the Central Government Guidelines permit a utility to negotiate and accept a tariff higher than that quoted by the lowest bidder.

The observations, in **Tata Cellular** and **Cochin International Airport,** were made by the Supreme Court while considering the scope of interference, in judicial review proceedings under Article 226 of the Constitution of India, with the tendering process. In a Section 63 bid process, the tariff (ie the price) is possibly the most important criteria, unlike other

tenders where other criteria may have greater relevance in awarding the contract. While negotiations could possibly have been undertaken to secure a price below or equal to that quoted by the lowest bidder, it was certainly not permissible for the Appellant to negotiate with the other bidders to agree on a tariff (price) higher than that quoted by L-1 in Bid-1.

It is true that the judgment of the Supreme Court, in **Jaipur Vidyut Vitran Nigam Limited**, arose under Section 63 of the Electricity Act. What is of significance is that the appeal before the Supreme Court was filed not only against the judgment of this Tribunal but also against the judgment of the Division Bench of the Rajasthan High Court exercising jurisdiction under Article 226 of the Constitution of India. The observations of the Supreme Court, on which reliance is placed on behalf of the Appellant, were made in the context of a mandamus being issued by the Division Bench of the Rajasthan High Court directing the Appellant in the said case to procure power from the Respondent at the rates quoted by them, even though they were not market aligned. It is the issuance of such a mandamus by the Division Bench of the Rajasthan High Court which has been faulted by the Supreme Court. The observations in the said judgment cannot be read out of context or be understood as permitting the Appellant to give a complete go by to the 2013 Central Government Guidelines. Reliance placed by the Appellant, on the aforesaid judgments, are therefore of no avail.

D. ANALYSIS:

As noted hereinabove, the 2013 Central Govt Bidding Guidelines does not provide for the bucket filling system and, consequently, the Appellant could not have procured the required quantum, from the bidders L2, L3 and L4 onwards, at a price higher than the price quoted by L1 in its bid. As noted hereinabove, the RfP only provides for the other bidders to be permitted to

match the bid of L1 bidder. Even if we were to read the stipulation of matching of the bids, in the 2013 Central Govt Bidding Guidelines, as permitting negotiations, such negotiations should only have culminated in the bidders, other than the lowest bidder, submitting their respective bids matching the lowest bid quoted by L1.

What is held by the KSERC, in the impugned order, to be a deviation is not the fixed charges quoted by some of the bidders, but the change in the fixed charges quoted by them during the negotiation process or when the bidders were asked to match the bid of L1 in Bid-2. The variation in fixed charges by the very same bidder, for supply of power from the very same generating station using the very same machinery, between Bid-1 and Bid-2 (Jindal Power Limited) was also rightly held by the KSERC to be a significant deviation. One single composite bid being invited, instead of two separate bids, would have avoided such a deviation.

As the negotiation process undertaken by the Appellant has not resulted in the requirements of Section 63 of the Electricity Act being fulfilled, ie of the tariff being determined through a transparent process of bidding in accordance with Government of India Guidelines, the appellant's contentions under this head necessitate rejection.

XIV. CENTRAL GOVERNMENT DECLINING TO GIVE POST FACTO APPROVAL : ITS CONSEQUENCES:

A. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would submit that in the present case, when the Appellant

pursued with the Central Government for post facto approval of the deviations, the Central Government, by its letter dated 18.11.2016 and letter dated 11.12.2019, took the position that it cannot give any post-facto approval to such deviations, and also that the State Commission may take appropriate action.

B. ANALYSIS:

The Additional Chief Secretary, Government of Kerala appears to have addressed a letter dated 15.09.2016 to the Ministry of Power, Govt of India seeking approval for the bidding process adopted by the Appellant for long term procurement of power through Case-I bidding under DBFOO Model. In reply thereto the Ministry of Power, Government of India, vide letter dated 18.11.2016, informed the Additional Chief Secretary, Government of Kerala that the Guidelines for procurement of power dated 09.11.2013 stipulated that any deviations from the Standard Bidding Documents shall be made only with the prior approval of the Central Government; under the proviso thereto, any project specific modifications expressly permitted in the Standard Bidding Documents shall not be construed as deviations from the Standard Bidding Documents; these Guidelines were amended on 05.05.2015 which provided that "any deviation from the Standard Bidding Documents Shall be made by the Distribution Licensees only with the prior approval of the Appropriate Commission”; under the proviso thereto, any project specific modifications expressly permitted in the Standard Bidding Documents shall not be construed as deviations from the Standard Bidding Documents; the contention of the Govt. of Kerala, that the Appellant had requested the Ministry of Power, Government of India vide letter dated 23.08.2014 to issue approval for deviation from the SBDs for tying up the required quantum of power by the utility, in the event the quantum offered by the lowest bidder is less than the bid quantity, did not appear in order; in this

regard, the Appellant had submitted the documents through email dated 30.07.2014, which was examined in the Ministry, and structural incongruity was observed in the Standard Bidding Documents uploaded by the Appellant, as the bids were proposed to be called using two fuel options le captive Coal and Linkage based projects in the same contract whereas the Model Bidding Documents provides for separate bidding framework for different fuel options; accordingly, vide letter dated 06.08.2014, it was suggested that the Appellant take appropriate action to make the Standard Bidding Documents framed by them in line with the Model Bidding Documents notified by this Ministry; the deviations, as pointed out by KSERC, would have been got vetted and approved by the Central Government before issuance of RFQ, RFP and PSA, and not at this stage; as per the Guidelines, deviations on the provisions of the bidding documents were approved, if necessary, and not the action taken by the Utility as per practice or precedent; and, in view of the above, the Govt. of Kerala/KSEB Ltd may take action as appropriate in consultation with the KSERC.

The suggestion in the last part of the said letter, that the Appellant/Government of Kerala may take action as appropriate in consultation with the KSERC, was evidently made in view of the amendment to the 2013 Guidelines on 05.05.2015 which enabled deviations from the Standard Bidding Documents to be made by the distribution licensees with the prior approval of the appropriate Commission, unlike the 2013 guidelines which required prior approval of the Central Govt alone, and not the appropriate Commission. In the present case the 2015 amendment, to the 2013 Guidelines, has no application since the entire bidding process, culminating in the PSAs being executed by the Appellant with Respondent Nos. 2 and 3, took place long prior to 05.05.2015 when the amendments were made. Consequently, any deviations from the 2013 Central Govt

Guidelines could only have been resorted to with the prior approval of the Central Government, and not by seeking its post facto approval, that too long after the PSAs were executed.

Both the Appellant and the Government of Kerala appear to have again addressed letters dated 24.07.2019 and 21.01.2018 to the Ministry of Power, Govt of India respectively seeking advice of the Ministry on the approval given by the Government of Kerala for long term procurement of 865 MW power through Case-I bidding under DBFOO Model in the year 2014.

By its letter dated 11.12.2019, the Ministry of Power, Govt of India informed the Principal Secretary, Government of Kerala that, by the said letters, advise of the Ministry of Power, on the approval given by the Government of Kerala for long term procurement of 865 MW power through Case-I bidding under DBFOO model conducted during the year 2014, was sought; the Ministry of Power had already communicated its response to the Government of Kerala vide letter dated 18.11.2016; subsequently the Government of Kerala, vide letter dated 20.01.2018, had requested the Ministry to render advise as to whether it would be irregular to confirm the purchase; the Appellant, vide letter dated 24.07.2018, had informed that, on the above mentioned bidding process, as on date the Appellant was availing a total of 765 MW based on the approval given by the Government of Kerala, and subsequently allowed by the KSERC; however, final approval for 350 MW PPA was still pending with the KSERC on the issue of certain clarifications required on the deviations made by the Appellant from the guidelines and the Model Bidding Documents issued by the Ministry of Power; the matter had been further examined; the view of the Ministry of Power, as communicated earlier vide letter dated 18.11.2016, was reiterated; the deviations, as pointed out by the KSERC, would have to be got vetted and approved by the Central Government before issuance of RFQ, RFP and

PSA, and not at this stage; and the Government of Kerala/KSEB Ltd. may take action as appropriate in consultation with the KSERC.

Reference to the KSERC, in the last sentence of this letter also, is evidently because of the 2015 amendment which, as noted hereinabove, has no application to the case on hand. Absence of approval of the Central Govt, rendered the deviations from the Central Govt guidelines illegal. Consequently, the KSERC was justified in refusing to adopt the tariff which was not determined by a transparent process of bidding and was contrary to the applicable guidelines of the Central Govt; and as it was in violation of Section 63 of the Electricity Act.

XV. CVC GUIDELINES: ITS EFFECT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the process of inviting other bidders to match the L1 bid, for the balance quantum of power which is not covered under L1 bid, is ipso facto in public interest to avoid another bidding process to be adopted afresh; and this has also been considered by the CVC guidelines in Circular dated 15.03.1999 and 03.03.2007.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT:

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would submit that the CVC guidelines dated 15.03.1999 and 03.03.2007 have no applicability, since specific guidelines have been framed, under Section 63 of the Electricity Act, by the Central Government.

C.ANALYSIS:

With respect to its earlier instructions dated 18.11.1998, banning post tender negotiations except with L-1 i.e., the lowest tenderer, the Central Vigilance Commission (the "CVC" for short), vide its circular dated 30.09.1999, observed that some of the organisations had sought clarifications from the CVC as they were facing problems in implementing these instructions; and the following clarifications were being issued with the approval of the Central Vigilance Commissioner. On the issue that many a time the quantity to be ordered was much more than what L1 alone could supply, the circular clarified that, in such cases, the quantity ordered may be distributed in such a manner that the purchase is done in a fair transparent and equitable manner.

Subsequently, in 2007, the Central Vigilance Commission clarified that, as regards splitting of quantities, if it is discovered, after due process, that the quantity to be ordered is far more than what L-1 alone is capable of supplying, and there was no prior decision to split the quantities, then the quantity being finally ordered should be distributed among the other bidders in a manner that is fair, transparent and equitable; it is essentially in cases where the organisations decide in advance to have more than one source of supply, that the CVC insists on pre-disclosing the ratio of splitting the supply in the tender itself, and this must be followed scrupulously; counter-offers to L-1, in order to arrive at an acceptable price, shall amount to negotiations; however, any counter-offer thereafter to L-2, L-3, etc., (at the rates accepted by L-1) in case of splitting of quantities, as pre-disclosed in the tender, shall not be deemed to be a negotiation.

Reliance placed, on behalf of the Appellant, on the CVC guidelines, is wholly misplaced. Section 63 of the Electricity Act, in terms of which the

Appellant herein had invited bids, requires the KSERC to adopt the tariff, if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government. Adoption of tariff by the Commission is permissible only if such tariff has been determined through a transparent process of bidding, and that too in accordance with the guidelines issued by the Central Government. Since guidelines have been issued, under Section 63 of the Electricity Act, by the Ministry of Power, Government of India on 09.11.2013, the KSERC was required to examine whether the tariff, at which the appellant had agreed to procure power from Respondent Nos. 2 and 3, had been determined by a transparent process of bidding in accordance with the said 2013 guidelines issued by the Central Government under Section 63 of the Electricity Act.

The test to be applied by the KSERC, for adoption of tariff, was to ascertain whether such tariff had been determined through a transparent process of bidding in accordance with the 2013 guidelines issued by the Central Government under Section 63 of the Electricity Act, and not any other guidelines even if it be those issued by an exalted body such as the Central Vigilance Commission. The submissions urged on behalf of the Appellant, placing reliance on the CVC guidelines, necessitate rejection.

XVI. SUBSEQUENT AMENDMENT TO THE CENTRAL GOVERNMENT GUIDELINES: ITS EFFECT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that it is also clear from the subsequent amendment in the Standard Bidding guidelines, of allowing bucket filling, which clarifies the position**;** and, if such stipulation has been made in the

subsequent amendment, the process adopted by the Appellant cannot be termed as arbitrary, non-transparent, unfair, etc.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would submit that the Appellant's reliance on the subsequent amendment to the Standard Bidding Guidelines, which was issued on 05.05.2015, further establishes that bucket filling was not contemplated prior to this amendment.

C. ANALYSIS:

As noted hereinabove, bids were invited in terms of the RFP issued by the Appellant, and the subject bidding process culminated in PSAs being executed by the appellant with Respondent No. 2 on 22.12.2014 and with Respondent No.3 on 29.12.2014. The Central Government guidelines then in force were the guidelines dated 09.11.2013.

The said guidelines were, subsequently, amended by the Central Government by its proceedings dated 05.05.2015, and the 2015 amendment to the 2013 Government of India Guidelines stipulated that the provisions had been modified so that the lowest bidder shall be the selected bidder and the remaining bidders shall be kept in reserve and may, in accordance with the process specified in the RFP, be invited to match the bid submitted by the lowest bidder in case such lowest bidder withdraws or is not selected for any reason, or in case the capacity required is not fully met by the lowest bidder.

It is evident, from the above referred stipulation, that selection of the lowest bidder, and keeping the other remaining bidders in reserve. must be in accordance with the provisions specified in the RFP. It is only those RFPs, whereby bids were invited after the amendment came into force on 05.05.2015, which may have, possibly, made provision for a bucket filling system. The RFP, which is the subject matter of the present appeal, contains no provision for a bucket filling system to be adopted, evidently because no such provisions existed in the guidelines issued by the Central Government on 09.11.2013, in terms of which the RFP was finalised by the Appellant and bids were invited. Any amendment to the 2013 guidelines would only have prospective application, ie on or after 05.05.2015 when the 2015 amendment came into force, and cannot be applied retrospectively to bids invited prior thereto.

The tariff, under Section 63 of the Electricity Act, can only be adopted if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government. Application, of a subsequent amendment to the 2013 Government of India guidelines, (ie the 2015 amendment) to a bid process undertaken prior to such an amendment, would not satisfy the test of the tariff being determined through a transparent process of bidding, since the earlier bid documents would not contain any provision for acceptance of bids through the bucket filling system. The contentions urged on behalf of the Appellant, under this head, also necessitate rejection.

XVII. ORDER OF KSERC IN O.P.NO. 13 OF 2015 DATED 30.08.2016: ITS EFFECT:

A. SUBMISSIONS URGED ON BEHALF OF RESPONDENTS:

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would submit that, in its Order in OP. No.13 of 2015 dated 30.08.2016, the State Commission specifically noted all the deviations and held that the process followed by the Appellant in splitting the bids, transferring certain quantum from Bid 1 to Bid 2, and also the close proximity of the bid dates were erroneous and, therefore, the concerned PSAs, other than L1 PSAs, could not be accepted; this Order has not been challenged by the Appellant in any proceeding; the Appellant was simply contending that, since it was directed to follow up the matter with the Government of India and the Government of Kerala on the deviations, the KSERC had not expressed any final view in the matter; this is also incorrect since the findings arrived at by the KSERC cannot be indirectly challenged in the present appeal which is confined to the Order passed by the State Commission in OP. NO.05 of 2021 dated 10.05.2023.

B. ORDER IN OP NO. 13 OF 2015 DATED 30.08.2016: ITS CONTENTS IN BRIEF:

The Section 63 bid process was undertaken by KSEBL for long-term procurement of 865 MW of electricity. Two separate bids, the first of 450 MW, and the second of 400 MW were invited. On completion of the bid process, KSEBL filed OP No. 13 of 2015 before the KERC for adoption of the tariff under Section 63 of the Electricity Act, 2003.

In its order, in OP No. 13 of 2015 dated 30.08.2016, the KSERC noted several deviations from the Government of India guidelines including, among others, that (i) the KSEBL had awarded power purchase contract to the second lowest bidder in Bid 1 at its quoted rate of Rs. 4.15 per kWh which was higher than the lowest rate quoted by L 1 of Rs. 3.60 per kWh, though

the Government of India guidelines provided only for selection of the lowest bidder; (ii) KSEBL had not invited all the remaining bidders, other than L1, to match their rates with that of L1; (iii) as against the tendered quantity of 400 MW in Bid 2, KSEBL had purchased 550 MW of power; prior approval of the Government of India was not obtained for these deviations from the standard bidding documents and the guidelines; KSEBL had also not obtained approval from the Commission before executing the Power Purchase Agreement; and there was also no clause stipulated in the PPA that the PPAs would be effective only after approval by the Commission.

In the light of the afore-said deficiencies, the KSERC, in its order in OP No. 13 of 2015 dated 30.08.2016, approved procurement of 200 MW of power from the lowest bidder in Bid-1 and 100 MW of power from the lowest bidder in Bid-2. With regards approval of purchase from the other bidders, KSERC opined that such approval would be considered after KSEBL obtained approval from the Government of India for the deviations from the guidelines, and on obtaining the views of the Government of Kerala.

C.ANALYSIS:

Pursuant to the order of the KSERC, in OP No. 13 of 2015 dated 30.08.2016, the Government of Kerala, by its letter dated 15.09.2016, sought approval, of the deviations, from the Govt of India. The request, for grant of approval for the deviations was, in effect, rejected by the Government of India which, by its letter dated 18.11.2016, informed that approval from the Central Government ought to have been obtained for such deviations before issuance of RfP and PSA and not at a later stage. There is nothing, in the letter of the Government of India dated 18.11.2016, to even suggest that, despite the deviations, the appellant was entitled to act upon the PSAs it had signed with the bidders, other than the lowest bidders in Bid 1 and Bid 2.

After the Government of Kerala issued a G.O. on 13.11.2016 granting them permission to procure 115 MW of power from Jhabua Power Limited from 01.12.2016, the appellant again approached the KSERC and informed them that no formal communication had been received in respect of approval from the Government of India. In the light of the GO issued by the Government of Kerala, KSERC, vide its order in OP No. 13 of 2015 dated 22.12.2016, provisionally approved purchase of 115 MW of power by the appellant-KSEBL from Jhabua Power Limited at Rs. 4.15 per kWh as per the Power Purchase Agreement dated 31.12.2014, and subject to clearance from the Government of India.

After the Supreme Court, by its order in Civil Appeal No. 41 of 2021 dated 10.02.2023, directed KSERC to decide the subsequent petition filed by KSEBL in OP 5 of 2021, seeking adoption of tariff of the unapproved PSAs under Section 63, within three months, that KSERC passed a final order in OP 5 of 2021 on 10.05.2023 (on the last day before expiry of the three-month period stipulated by the order of Supreme Court dated 10.02.2023).

It is true that the Appellants herein did not subject the order of the KSERC, in OP No. 13 of 2015 dated 30.08.2016, to challenge by way of an appeal and had, in fact, complied with the afore-said order by seeking the views of the Government of Kerala, and in approaching the Government of India seeking its approval for the deviations from 2013 Guidelines. The fact remains that the Government of India did not accord approval to the Appellant's deviations from the 2013 Guidelines.

The legality of this order passed by the KSERC in OP No. 13 of 2015 dated 22.12.2016, in provisionally approving purchase of 115 MW of power from Jabhua Power Limited at Rs.4.15 per KWh, as per the Power Supply Agreement dated 31.12.2014, subject to clearance from the Government of

India, is not free from doubt, since the KSERC had itself opined, in its earlier order dated 30.08.2016, that the Section 63 bid process undertaken by KSEBL was in deviation of the Central Government guidelines; and the Government of India had informed that the deviation, from the prescribed bidding documents, required its prior approval. Neither was prior approval of the Government of India sought nor was it granted. Even post facto approval was not accorded by the Government of India, and yet KSERC, vide its order in OP 13 of 2015 dated 22.12.2016, accorded provisional approval for procurement of power from the L 2 bidder, though acceptance of the bid submitted by L 2 was in deviation of and contrary to the 2013 Central Govt bidding guidelines.

The question whether the order of the KSERC, in OP No. 13 of 2015 dated 30.08.2016, is interlocutory in character, and consequently whether or not the findings therein can be said to have attained finality, may arise for consideration, in determining whether the Appellant is bound by the findings recorded by the KSERC in the said order. We see no reason to delve into these aspects, more so since a final order has been passed by the KSERC, in OP No. 05 of 2021 dated 10.05.2023, exhaustively dealing with the deviations by the Appellant from the 2013 Government of India Guidelines. It is the validity of this order of the KSERC dated 10.05.2023 which we have been directed by the Supreme Court, in its order in Civil Appeal Nos. 10046 and 10047 of 2024 dated 30.09.2024, to examine. It is un-necessary for us, therefore, to examine the nature and scope of the earlier order of the KSERC in OP No. 13 of 2015 dated 30.08.2016.

XVIII. RECOMMENDATION OF THE COMMITTEE CONSTITUTED BY THE GOVERNMENT OF KERALA: ITS EFFECT:

A. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Sri Sajan Poovayya, Learned Senior Counsel and Ms. Swapna Seshadri, Learned Counsel appearing on behalf of the Respondent-Generators, would submit that, on 27.10.2021, the Government of Kerala had constituted a Committee with the Additional Chief Secretary (Finance) as the Chairman, the Principal Secretary (Power) as the Convenor and the Law Secretary and CMD, KSEBL as members to examine the bidding process, and the purchase agreements entered into by the Appellants, based on the comments of the statutory agencies and the possibility of terminating/re-negotiating the power purchase agreements in the best interest of the State; and the Committee on 19.01.2022 recommended that the prudent course of action would be that deviations in the standard bidding process are not agreed to by the Government of Kerala in respect of the PSAs entered into with the L2 bidders.

B. ANALYSIS:

While it is true that the Committee constituted by the Government of Kerala had, on 19.01.2022, recommended that the Government of Kerala not agree to the deviations in the standard bidding process followed by the Appellant with respect to the PSAs entered into with the other bidders, the recommendation of the Committee constituted by the Government of Kerala matters little, since firstly it is just a recommendation; and, in any event, the State Government has little say in adoption of tariff under Section 63 of the Electricity Act, as any such exercise of adoption of tariff is to be undertaken by the KSERC after satisfying itself that the tariff has been determined by a transparent process of bidding in accordance with the Government of India Guidelines which, in the present case, are the 2013 Guidelines.

XIX. CONCLUSION:

Viewed from any angle, we are satisfied that the KSERC was justified in rejecting the Appellant's request that approval be granted to the PSAs executed by them, and they be permitted to procure power from Respondent Nos. 2 and 3, since the entire bidding process undertaken by the Appellant was in flagrant violation of, and in significant deviation from, the 2013 Central Government Guidelines. The impugned order passed by the KSERC does not suffer from any infirmity warranting interference by this Tribunal. The Appeal and the I.As therein fail and are, accordingly, dismissed.

Pronounced in the open court on this the **13th day of February, 2025**.

(Seema Gupta) Technical Member	(Justice Ramesh Ranganathan) Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd