IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

Appeal No. 352 of 2018
&
Appeal No.240 of 2019

Dated: 09.09.2025

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

Appeal No. 352 of 2018

In the matter of:

BSES Kerala Power Ltd.
Puthiya Road,
Udyogmandal,
Kochi-683501. **…Appellant(s)**

Vs.

1. Kerala State Electricity Regulatory Commission
Through its Secretary
KPFC Bhavanam, C.V. Raman, Pillai Road,
Vellabyamablam
Thiruvananthapuram -695 010.

2. Kerala State Electricity Board Ltd.,
Through its Managing Director
Vydyuthi Bhavan, Pattom,
Thiruvananthapuram -695 033 **...Respondent(s)**

Counsel for the Appellant(s) : Mr. Shri Venkatesh
Mr. Varun Singh
Ms. Nishtha Kumar
Mr. Sandeep Rajpurohit

Mr. Somesh Srivastava
Mr. Vikas Maini

Counsel for the Respondent(s) : Mr. M.T. George for R-1

Mr. Subhash Chandran K.R. for R-2

Appeal No.240 of 2019

In the matter of:

Kerala State Electricity Board Ltd.,
Through its Managing Director
Vydyuthi Bhavan, Pattom,
Thiruvananthapuram **…Appellant(s)**

Vs.

1. Kerala State Electricity Regulatory Commission
Through its Secretary
KPFC Bhavanam, C.V. Raman, Pillai Road,
Vellabyamablam
Thiruvananthapuram -695 010.

2. BSES Kerala Power Ltd.
Through its Chairman & Managing Director
Puthiya Road,
Udyogmandal,
Kochi-683501, Kerala. **...Respondent(s)**

Counsel for the Appellant(s) : Mr. Subhash Chandran K.R.
Ms. Krishna L.R.

Counsel for the Respondent(s) : Mr. M.T. George for R-1

Mr. Shri Venkatesh
Ms. Nishtha Kumar
Mr. Suhael Buttan

Mr. Somesh Srivastava
Ms. Ankita Bafna for R-2

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The present batch of appeals consists of two appeals: 1) Appeal No. 352 of 2018 and 2) Appeal No. 240 of 2019. The Appeal No. 352 of 2018 has been filed by BSES Kerala Power Limited, and Appeal No. 240 of 2019 has been filed by Kerala State Electricity Board Ltd. These appeals are filed challenging the legality, validity, and propriety of the Order dated 05.10.2018 in O.P. No. 34 of 2015 (in short "Impugned Order") passed by Kerala State Electricity Regulatory Commission (hereinafter referred to as "KSERC" or "Commission").

Description of Parties: -

2. BSES Kerala Power Limited (in short "BKPL") is an Independent Power Producer that established a power plant at Kochi using Naphtha as fuel during the late 1990s.

3. Kerala State Electricity Board Limited (in short "KSEBL") is a wholly owned company of the Govt of Kerala, incorporated under the Companies Act, 1956, for supplying power to the consumers in the State of Kerala.

4. The Respondent No.1 herein, the Kerala State Electricity Regulatory Commission, is the Regulatory Commission for the State of Kerala, inter alia, having the powers to adjudicate the matters in hand.

Factual Matrix of the Case (as submitted by the Appellant - BKPL)

5. Considering the shortage of power, the State of Kerala, in 1995, decided to implement Short Gestation Thermal Power Plants in collaboration with Kerala State Industrial Development Corporation Limited (in short, "KSIDCL"). Accordingly, KSIDCL invited bids for the establishment of using naphtha/ furnace oil as fuel at various sites. BSES was awarded two 40.50 MW projects, one at Kakkanad, Kochi, and another at Techno Park, Thiruvananthapuram.

6. Subsequently, on 24.12.1996, BKPL was set up as a joint venture between BSES and KSIDCL for implementing the two projects.

7. On 24.12.1996, two power purchase agreements were signed between BKPL and KSEBL to develop, procure, finance, construct, own, operate, and maintain the two projects of 40.5 nominal capacity each at Kochi and Thiruvananthapuram.

8. Later on, in 1997, it was decided to commission the two projects at Kochi along with a third project awarded to KSIDCL by the Planning Commission, Government of India, as the Model Power Plant. Hence, it was decided to set up all three projects at one location and convert the open cycle plant into a combined cycle plant.

9. BSES entered into a Fuel Supply Agreement (in short, “FSA”) with Indian Oil Corporation Limited (in short, “IOCL”) for the supply of Naphtha from IOCL for these projects of a capacity of 107 MW.

10. It is submitted that under Clause 7.4.3 of the FSA, BKPL was required to intimate IOCL, at least 3 months before the commencement of each contract period, the annual required quantity for Naphtha. Under Clause 11 of the FSA, IOCL was to store, at its facility, at least 1/24th of the Annual Linkage Quantity. Under Clause 11.4, BKPL was to store in its on-site facility an inventory of at least 1/12th of the Annual Linkage Quantity.

11. On 03.05.1999, BKPL and KSEBL entered into a PPA, wherein BKPL was required to establish a power plant and sell the electricity to KSEBL for the entire Plant capacity of 157 MW (3 plants). The PPA was to be in force for 15 years. Under Article 7.4 of the PPA, KSEBL and BKPL could negotiate a mutually agreeable tariff for the PPA period beyond the 15th tariff period. Under Article 15.1, the term of the PPA could be further extended for a period of ten tariff periods beyond the fifteenth tariff period on a mutually agreed price as per Article 7.4.

12. On 05.08.2010, BKPL wrote to KSEBL for approval regarding the conversion of the Plant from Naphtha into Liquid Natural Gas (in short, “LNG”). BKPL furnished the offers made by IOCL, Bharat Petroleum Corporation Ltd. (in short, "BPCL"), and GAIL India Ltd. for the supply of LNG through their draft Gas Sale Agreement.

13. On 29.10.2010, KSEBL, through its letter, informed that BKPL should take up the issue with the Ministry of Petroleum and Natural Gas (in short, "MoPNG") to allocate 40% domestic gas and the remaining from outside.

14. On 16.01.2012, BKPL, by its letter dated 16.01.2012, requested the Central Electricity Authority (in short, "CEA") to allocate Natural gas to its power plant. CEA vide its letter dated 01.02.2012 informed BKPL that its request would be taken up by MoPNG in the 12th Planning Commission and communicated at the earliest. Similar requests appear to have been made by BKPL to KSEBL and the State of Kerala during 2012 and 2013 (by letters dated 11.07.2013, 01.08.2013, 24.08.2013, 17.09.2013, 27.11.2013), expressing its intentions to convert the fuel for the Plant from Naphtha to LNG. However, no responses seem to have been received.

15. Since BKPL's requests for conversion of fuel from Naphtha to LNG were not approved, it continued to procure Naphtha for the Plant. In November 2014, it appears that BKPL was constrained to purchase Naphtha worth Rs. 45 Crores from IOCL, as per the Dispatch Instructions issued by the State Load Despatch Centre (in short, "SLDC") and in anticipation of continued plant operation. It is BKPL's case that due to the non-availability of Naphtha on short notice from Kochi Refinery, the Appellant was even forced to procure Naphtha from IOCL, Chennai.

16. BKPL claims that this was done to comply with KSEBL's letter dated 07.11.2014, wherein KSEBL had instructed BKPL to ensure sufficient fuel stock at the station, considering the envisaged continuous scheduling of the Plant and according to the PPA. Accordingly, BKPL raised invoices on KSEBL for the supply

of power based on Naphtha.

17. However, after 22.11.2014, it appears that the Plant had been scheduled only for a brief period between 04.05.2015 and 06.05.2015. The aforementioned non-scheduling of the plant by KSEBL apparently resulted in BKPL holding a stock of approximately 10,400 MT of Naphtha, for more than two years (about 6,800 MT of Naphtha in the Plant and another 4,200 MT at IOCL's storage facilities at Irumpanam), which, BKPL claims, was bought exclusively for the purpose of generating and selling power to KSEBL.

18. On 15.01.2015, BKPL, vide its email, informed KSEBL regarding the Naphtha stock which was lying unused. This, BKPL claims, was repeatedly apprised to KSEBL.

19. On 29.01.2015, BKPL requested KSEBL to consider the proposal of conversion of the Plant from Naphtha to Gas with extension of the PPA for another 10 years. BKPL also requested that, in the interim, the plant may be run on Naphtha as fuel without interruption till completion of the conversion of the Plant.

20. Even though the PPA was expiring on 31.10.2015, the Government of India, Ministry of Commerce & Industry (Petroleum and Explosive Safety Organisation) renewed BKPL's storage of Naphtha license up to 31.12.2017 through its letter dated 17.06.2015.

21. On 14.07.2015, KSEBL, through its letter communicated the decision taken by its Board of Directors to accord in-principle approval for BKPL to run its power

plant on Naphtha for another 2 years, subject to certain conditions, namely (a) terms of the existing PPA were to be suitably modified; (b) the fixed charges applicable for the extended period were to be re-ascertained; and (c) approval from KSERC was to be obtained. Notably, this communication was issued post KSERC's Order dated 30.04.2013, by which KSERC had expressed its view that power from BKPL on Naphtha basis should not be taken after expiry of the PPA. The letter dated 14.07.2015 also mentioned that the proposal for conversion of the fuel from Naphtha to natural gas will be considered in due course.

22. Yet again, on 29.09.2015, KSEBL reiterated its in-principle approval to BKPL for extension of the PPA and directed BKPL to file a petition before KSERC for the approval of the PPA and tariff for the proposed extended period of two years. KSEBL further proposed that the components to determine Annual fixed Charges shall be based on: (a) Operation and Maintenance expenses; (b) Interest on Working Capital; and (c) Return on Equity.

23. On 03.10.2015, BKPL filed Petition No.34 of 2015 under Section 86 (i)(b) of the Electricity Act for approval of extension of PPA (in short, the "Petition"). BKPL also sought interim approval for running the Plant on Naphtha as the PPA was expiring on 31.10.2015. However, KSERC did not consider this application of BKPL.

24. On 21.10.2015, KSEBL filed its Preliminary Submissions before KSERC in the Petition, inter alia stating that BKPL's Plant is a reliable standby source and the cost incurred towards the same is for ensuring a reliable supply of power. It was also stated that the reliability of power from BKPL through Naphtha would be

useful till the Open Access that was contracted by KSEBL materialized, and since BKPL's Plant was within the State of Kerala, it is free from transmission corridor constraints and would help in reducing transmission losses, being situated in the load centre. KSEBL also stated that extension of PPA on Naphtha would also allow it to critically examine the impact of LNG in the changing energy market.

25. On 28.10.2015, KSERC passed an Order in the Petition, directing KSEBL to file a petition, if found necessary, for extension of the PPA, in accordance with Articles 15.1 and 7.4, with mutually agreed tariff and terms and conditions incorporated in the Draft PPA initialed by both the parties within a month. It transpires that following this order, discussions were held by the parties (BKPL and KSEBL), but no mutually agreeable terms could be arrived at.

26. Though on 08.12.2015, KSEBL informed BKPL that no plausible solution could be arrived at between them, discussions were subsequently held between the parties. Following this, BKPL shared proposals with revised tariffs for the new PPA on 14.12.2015 and 09.01.2016.

27. PPA extension being a regulatory and policy matter, KSEBL had forwarded BKPL's proposal for extension of the PPA to the State government of Kerala for its approval in December 2015. In view of the time required for getting the State government's approval, BKPL had requested KSEBL to seek extension of time till 31.03.2016 from KSERC to comply with its directive dated 28.10.2015. This was also brought to KSERC's notice, vide BKPL's letter dated 13.02.2016.

28. On 24.02.2016, the State government of Kerala was pleased to ratify the in-

principle approval for extension of PPA granted by KSEBL vide its Order, subject to the condition that final tariff shall be determined by KSERC and brought back to the State government for its final approval.

29. On 25.04.2016, KSEBL in view of the in-principle approval granted by the State Government for extension of PPA, submitted a jointly initialed draft PPA before KSERC for approval of extension of PPA and adjudication on the points of difference between both the parties to arrive at mutually agreed tariff, namely: (a) Return on Equity; (b) O&M Charges; (c) Cost of spares included in the computation of Interest on Working Capital; (d) Calculation of fuel stock for the computation of Interest on Working capital; (e) Reimbursement of Tax on Returns; (f) Reimbursement of Land Lease charges payable by BKPL to TCCL. Notably, while KSEBL suggested 0.297 Rupees/kWh for fixed charges for extension of PPA, and BKPL had proposed 0.342 Rupees/kWh for the first year and 0.356 Rupees/kWh for the second year. The point of difference on fixed charges between BKPL and KSEBL was just 0.04 Rupees for the first year and 0.06 Rupees for the second year.

30. During the year 2016, several other communications appear to have been sent by BKPL to resolve the problems regarding the draft PPA, but the same could not be resolved due to a lack of consensus.

31. On 26.10.2016, KSERC dismissed the Petition filed by BKPL on the ground that it was not maintainable, as it was filed by BKPL under Section 86(1)(b) of the Electricity Act for extension of PPA and not under the relevant provisions of the Act. KSERC observed that under Section 86(1)(b) of the Act, it had the power to

regulate the power procurement of the distribution licensee, including the price of power. The distribution licensee must apply with the necessary and sufficient details for the approval of the PPA. Despite repeated directions issued by KSERC vide the daily orders dated 28.10.2015 and 16.08.2016, KSEBL had failed to apply with sufficient details. Therefore, the Petition was held to be not maintainable. KSERC further observed that as and when KSEBL applies with a proper PPA initialed by both KSEBL and BKPL as per Regulation 78 of the Tariff Regulation, 2014 read with clause (b) of sub section (1) of section 86 of the Electricity Act, with mutually agreed tariff as stipulated under clause 15.1 of the PPA, KSERC would decide on merits as per the provisions of the Act.

32. By its letter dated 09.12.2016 addressed to KSEBL and the State government, BKPL raised the issue of the huge quantities of Naphtha lying with it. BKPL stated that it had maintained the said stock due to the legitimate expectation of PPA extension, the assurance for which was given by the KSEBL and the State government of Kerala, and the same was not taken due to reduced demand by KSEBL.

33. Owing to the increase in operational costs on account of the salary of the employees and the contract staff, BKPL decided to lay off certain contract staff who are associated with the painting and housekeeping.

34. Aggrieved by the action of lay off, and assuming that all the employees are being terminated, at the behest of the trade unions of the contract workers, a complaint was preferred before District Collector & Chairman, District Disaster Management Authority on 09.12.2016, alleging that BKPL had decided to shut

down the plant and to lay off all the employees, by neglecting the stock of fuel stored in its premises. It was further alleged that the entire stock of Naphtha, about 6500 MT, stored in its premises, may cause some safety threat. It was therefore prayed by the Trade Unions that sufficient steps may be taken to ensure that the layoff is withdrawn, and the safety of the plant is ensured.

35. On receipt of the complaint, the office of the District Collector & Chairman, District Disaster Management Authority, initiated action under the provisions of the Disaster Management Act, 2005 (in short, the "DM Act") and issued directions to BKPL to dispose of the Naphtha lying in its property or maintain required manpower for the safety of the power Plant.

36. Vide its letter dated 17.12.2016, BKPL assured the District Collector & Chairman, District Disaster Management Authority regarding the continuing foolproof safety mechanism which has been adopted by it. BKPL stated that the Naphtha was purchased during the pendency of the original PPA exclusively for generating and supplying power to KSEBL and was kept in BKPL's premises due to a legitimate expectation of extension of the PPA based on the in-principle approval for extension of the PPA on Naphtha, which was granted to BKPL by KSEBL and the State of Kerala. BKPL further informed the District Collector & Chairman, District Disaster Management Authority that a request for early disposal of Naphtha had already been issued by BKPL to KSEBL and the State government through its letter dated 09.12.2016.

37. However, the District Collector & Chairman, District Disaster Management Authority vide its Order dated 29.12.2016, invoked provisions of the DM Act to

dispose of the Naphtha stock lying at BKPL's Plant.

38. Aggrieved by this, BKPL was constrained to approach the High Court of Kerala by way of Writ Petition No.540 of 2017, to quash the order of the District Collector & Chairman, District Disaster Management Authority dated 29.12.2016, along with a challenge to KSERC's Order dated 26.10.2016 passed in Petition No. 34 of 2015.

39. The High Court of Kerala, by its Order dated 20.01.2017, was pleased to issue directions to an Expert Committee to inspect the site.

40. Accordingly, an inspection was conducted on 27.01.2017, which found that the safety conditions at the Plant were intact. However, the expert committee proposed the following:

(a) Generating power on an unscheduled interchange basis in coordination with SLDC of KSEBL, subject to the approval from KSERC, thereby consuming the Naphtha stock.

(b) BKPL could explore possibilities for the generation of power and sale to anyone by utilizing the grid of KSEBL, as open access is permitted now.

(c) Any other feasible option, including transfer to other Naphtha consuming industries like nearby FACT, availing the services of the oil marketers like IOCL.

41. However, the report recorded that option (c) was not feasible due to unserviceable pipelines of the IOCL since September 2015.

42. Meanwhile, IOCL vide its Report dated 07.02.2017, after an inspection, submitted that retransmitting Naphtha through the underground pipelines to IOCL was not possible due to the following reasons:

(a) The underground pipeline, which was used to transfer Naphtha from IOCL to BKPL, was found to be leaky during mandatory hydro testing and declared unserviceable in September 2015, being beyond repair.

(b) Only one tank of 7000 kiloliters was available in IOCL Irumpanam Terminal for Naphtha storage, which was currently storing 6000 kiloliters of Naphtha. This product was brought earlier from Chennai for exclusive usage by BKPL in 2014, and the balance quantity of 6000 kiloliters has been lying dormant for the past two years. Hence, there was no adequate storage provision available at the IOCL terminal to accommodate the BKPL product.

(c) Facilities for pumping naphtha back to IOCL through the pipeline were not available at the BKPL power Plant site.

(d) IOCL would not be able to dispose of this product since there was no customer in Kerala for its usage. The existing stock at the IOCL terminal (6000kl) was brought earlier from Chennai as indented by BKPL in 2014. IOCL was also facing difficulties as there was no provision to pump it to ocean tankers at its premises.

43. On 25.03.2017, KSEBL wrote to BKPL, stating that it had decided not to proceed with the extension of PPA for purchasing more expensive electricity from the power BKPL's Plant, and that a proposal for buyout of the Plant was under consideration by the State government of Kerala.

44. Meanwhile, on 04.04.2017, the High Court of Kerala passed an Interim Order in Writ Petition No.540 of 2017 providing options for the disposal of Naphtha. The High Court, vide Interim Order dated 04.04.2017, observed as under:-

> *"8. The compelling concern of this Court, at present, is apprehended disaster and this Court is of the opinion that the option submitted by KSEBL has to be put into effect, subject however to further orders passed in the Writ Petition. The Options for disposal of Naphtha, as suggested by the KSEBL, has been placed on record in the report of the District. Collector, which are as follows:-*
>
> *1. Generating power on Unscheduled Interchange (UI basis in coordination with the Load Despatch Centre of KSEBL subject to the approval of KSERC thereby consuming the Naphtha stock.*
>
> *2. M/s BKPL could explore possibilities of generation of power and sale to any one by utilizing the grid of KSEBL as open access is being permitted now.*
>
> *3. Any other feasible option including transfer to other naphtha consuming industries like nearby FACT availing the service of oil marketers like IOCL.*
>
> *9. The Petitioner could definitely explore possibilities at option number 2 and 3, but however the same would have to be finalized, within a period of one month from today and the disposal of the naphtha as per either of the options started within the said period and concluded within the time herein above stipulated. If the petitioner does not intend to carry out the said options, then they shall generate power on*

Unscheduled Interchange basis in co-ordination with the Load Despatch Centre and KSEBL; subject to approval of KSERC and also subject to further orders to be passed in the Writ Petition. The petitioner could definitely approach the KSEBL immediately for such generation of power on UI basis. It is made clear that the entire Naphtha available at the Petitioner Companies premises and that available at IOCL would be disposed off before 01.07.2017. If the same is not so disposed of, then definitely, the Chairman of the Disaster Management Authority, the District Collector would be entitled to take such steps for disposal of the Naphtha without even reference to this Court All issues raised by all parties are left open for consideration in the writ petition...."

45. On 18.04.2017, BKPL filed an application before KSERC, seeking necessary approval in connection with the implementation of the Interim Order of the High Court dated 04.04.2017 in Writ Petition WP(C) No. 540/2017. In view of the same, KSEBL, vide its letter dated 25.04.2017, submitted its comments regarding the scheduling of power from BKPL's Plant on an Unscheduled Interchange (in short, "UI") basis.

46. Thereafter, on 27.04.2017, KSERC, vide its Order, disposed of the Application filed by BKPL on 18.04.2017. By way of the said Order, KSERC granted approval in accordance with the directions of the High Court in its order dated 04.04.2017, to the SLDC of KSEBL for scheduling power and to the Strategic Business Unit-Distribution of KSEBL for purchasing the power generated on UI basis, from the 6500 MT of Naphtha purchased and stored in the premises of BKPL and the 6000 KL of Naphtha purchased and stored by BKPL in the

premises of IOCL.

47. On 31.10.2017, the High Court delivered its Judgment in W.P. (C) No. 540 of 2017, whereby it set aside KSERC's Order of 26.10.2016 and consequential letter dated 25.03.2017 issued by KSEBL (intimating its decision not to extend the PPA) and remanded the matter back to KSERC for fresh consideration. The High Court ordered as under:

> "*the petitioner does have a case that, in as much as the Naphtha, that was used for the generation of the said electricity, was part of the consignment that was stored to meet the requirements of KSEBL under the PPA that held the field till 31.10.2015, the rates under the said PPA should govern the supply. The Commission shall therefore adjudicate on the said issue, as regards the rate applicable in respect of the above supply of electricity, also, untrammeled by any of the findings in its order dated 27.04.2017*."

48. Pursuant to the above, on 20.11.2017, BKPL, vide its letter, placed the copy of the Judgment passed by the High Court on 31.10.2017, before KSERC for its immediate compliance and to issue subsequent Orders with respect to the same.

49. On 18.12.2017, BKPL also filed an Application before KSERC, wherein it was prayed that appropriate directions may be issued to KSEBL for the following things, namely:

(a) To pay BKPL the price of energy generated and the fixed charges and other reimbursements as per the provisions of the PPA, as modified by the points of difference.

(b) To pay BKPL an amount of Rs 157.34 Crore along with the interest, as stipulated in PPA, from the date on which the arrears fell due till the date of realization.

50. Meanwhile, the Judgment dated 31.10.2017 passed by the High Court in W.P. No. 540 of 2017 was challenged before the Division Bench of the Hon'ble High Court by way of Writ Appeal No. 237 of 2018. On 29.01.2018, the Division Bench of the Hon'ble High Court disposed of W.A. No. 237 of 2018, inter alia, observing as under:-

"*3. The only grievance of the petitioner is the purported finding of the Learned Single Judge with respect to the existence of an agreement.*

4. Heard the learned counsel appearing for the KSEBL, the learned Senior Counsel appearing for M/s.BSES Kera/a Power Ltd. and also the learned Government Pleader appearing for respondents 2&3.

5. It is the common case that the existence of an agreement also can be considered by the KSERC. It is pointed out by all parties that the KSERC had already heard the matter and the appellant was also heard and now orders have been reserved. In view of the common case of all the parties that the existence of an agreement is also left to be adjudicated before the KSERC, we are of the opinion that the writ appeal can be disposed of, making it clear that the said issue would also be adjudicated by the KSERC it would be open for the KSERC to

reopen argument, if found necessary, on the question as to whether there is an agreement in existence. This would not be necessary, if the issue has already been addressed before the KSERC. The above writ appeal is disposed of."

51. On 05.10.2018, KSERC passed the Impugned Order, rejecting the prayers sought by BKPL, and directing that the tariff /rate for power supplied would be calculated as per the weighted average RTC price of the IEX. KSERC also permitted the extension of the PPA by one month.

52. On 22.10.2018, BKPL issued a letter to KSEBL along with invoices and supporting annexures for payment by the KSEBL in terms of the order dated 05.10.2018 passed by KSERC.

53. On 24.02.2023, this Tribunal passed an interim order, permitting BKPL to file a petition before KSERC for implementation of the Impugned Order. However, it transpires that, by its order dated 22.05.2024, KSERC rejected BKPL's execution petition on the ground that the dispute is pending before this Tribunal and KSERC had not specified any timelines in the Impugned Order for making the payments or determining the amount to be paid by KSEBL to BKPL.

Submissions of BKPL

54. The thrust of BKPL's contentions was that it had procured the stock of Naphtha basis the in-principle approval and assurance from both KSEBL and the State Government of Kerala, vide letters dated 13.07.2015 and 24.02.2016 that

the PPA would be extended for two more years after 31.10.2015. BKPL contends that Plant was to continue generating electricity as per the dispatch instructions of KSEBL and partly provide a standby generation facility for KSEBL until the time it was converted for operation on natural gas.

55. BKPL further relies on the contemporaneous conduct of both parties, i.e., itself and KSEBL, which pointed towards an extended PPA for two years. KSEBL's conduct throughout this period reflected an expectation that the extension was inevitable. BKPL contends that the fact that the parties were in active discussions and that KSEBL instructed BKPL to file a petition before KSERC to finalize the extension, and that KSEBL itself submitted the draft PPA for approval and for adjudication only on the limited aspects of points of difference, highlights that the relationship inter se parties was analogous to a contract.

56. Reliance is placed on Section 70 of the Indian Contract Act, 1872 (in short, the "Contract Act") in support of this contention. BKPL emphasizes that despite the power generated by it being fully utilized by KSEBL, BKPL is yet to recover its legitimate dues for this power supply. KSEBL has thus unjustly enriched itself at BKPL's expense. Reliance is placed on the Judgements of the Hon'ble Supreme Court in ***Food Corporation of India Limited vs. Majdoor Kamdar Sahkari Mandli Ltd (2007) 13 SCC 544*** and ***Mahanagar Telephone Nigam Limited vs. Tata Communications Limited (2019) 5 SCC 341***.

57. BKPL also highlights the fact that KSEBL entered into discussions with BKPL following an interim order of KSERC dated 28.10.2015 extending the PPA by one month. This order was never challenged by KSEBL.

58. Accordingly, BKPL contends, it provided a standby generating facility incurring heavy financial expenses during the period of 2 years and declared daily availability to KSEBL, which has never been refuted by it. BKPL procured substantial quantities of Naphtha; 6800 MT, which was stored at BKPL's plant, and an additional 4100 MT stored at the IOCL depot as per the specific written instruction of KSEBL on 07.11.2014 (i.e., during the period of PPA). This Naphtha was retained in stock post expiry of the original term of PPA, fully relying on the understanding that the PPA extension would be formalized and that KSEBL would continue to purchase power from BKPL.

59. BKPL invokes the doctrine of legitimate expectation to contend that continuing the contractual relationship basis of assurances from KSEBL and the State government led to significant financial commitments. BKPL, having incurred substantial fixed costs to keep the plant operational during this period, should have been entitled to the fixed charges for the entire period from 01.11.2015 to 31.10.2017, not just for one month. Reliance is placed on the judgments of the Hon'ble Supreme Court in ***Collector of Bombay vs. Municipal Corporation of the City of Bombay and Ors., AIR* 1951 SC 469,** and ***State of Jharkhand vs. Brahmaputra Metallics Ltd. and anr. (2023) 10 SCC 634***.

60. BKPL also invokes the doctrine of estoppel against KSEBL for withdrawing from its obligations retrospectively w.e.f. 01.12.2015 since BKPL's actions were taken in reliance on KSEBL's commitments, and KSEBL should be estopped from negating its earlier promises. Reliance is placed upon the Judgement passed by the Hon'ble Supreme Court in ***Shree Sidhbali Steels Limited vs. State of Uttar***

Pradesh and Ors. (2011) 3 SCC 193. BKPL also contends that KSEBL, being a state instrumentality, ought to have acted in a fair and equitable manner. Reliance is placed on the Judgement passed by the Hon'ble Supreme Court in ***Unitech Ltd. v. Telangana State Industrial Infrastructure Corpn. (2021) 16 SCC 35***.

61. BKPL has also submitted that KSERC overlooked critical provisions of the PPA, specifically Article 15.1 and Article 7.4, which provided mechanisms for the extension of the PPA. Instead of recognizing these provisions, KSERC erroneously treated the matter as though it were dealing with the approval of a new PPA, rather than the continuation of an existing agreement. The Impugned Order failed to treat Articles 15.1 and 7.4 as operative after the PPA's expiry on 31.10.2015, leaving only the tariff determination as the issue to be resolved by it, as per the judgment of the High Court dated 31.10.2017.

62. BKPL also rebuts KSEBL's contentions that that in terms of Section 31 of the Contract Act, extension of the PPA for two years under Clause 15.2 and Clause 7.4 of the PPA can only happen after a contingent event, namely, mutual agreement between parties. Relying on KSEBL's letter dated 29.09.2015, whereby BKPL was asked to file a petition before KSERC for approval of the PPA, and the fact that KSEBL itself, on 25.04.2016, submitted a jointly initialed draft PPA to KSERC for adjudication on the points of difference, establishes the mutual understanding of the parties that the PPA was subsisting.

63. BKPL contended that KSERC passed the Impugned Order in gross violation of the observations and directions passed by the Kerala High Court in its Judgement dated 31.10.2017. BKPL's submissions in this regard are broadly as

follows:

(a) KSERC rejected the extension outright due to a lack of agreement inter se parties, while the High Court acknowledged the in-principle approval and BKPL's legitimate expectation, directing KSERC to consider applying the rates under the PPA for the power supplied. The Hon'ble High Court observed that the Petition was filed at KSEBL's instance for KSERC to consider and approve the clauses of the PPA.

(b) KSERC absolved KSEBL of any liability concerning the Naphtha stock, whereas the Hon'ble High Court held that the Naphtha stock was procured at the behest of KSEBL and to fulfil the requirements under the PPA. Hence, the Hon'ble High Court directed KSERC to consider the Naphtha stock as part of the obligation under the PPA at the rate under the said PPA and accordingly factor it in at the time of tariff determination.

(c) KSERC's reliance on the interim order dated 04.04.2017 is in direct contravention of the finding of the Hon'ble High Court, which categorically directed KSERC to be untrammeled by the findings rendered in its order dated 27.04.2017.

64. Despite being asked to adjudicate the Petition on merits by the High Court, KSERC chose to reject it, once again, on technical grounds.

65. Elaborating on the consequence of KSERC's failure to adjudicate the issue on the merits, BKPL submitted that public authorities, particularly those tasked with public duties, must be guided by a commitment to justice and fairness, prioritizing their duty to serve the public interest over a rigid adherence to

procedural formalities. The High Court emphasized that KSERC should have addressed the substantive issues presented in the petition on its merits.

66. BKPL further contended that KSERC's grant of tariff to BKPL as per the rate of average RTC clearing price of Indian Energy Exchange (in short, "IEX") for the energy generated and injected into the grid during the period from 25.05.2017 to 24.06.2017 was without any rational basis and liable to be rejected. It is argued that KSERC ought to have taken into account the actual costs incurred by BKPL in generating the power, which were far higher than the market-determined IEX rates. The application of IEX rates, which are typically based on short-term market conditions, does not reflect the long-term obligations and costs associated with power generation under a PPA and is completely one-sided and arbitrary, as it favours only KSEBL.

67. BKPL argues that during the period from 25.05.2017 to 24.06.2017, BKPL supplied 61.9 Million Units (MUs) of electricity to KSEBL, incurring a cost of INR 69.6 Crores. Despite this, KSERC based the payment on the IEX RTC clearing price, which does not cover the actual costs incurred by BKPL. BKPL relies on the obligations of KSERC to provide cost-reflective tariff in terms of Section 61 of the Electricity Act.

68. Specifically in respect of fixed charges, BKPL contends that the point of difference on fixed charges between BKPL and KSEBL was just 0.04 Rupees for the first year and 0.06 Rupees for the second year, while BKPL had proposed 0.342 Rupees /kWh for the first year and 0.356 Rupees /kWh for the second year; on the contrary, KSEBL had suggested 0.297 Rupees/kWh in the draft PPA

submitted by KSEBL before KSERC. Thus, BKPL contends, KSERC should have granted BKPL at least the fixed charges for two more years at the rate proposed by KSEBL itself.

69. In sum and substance, BKPL argues that despite having performed all its obligations under the PPA and having generated power based on KSEBL's assurances, it is now unjustly penalized due to KSEBL's unilateral and prejudicial actions, including its refusal to extend the PPA.

Submissions of KSERC

70. KERC submits the fact that the BKPL and KSEBL never reached any consensus regarding the tariff and terms and conditions for extension of the PPA. It relies on KSEBL's communications, categorically stating that in view of non-consensus, KSEBL would not be liable for fixed charges or any other charges with effect from 01.12.2015. KERC submits that post the expiry of the PPA on 31.10.2015, there was no PPA in existence between the parties with effect from 01.11.2015. Even within the extended time granted by KERC, i.e., till 27.11.2015, the parties could not reach any consensus on the tariff or on extending the PPA.

71. KSERC, in its order dated 16.08.2016, expressed the view that a PPA cannot be imposed on KSEBL and will have to evolve out of *consensus ad idem*. Vide this Order, KSERC had also directed KSEBL to state in unequivocal terms whether it required power from BKPL. However, no response was received. It was on account of this reason that KSERC disposed of the Petition on 26.10.2016, observing that KSERC would take up the issue when both parties submit a jointly

initialed PPA.

72. It is KSERC's case that *consensus ad idem* is the most fundamental requirement of a contract under the Contract Act, which cannot be given a go-by. In the present case, the negotiations for extending the PPA started much before the expiry. However, at no point in time did the parties reach consensus. Even the in-principle sanction granted by the State Government was a conditional one. Therefore, KSERC could not have held that a valid agreement between the parties existed. Furthermore, the parties never extended the PPA in accordance with Articles 15.1 and 7.1 of the PPA.

73. Rebutting BKPL's case on legitimate expectation and promissory estoppel, KSERC relies on the Hon'ble Supreme Court's judgment dated 08.01.2010 in Civil Appeal No. 5182/2002 to hold that the offer made by KSEBL vide communication dated 13.07.2015 and 29.0.2015 was conditional and the conditions stipulated therein could not be fulfilled, and thus, no agreement was reached between the parties. Further, KSEBL had already made alternate arrangements to meet the electricity demand of the State. KSERC contends that the principle of estoppel cannot override the provisions of the statute. On the contrary, KSEBL wrote to BKPL on 08.12.2015, clearly stating that it would not be liable for the payment of fixed or any other charges.

74. Nevertheless, KSERC took the view that BKPL was entitled to fixed charges for the month of November 2015, since KSERC had vide its daily order dated 28.10.2015 granted permission to extend the PPA from 01.11.2015 to 30.11.2015, and even KSEB, vide letter dated 08.12.2015, raised a dispute for payment of fixed

charges only post 01.12.2015. Accordingly, it was held that BKPL was not eligible to claim fixed charges, lease rent, income tax, or other charges during the period from 01.12.2015 to 31.10.2017.

75. In respect of the rate applicable to the quantum of electricity supplied by BKPL pursuant to the High Court's interim order dated 04.04.2017, KSERC considered (a) whether KSEBL had any liability on the balance stock of fuel at BKPL's premises; and (b) the rate of electricity generated by BKPL and supplied to KSEBL during 25.05.2017 to 24.06.2017.

76. On the issue of KSEBL's liability in respect of the balance stock of Naphtha, KSERC submits that one of the components of fixed cost, i.e., interest on working capital, includes the fuel cost for one month calculated on normative Plant Load Factor (in short, "PLF"). Thus, irrespective of the actual fuel stock, the fixed stock only includes one month's stock calculated at a normative PLF of 80%. The stock of fuel maintained by BKPL during the term of the PPA was much less than that required to be maintained on a normative basis, and the PLF was also much less than 80% (9.7% average), despite which 30 days' stock was included in the working capital calculation. Due to the excessive cost of Naphtha, KSERC was not approving the schedule from the Plan except during contingencies. Irrespective of that the full fixed cost was being approved for 15 years. The obligation to stock fuel is that of BKPL to ensure continuous generation. The financing cost of this is to be recovered through fixed costs. There is no provision in the PPA that the balance fuel stock at the time of expiry of the PPA is the liability of KSEBL. BKPL could have utilized the balance fuel stock in any manner as it pleased. Considering that BKPL has been provided with relief far in excess of its

actual expenditure, KSERC submits that it cannot be entitled to energy charges based on the ruling price of Naphtha at the time of its purchase.

77. In respect of the rate of electricity generated by BKPL and supplied to KSEBL during 25.05.2017 and 24.06.2017, KSERC relies on the High Court's Order dated 04.04.2017, whereby BKPL was directed to explore the suggested options or generate power on UI basis, subject to approval of KSERC. During the proceedings before KSERC, KSEBL submitted that it did not have the requirement of 65 MU of BKPL since it had already tied up its requirement of power. KSEBL also requested, *inter alia,* that it not be forced to purchase power at a rate higher than UI. Accordingly, by its order dated 27.04.2017, KSERC approved the sale of power to KSEBL on UI basis. However, instead of raising invoices for the power sold on a UI basis, BKPL contended that they were eligible to get the actual cost of fuel used for power generation. KSERC submits that since the power was sold to KSEBL only for the limited purposes of exhausting the Naphtha stock, pursuant to the Orders of the High Court and not for meeting the electricity demand of the State, and since BKPL itself exercised the option of selling power on UI basis, BKPL is not entitled to energy charges based on the cost of Naphtha.

78. KSERC submits that upon analyzing the data of power purchased by KSEBL during the concerned period, it was found that in order to absorb the energy generated by BKPL without affecting grid stability, KSEBL had reduced the average purchase from the power exchange. If BKPL did not inject power, KSEBL might have purchased an equal quantum from power exchanges on day to day-ahead basis. Thus, the opportunity cost to KSEBL for the power injected by BKPL is the average Round The Clock (in short, "RTC") price in the power exchanges

during this period. KSERC further submits that BKPL knowingly and voluntarily assumed the inherent risks of storing Naphtha when they chose to execute the PPA. Hence, BKPL's demand for full energy charges cannot be accepted.

Submissions of KSEBL

79. Responding to BKPL's contentions regarding the in-principle approval of the PPA and the principle of legitimate expectation, KSEBL agrees that when the term of the PPA was about to expire, it had granted in-principle approval to extend the PPA for a period of two years pending conversion of the Plant to LNG. However, KSEBL argues, this was subject to the following conditions, amongst others: (1) Terms of the existing PPA to be suitably modified, (2) To re-ascertain the fixed charges applicable for the extended period as the existing plant is fully depreciated; and (3) To obtain approval from KSERC.

80. Thus, the in-principle approval was not absolute, but conditional. Several rounds of negotiations were held to arrive at a mutually agreed tariff, but none were successful. Therefore, as per the provisions of the Contract Act, no agreement was reached between the parties for the extension of the PPA.

81. KSEBL further argues that in compliance with its obligations under section 86 (b) of the Electricity Act, to regulate the electricity purchase and procurement process, KSERC issued the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 (in short, "2014 Regulations"), which govern the electricity procurement of the licensees in the State. As per Regulation 78 of the 2014 Regulations, every agreement or arrangement for the 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 the said was to come into effect only with the approval of KSERC.

82. In view of the above, KSEBL argues that in the absence of approval of the PPA by KSERC, there was no enforceable agreement between the parties beyond 31.10.2015. Reliance is also placed on Sections 7-9 of the Contract Act to emphasize that there was no acceptance by KSEBL of any proposal of BKPL, leading to the formation of a valid contract between the parties.

83. KSEBL argues that the principle of promissory estoppels and consequent legitimate expectation is well-settled one. Relying on the judgment of the Hon'ble Supreme Court dated 08.01.2010, in Civil Appeal No. 5182/2002, KSEBL argues that the offer made by KSEBL vide communications dated 13.07.2015 and 29.09.2015 was conditional and the conditions stipulated therein could not be fulfilled. Thus, no agreement was reached between the parties.

84. KSEBL also argues that BKPL had not done anything pursuant to KSEBL's communications to ensure that the conditions stipulated therein were met. In any case, without KSERC's approval, no agreement between the parties would be valid and binding. KSERC, in fact, had earlier assessed the cost structure of this Plant and, finding it unviable, had specifically ordered that power should not be drawn from this source after the expiry of the earlier contract. The principle of estoppel cannot override the provisions of a statute. Thus, KSEBL contends, the principles of promissory estoppel and legitimate expectation are not applicable in this situation.

85. Rebutting BKPL's contention that the Impugned Order was in the teeth of the High Court's judgment dated 31.10.2017, KSEBL relies on the High Court's interim order dated 04.04.2017, which directed the BKPL to dispose of the Naphtha by generating power on Unscheduled Interchange (UI) basis in co-ordination with the Load Dispatch Centre of KSEBL subject to the approval of KSERC or by exploring the other two options identified by the Court in this regard. Subsequent to this order, BKPL preferred an interim application dated 18.04.2017 before KSERC, requesting approval in connection with the implementation of the High Court's order dated 04.04.2017. KSERC disposed of the application, granting approval as per the terms of the High Court's order dated 04.04.2017. KSEBL contends that accordingly, power was generated and allowed to be injected into the grid of KSEBL on UI basis from 25.05.2017 to 24.06.2017.

86. KSEBL contends that at the time of the interim order, it did not have a requirement of 65MU of BKPL power, as KSEBL has already tied up its requirement of power in advance for the said period under long-term and medium-term contracts. Further, the rate of power in the market had drastically come down. Despite this, in compliance with the direction of the High Court and orders of the Commission, KSEBL intimated BKPL that it was ready to absorb the power generated for the disposal of Naphtha on average UI rate prevalent on the actual date of scheduling during the period of power injection, and KSEBL would be liable to pay only the UI rate for the power so generated. BKPL also intimated its willingness to generate electricity as per the scheduling instructions of SLDC without binding any condition regarding the rate specified by KSEBL. KSEBL reiterated its stand that absorption of power for disposing of Naphtha shall be on

UI basis only.

87. KSEBL contends that vide letter dated 20.05.2017, it also intimated BKPL that the SLDC would make necessary arrangements for the evacuation of power, and terms and conditions on scheduling of power would be strictly as per the orders of the High Court, orders of KSERC, and the conditions specified by KSEBL in its letters dated 04.05.2017 and 12.05.2017. The matter was also informed before the District Collector, Ernakulam.

88. KSEBL argues that the total energy generated by BKPL for the period from 25.5.2017:9.00 hrs. to 24.06.2017:19:30 hrs. was 61.92 MU. KSEBL had been promptly informing BKPL of the details of energy generated and the average DSM rate for the said period and had requested BKPL to raise the weekly invoice based on the specified DSM rate. It was also intimated that KSEBL will not be liable for any interest on delayed payment, due to the non-raising of the invoice.

89. However, BKPL did not raise any bills, in violation of the orders of the High Court, instead filed an IA (IA No.12331 of 2017) in WP(C) No.540/2017 on the rate of power generated and injected for disposing of Naphtha.

90. The High Court on 31.10.2017 has finally disposed of WP(C) No.540 of 2017, quashing the order of KSERC dated 26.10.2016 and remanding the matter back to the Commission for fresh consideration. KSEBL contends that the High Court acknowledged the fact that the PPA was valid only till 31.10.2015. The only issue to be decided by KSERC was the rate applicable for the supply of electricity made by BKPL for disposing of the Naphtha.

91. KSEBL further contends that in the order dated 05.10.2018, KSERC had extended the PPA by one month without the consent of KSEBL, which is not only against the relevant provisions of the PPA, but also against the statutory as well as settled legal positions. KSEBL relies on a judgment of the High Court of Andhra Pradesh in W.A 383 of 2019 and batch, which ruled that the terms of the PPAs cannot be altered either by the Commission or by the State Governments or the Courts.

92. In any case, KSEBL contends that the PPA was extended by one month only on a provisional basis, subject to fulfillment of conditions as stipulated in Clause 15.1 and 7.4 of the original PPA, i.e., mutual agreement of the parties on tariff.

93. KSEBL also relies on the order of the High Court dated 29.01.2018, which holds that it was open for KSERC to reopen arguments on the question as to whether a PPA existed between the parties during the period in question.

94. Refuting BKPL's contentions that it was entitled to recover fixed charges from 01.12.2015 to 31.10.2017, KSEBL relies on clause 15.1 of the PPA, which stipulates that the PPA could be extended only if the parties mutually agreed on the tariff. KSEBL's communications regarding the in-principle extension of the PPA were also conditional upon the parties reaching a mutual agreement on tariff, which never fructified. Hence, KSERC was right in dismissing the Petition for want of consensus between the parties regarding the tariff. KSEBL reiterates that there cannot be any contract without consensus *ad idem* and free consent of both parties.

Analysis and Conclusion

95. The primary issue to be considered is whether the PPA dated 03.05.1999 stood extended for a period of two years beyond the expiry of the PPA (particularly during the period from 25.05.2017 to 24.06.2017, when BKPL supplied power to KSEBL). Consequently, what is the consideration due to be paid to BKPL for this period, and particularly for the power supplied to KSEBL– would it be as per the terms of the PPA, or would it be on some other terms, if so, what? Another aspect to be deliberated upon is KSERC's role in all of this.

96. The first and the most important aspect to be considered is whether the PPA stood extended beyond its expiry period and whether KSERC erred in refusing to acknowledge the extension, holding that there was no subsisting PPA between the Parties.

97. KSERC reasoned that there was no consensus *ad idem* between BKPL and KSEBL because there was neither any signed PPA, nor were the Parties in agreement about fundamental aspects of the PPA, such as tariff. Both KSERC and KSEBL argue that without consensus *ad idem*, there can be no contract under the Contract Act. The Impugned Order of KSERC dismisses BKPL's contentions regarding legitimate expectation and promissory estoppel on several grounds, as detailed above. Nevertheless, KSERC acknowledged and approved the extension of the PPA for a period of one month, i.e., till 30.11.2015.

98. It is a matter of fact that the PPA was in force only for a period of 15 years

and expired on 31.10.2015. What we are called upon to decide is whether the contract between the parties stood impliedly extended beyond this period? If the answer to this question is yes, we must also consider whether KSERC was right in refusing to consider this issue by taking shelter under Section 86(1)(b) of the Electricity Act, holding that in the absence of a valid agreement between the parties, adjudication under Section 86(1)(b) cannot be done, also ruling that the petition should have been filed by the Discom.

99. We will first examine whether the PPA dated 03.05.1999 stood extended for a period of two years. If the answer to this question is yes, then it is obvious that BKPL will be entitled to claim fixed and other attendant costs for the entire duration of the extended period.

100. Under the Contract Act, a contract need not always be express or in writing. Section 9 of the Contract Act states:

> "***9. Promises, express and implied***
> *In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."*

101. Section 9 gives statutory recognition to implied contracts, where the proposal or the acceptance or both are signified not by words, but by acts or conduct. In ***Haji Mohammed Ishaq v. Mohamad Iqbal and Mohamed Ali and Co., (1972) 2 SCC 493***, the Hon'ble Supreme Court found an implied contract to

have formed when the Defendants in that case accepted the goods supplied by the Plaintiff and never repudiated the demand for payment for the goods supplied. The Hon'ble Apex Court held:

> *"**10.** It is not necessary to encumber this judgment with unnecessary citations of the case law on the point. We may with advantage only quote a passage from Chitty on Contracts, twenty-third Edn., pp. 9-10, para 12:*
>
> *"Express and implied contracts.—Contracts may be either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination.* ***There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case the court may infer that the parties have agreed to renew the express contract for another term****. Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct. Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, it follows that the distinction between*

express and implied contracts has very little importance, even if it can be said to exist at all."

11. *We found absolutely no substance in the argument of the appellants to assail the finding of the High Court* ***that the plaintiff had supplied the goods on its own account to the defendants*** *and that plaintiff's partner Babalal had handed over the Patti 12 (Bijak) Ex. 85 to the defendants at their place of business at Katni along with the two railway receipts. The High Court has further found that the subsequent railway receipts were sent by registered post by the plaintiff and in several letters and telegrams the plaintiff demanded the payment of the price of the goods supplied from the defendants. Nowhere Rahim was justifiably in the picture. The High Court has further pointed out the reason as to why about 501 bags of tobacco were supplied from the warehouse of Manavi who became the consignor in the several railway receipts. Manavi supplied the goods on plaintiff's account. It has further been found that the cheques drawn by the defendants in the name of Rahim were all endorsed by him in favour of the plaintiff and ultimately to the knowledge of the defendants the payment of the part of the price was made by the defendants to the plaintiff. No goods were supplied on account of Rahim. No part payment was really and actually made to him and the defendants were liable to pay the balance of price to the plaintiff.*

12. On the facts found, there is no difficulty in assuming or even inferring that initially the express contract for supply of the goods

was between the defendants and Rahim. The fact whether Rahim acted as the plaintiff's agent or the defendants' is immaterial. What is clear is that the orders placed with Rahim were in fact executed by the plaintiff by supply of goods to the defendants. *It was so done on account of the plaintiff from its own warehouse as well as from Manavi's warehouse.* ***Defendants by their clear conduct of accepting the goods and never repudiating any of the numerous letters and telegrams of the plaintiff demanding the money from them on the assertion that the goods were despatched by the plaintiff and the defendants should pay the money, clearly showed that a direct contract which in law is called an implied contract by conduct was brought about between them.*** *Whatever may be the jural relationship between the plaintiff and Rahim, Rahim and the defendants and in whatever manner he acted as a go-between man, between the plaintiff and the defendants, what is clear is that eventually and finally the supply of the goods by the plaintiff was to the defendants on its own account and not on account of Rahim.* ***The defendants clearly and unerringly accepted the goods as such and became liable to pay the whole of the price directly to the plaintiff. A part was paid and the liability to pay the balance was definitely incurred by them."***

(***emphasis added***)

102. However, KSERC is correct in contending that for a contract to exist, there must be *consensus ad idem*. Even in respect of implied contracts, there must be

a meeting of minds, though, in such cases, the offer and acceptance may be inferred from the conduct of the parties. However, there are exceptions to this rule, found in principles of promissory estoppel and legitimate expectation, which we will deal with later.

103. It is important to take note of the extension clause in the PPA. Clause 15.1 of the PPA provides as under:

> "*This Agreement can further be extended for a period of Ten Tariff Periods beyond the fifteenth Tariff Period on a mutually agreed tariff and as per Clause 7.4 taking into account the Fuel charges, Operation & Maintenance charges and a nominal net residual value of the Project which the Company would have normally expected on dismantling and selling the same at its Cost."*

104. Clause 7.4 of the PPA reads as under:

> *"For the period beyond fifteenth Tariff Period the Board and the Company may negotiate a mutually agreeable Tariff based on the Fuel charges, O&M charges, and the asset value based on the amount the Company would have reasonably expected on dismantling and selling at its cost the generating set and other facilities built."*

105. It is true that the PPA contemplated extension on a "mutually agreed tariff". However, what is notable is that the PPA does not leave the agreement on tariff open-ended. It identifies some guiding factors that the parties must consider when

mutually agreeing on the tariff. It is evident that in such negotiations the parties were bound to consider "*Fuel charges, Operation & Maintenance charges and a nominal net residual value of the Project which the Company would have normally expected on dismantling and selling the same at its Cost".* It can be clearly seen that the mutually agreed tariff was intended to compensate BKPL for the legitimate expenses it would incur in running the Plant, as well as the gains BKPL could have made by dismantling the Plant instead of continuing to operate it.

106. Be that as it may, the fulcrum of KSEBL and KSERC's case is that, since there was no mutually agreed tariff, the PPA cannot be said to have been extended for a period of two years, even though KSEBL and the State Government had given their in-principle approval. Though this argument is attractive at first blush, a closer look at the representations made by KSEBL/ the Kerala State Government and the subsequent acts of BKPL in reliance on these representations brings into play other considerations of estoppel and legitimate expectation, which cannot be ignored.

107. Undoubtedly, during the tenure of the PPA, BKPL supplied, and KSEBL consumed the power supplied by BKPL, making payments in terms of the PPA. The PPA was set to expire on 30.10.2015.

108. Clause 7.6 of the PPA provides that in case of a steep increase in the price of fuel or the availability of alternative, cheaper fuel, KSEBL retained the right to direct BKPL to use an alternative fuel. If LNG became available, then it was mandatory on BKPL's part to use LNG as the fuel for the Plant within six months of time.

109. Our attention is invited to a letter dated 05.08.2010 addressed by BKPL to KSEBL, stating that IOCL, BPCL, and GAIL had informed that they were authorized to supply gas from PLL, Kochi, and that they would be able to supply LNG from 2012. Draft agreements in this respect were also forwarded to BKPL. By this correspondence, BKPL requested KSEBL to vet the draft agreements and reiterated its intention to transition into LNG in accordance with Clause 7.6 of the PPA, once it had KSEBL's approval. It is thus clear that in keeping with the mandate of the PPA to transition into cheaper fuel, BKPL promptly sought KSEBL's approval, as early as 2010.

110. KSEBL seems to have responded on 20.10.2010 with their views on the draft agreements, but agreed to the transition into LNG. BKPL, in fact, stated that the "*chances of getting domestic gas linkage for the BKPL plant is brighter*".

111. Again in 2012, BKPL addressed a letter dated 16.01.2012 to KSEBL, asking for a recommendation to the Ministry of Petroleum and Natural Gas for allocation of 0.91 MMSCMD of domestic natural gas for the Plant. KSEBL responds on 01.02.2012, stating that BKPL's application shall be prioritized. It is noteworthy that this discussion about the Plant transitioning into LNG is taking place in 2012, less than three years before the PPA is set to expire. It is but obvious that the extension of the PPA was already in the contemplation of the parties, as basic business prudence dictates that foundational changes in the Plant would not have been the subject matter of discussion when the PPA was on its last legs.

112. **While these discussions were ongoing, KSEBL addressed a letter to**

BKPL on 07.11.2014 (less than a year prior to the expiry of the PPA), instructing BKPL to ensure sufficient fuel stock at its Plant, considering continuous scheduling under the PPA. It is a matter of fact that BKPL procured enough Naphtha and communicated the same to KSEBL. However, after 22.11.2014, the Plant was scheduled only for a brief period of two days, between 04.05.0215 and 06.05.2015, contrary to the express representation made by KSEBL in its letter dated 22.11.2014.

113. Given that the expiry of the PPA was fast approaching, BKPL started agitating the issue of extension of the PPA, along with the issue of converting the Plant to Gas, by its communication dated 29.01.2015.

114. In the meantime, the Petroleum & Explosives Safety Organization renewed BKPL's license for holding Naphtha up to 31.12.2017, i.e., much beyond the expiry of the PPA. Notably, this license was specific to the Plant. This extension also gave BKPL an impression (coupled with all the other communications that were being exchanged) that the PPA would be extended, and till the Plant converted to Natural Gas, it would continue to run on Naphtha.

115. **It was at this juncture that KSEBL issued its letter dated 13.07.2015, according to in-principle approval for BKPL to run its Plant for another two years, subject, of course, to certain conditions as set out in the letter. These conditions were: (a) the terms of the existing PPA were to be suitably modified; (b) the fixed charges for the period were to be re-ascertained; and (c) KSERC's approval was to be obtained.**

116. **The letter also stated that the proposal to convert the Plant to natural gas would be considered in due course. It is clear to us that KSEBL's letter was in keeping with its past conduct, clearly signaling that the Plant would continue to operate post expiry and that ultimately, it would be converted to natural gas.**

117. This was followed by another letter from KSEBL on 29.09.2015, barely a month before the expiry of the PPA, once again reaffirming the in-principle approval for the Plant to run using Naphtha for another two years. By this letter, KSEBL went as far as to request BKPL to file a petition before KSERC for approval of tariff and the PPA for the proposed extended period, subject to several conditions in respect of the calculation of certain components of tariff. It was suggested that the tariff petition was to be filed before 05.10.2015 (i.e., within 7 days of the letter).

118. The contents of these letters have to be considered harmoniously as part of the ongoing conduct of the parties, in light of the circumstances in which they came to be issued. Factors that weigh in with us are-

(a) that BKPL and KSEBL have been in talks for several years, discussing the proposal to convert the Plant to Natural Gas;
(b) at no point in time was BKPL told that the extension of the PPA or conversion to Natural Gas was an impossibility;
(c) on the contrary, BKPL was constantly given the hope that conversion would take place;

(d) KSEBL deemed it fit to grant its in-principle approval to extend the PPA, barely a month before it was set to expire;

(e) though the extension was conditional upon certain aspects of tariff being re-negotiated, the fact that this proposal was made at the very end left BKPL with no choice but to keep the Plant operational post expiry, pending negotiations and approvals from KSERC; and

(f) to maintain necessary fuel stock.

119. BKPL acted as instructed and filed a Petition before KSERC under Section 86(1)(b) of the Electricity Act, seeking extension of the PPA. This was filed in or around 03.10.2015, within the suggested deadline.

120. As the above Petition was being examined by KSERC, KSEBL issued a letter dated 21.10.2015, offering certain clarifications with respect to the Petition filed by BKPL. Pertinently, in this communication, KSEBL emphasized the importance of the Plant and stated:

> "*Notably, even during monsoon months, occasional dependence on Naphtha based power is found necessary whenever there is an unexpected outage in central stations and when there are contract failures with traders and IPPs. Thus, at least until LTA for the power contracted under DBFOO bid process gets operationalized, the Naphtha power plants needs to be seen as a standby source within the State and the cost incurred for the same is a cost to ensure reliability of supply……..**Hence it is submitted that the availability of power from BKPL plant, located within the state of Kerala is required for***

ensuring reliability of power supply within the state for the next two days till the open access for power contracted by KSEB Ltd materializes. Since BKPL plant is located within the State it is free from transmission corridor issues and is helpful in bringing down the transmission loss as the plant is located near the load center."

121. This letter, which came to be issued barely 9 days before the expiry of the PPA, is a crystal-clear representation to BKPL that the Plant was required to continue its operations even post the PPA's term.

122. BKPL cannot be faulted for the parties' inability to reach a consensus regarding the tariff. BKPL had been pursuing KSEBL for a significant time (a fact which KSEBL expressly admits in its letter dated 21.10.2015). The timing of KSEBL's approval, coupled with the fact that KSERC, as a state regulator, failed in its duty to work out an interim arrangement, led BKPL to continue to keep the Plant operational, in the hope that the parties would, sooner or later, execute a fresh PPA.

123. Even KSEBL, in its letter dated 21.10.2015 recognized the importance of an interim arrangement in the following words: "*…Till the finalization of the study, an interim arrangement need to be considered for continuing the availability of power from BKPL plant, in light of the power situation in the state. The willingness shown by KSEB Ltd to extend the PPA for two more years, subject to conditions that can substantially bring down the fixed costs may kindly be viewed in the above background."*

124. BKPL acted on KSEBL's representation. It is a matter of fact that even post the expiry of the PPA, the parties continued to negotiate on the terms of the extended PPA. However, all this while, BKPL kept the Plant operational, to KSEBL's knowledge. Had KSEBL not represented, or created an expectation that the PPA would be extended, BKPL may have (a) not procured such significant quantities of Naphtha; (b) not kept the Plant in a state of readiness in terms of the PPA; and (c) dismantled the Plant and generated some revenue out of that.

125. It cannot be disputed that BKPL incurred costs in maintaining the fuel stock and keeping the plant operational based on the correspondence made and in principle, approval conveyed by the KSEBL and the State Government.

126. We feel that KSERC also contributed to this situation significantly. Following KSEBL's instructions, BKPL had preferred a detailed Petition, seeking, amongst others, the extension of the existing PPA for a period of two years and, more importantly, interim approval for continuing sale of power to KSEBL during the intervening period till the tariff is determined, at the tariff proposed in the draft agreement for extension of PPA. As the State Regulator, KSERC should have been conscious that the PPA was set to expire very shortly and that some interim arrangement had to be worked out since the Plant was going to be kept in a running condition even post expiry of the PPA. In these circumstances, KSERC ought to have worked out a better interim arrangement than simply extending the PPA till 30.11.2015; all the same, it rejected the request for extension on the ground that the parties had yet to arrive at a consensus on the tariff rates.

127. The above order of KSERC appears to have prompted KSEBL to renege on

its representation and issue the letter dated 08.12.2015, stating that it would not be liable for fixed charges beyond 01.12.2015. However, what is interesting is KSEBL's acknowledgment that despite the expiry of the PPA and despite the parties not reaching any consensus on revised tariff rates, fixed charges were due to BKPL since the Plant was kept operational.

128. Be that as it may, despite the above letter, KSEBL kept negotiating with BKPL, as evident from the subsequent correspondence exchanged by the parties, which is a matter of record. In all its communications, BKPL consistently emphasized KSEBL's representations about the extension of the PPA and the conversion of the Plant to natural gas.

129. On 24.02.2016, the State Government of Kerala issued a Government Order, after taking note of all the facts, including KSERC's Order dated 25.10.2015, granting its in-principle approval for the extension of the PPA for two years. The State Government did include a caveat, however, that the final tariff was to be determined by KSERC and brought back to the Government.

130. With this communication, BKPL was assured that the PPA would be extended; however, the tariff would be determined by KSERC. In any case, the representation to BKPL was to continue keeping the Plant in an operational state. In all this time, KSEBL and BKPL continued their discussions, and a jointly initialed PPA was submitted by KSEBL itself on 25.04.2016 to KSERC for approval. In the meantime, BKPL continued to make representations to KSEBL for speeding up the extension of the PPA, converting the Plant to Natural Gas, and amending the Land Lease Agreement between TCCL and BKPL.

131. At this juncture, BKPL, by its letter dated 27.07.2016, requested KSERC's permission to amend its Petition, explaining the power of KSERC to adjudicate upon issues with respect to the PPA under Section 86(1)(f) of the Electricity Act. BKPL accordingly prayed that KSERC may "*adjudicate and take a decision on the points of differences raised by the respondent herein in relation to the initialed draft PPA submitted before this Hon'ble Commission by the Respondent".*

132. In these circumstances, KSERC fell into serious error by rejecting the Petition by its order dated 26.10.2016, on the ground that under Section 86(1)(b), KSERC could only "*approve only the purchase of electricity of a distribution licensee including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State",* and that since no petition was filed by KSEBL, KSERC could not look into the matter any further.

133. No thought was given to KSERC's powers under Section 86(1)(f) of the Electricity Act or the fact that huge quantities of Naphtha were procured on KSEBL's instructions and were lying unutilized at BKPL's premises. The only point that KSERC seems to have taken note of is that the cost of scheduling power from the BKPL Plant became an expensive proposition as compared to the alternative options that were available with KSEBL.

134. In these circumstances, the matter came up before the High Court. Before the High Court, KSEBL took the stand that there was no question of extending the PPA, since the procurement of power from the Plant became too expensive.

135. What appears to have happened is this – KSEBL was keen to extend the PPA and eventually convert the Plant to Natural Gas. At the time, it made representations to BKPL; it needed the Plant to be available as a standby source of power. It appears that subsequently, KSEBL was able to arrange power from other sources at much more economical rates, and hence, the requirement of extending the PPA ceased to exist. KSEBL thereafter performed a *volte face* and withdrew its approval for extending the PPA by its letter dated 25.03.2017, overtly stating that the procuring electricity from the Plant was expensive. Even in this letter, KSEBL stated that the proposal of KSEBL to take over the Plant was under consideration.

136. The facts that have been iterated and reiterated above leave no doubt in our mind that the actions of KSEBL, the State Government, and even KSERC, for that matter, created a legitimate expectation in BKPL's mind that the PPA would be extended. BKPL continued to be under the impression that the PPA would be extended and the tariff rates would either be mutually agreed upon or be adjudicated upon by KSERC. In any case, BKPL was pushed to keep the Plant operational and continue to store hazardous quantities of Naphtha till it could be disposed of under the directions of the High Court.

137. It is noteworthy that, as per Clause 6.1 of the PPA, BKPL was required to operate and maintain the Plant in accordance with Prudent Utility Practices and subject to Availability Declaration for the supply of power. Furthermore, Clause 7.5 of the PPA mandated BKPL to execute a Fuel Supply Contract. It is a matter of fact that BKPL kept KSEBL informed of its fuel stock details through weekly/

monthly tariff invoices, as also through its letters dated 15.01.2015, 25.08.2015, and 09.12.2016.

138. Further, as per Clause 7.4.3 of the FSA, BKPL was also obligated to specify the annual required quantity 3 months prior in writing to IOCL. As per Clause 11 of the FSA, the seller was to store at its storage facilities at the Supply Point an inventory equal to at least 1/12 of the Annual Linkage Quantity. As per Clause 11.4, BKPL was also required to store an inventory equal to at least 1/12 of the Annual Linkage Quantity. Hence, in terms of the FSA, which was to KSEBL's knowledge, BKPL was required to maintain Naphtha at its Plant as well as through the seller.

139. We are of the view that BKPL's having acted to its detriment by keeping the Plant operational and storing Naphtha, would bring into play the principle of estoppel, to stop KSEBL from going back on its word. The Hon'ble Apex Court has, in the judgment of ***Collector of Bombay v. Municipal Corporation of the City of Bombay and others, AIR 1951 SC 469,*** emphasized that State entities cannot be allowed to go back on their representation and if that were allowed, it would amount to the court countenancing what may only be described as "legal fraud". This principle was recently expounded in great detail in ***State of Jharkhand v. Brahmaputra Metallics Ltd., (2023) 10 SCC 634****:*

> *"33.* ***This Court has given an expansive interpretation to the doctrine of promissory estoppel in order to remedy the injustice being done to a party who has relied on a promise****. In Motilal Padampat [Motilal Padampat Sagar Mills Co. Ltd. v. State of U.P.,*

(1979) 2 SCC 409 : 1979 SCC (Tax) 144] , this Court viewed promissory estoppel as a principle in equity, which was not hampered by the doctrine of consideration as was the case under the English law. This Court, speaking through P.N. Bhagwati, J., (as he was then), held thus : (SCC p. 430, para 12)

> *"12. … having regard to the general opprobrium to which the doctrine of consideration has been subjected by eminent jurists, we need not be unduly anxious to protect this doctrine against assault or erosion nor allow it to dwarf or stultify the full development of the equity of promissory estoppel or inhibit or curtail its operational efficacy as a juristic device for preventing injustice. … We do not see any valid reason why promissory estoppel should not be allowed to found a cause of action where, in order to satisfy the equity, it is necessary to do so."*

H.4. From estoppel to expectations

34. Under English law, the doctrine of promissory estoppel has developed parallel to the doctrine of legitimate expectations. ***The doctrine of legitimate expectations is founded on the principles of fairness in government dealings. It comes into play if a public body leads an individual to believe that they will be a recipient of a substantive benefit****. The doctrine of substantive legitimate expectation has been explained in R. v. North & East Devon Health Authority, ex p Coughlan [R. v. North & East Devon Health Authority,*

ex p Coughlan, 2001 QB 213 : (2000) 2 WLR 622 (CA)] in the following terms : (QB pp. 241-42, paras 56-57)

> *"56. … 'But what was their legitimate expectation?' Where there is a dispute as to this, the dispute has to be determined by the court, as happened in Findlay In re [Findlay In re, 1985 AC 318 : (1984) 3 WLR 1159 (HL)] . This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.*
>
> *57. … Where the court considers that a lawful promise or practice has induced a legitimate expectation of a [Ed. : The matter between two asterisks has been emphasised in original as well.] benefit which is substantive [Ed. : The matter between two asterisks has been emphasised in original as well.] , not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."*
>
> *(emphasis supplied)*

35. Under English law, the doctrine of legitimate expectation initially developed in the context of public law as an analogy to the doctrine of promissory estoppel found in private law. ***However, since then, English law has distinguished between the doctrines of promissory estoppel and legitimate expectation as distinct remedies under private law and public law, respectively.*** *De Smith's Judicial Review [Harry Woolf, De Smith's Judicial Review (8th Edn., Thomson Reuters 2018).] notes the contrast between the public law approach of the doctrine of legitimate expectation and the private law approach of the doctrine of promissory estoppel:*

> *"[d]espite dicta to the contrary [Rootkin v. Kent County Council [Rootkin v. Kent County Council, (1981) 1 WLR 1186 (CA)] ; R. v. Jockey Club ex p RAM Racecourses [R. v. Jockey Club ex p RAM Racecourses, (1993) 2 All ER 225 (DC)] ; R. v. IRC ex p Camacq Corpn. [R. v. IRC ex p Camacq Corpn., (1990) 1 WLR 191 (CA)] it* ***is not normally necessary for a person to have changed his position or to have acted to his detriment in order to qualify as the holder of a legitimate expectation*** *R. v. Ministry of Agriculture, Fisheries & Food, ex p Hamble (Offshore) Fisheries Ltd. [R. v. Ministry of Agriculture, Fisheries & Food, ex p Hamble (Offshore) Fisheries Ltd., (1995) 2 All ER 714] … Private law analogies from the field of estoppel are, we have seen, of limited relevance where a public law principle requires public officials to honour their undertakings and respect legal certainty, irrespective of whether the loss has been incurred by the individual concerned*

[Simon Atrill, 'The End of Estoppel in Public Law?' (2003) 62 Cambridge Law Journal 3]."

(emphasis supplied)

37. ***Consequently, while the basis of the doctrine of promissory estoppel in private law is a promise made between two parties, the basis of the doctrine of legitimate expectation in public law is premised on the principles of fairness and non-arbitrariness surrounding the conduct of public authorities****.* ***This is not to suggest that the doctrine of promissory estoppel has no application in circumstances when a State entity has entered into a private contract with another private party****. Rather, in English law, it is inapplicable in circumstances when the State has made representation to a private party, in furtherance of its public functions [Nicholas Bamforth, "Legitimate Expectation and Estoppel", (1998) 3 Jud Rev 196.] .*

…..

H.5. Indian law and the doctrine of legitimate expectations

38. ***Under Indian law, there is often a conflation between the doctrines of promissory estoppel and legitimate expectation****. This has been described in Jain and Jain's well known treatise, Principles of Administrative Law [M.P. Jain and S.N. Jain, Principles of Administrative Law, (7th Edn., 2013).] :*

…

39. While this doctrinal confusion has the unfortunate consequence of making the law unclear, citizens have been the victims. ***Representations by public authorities need to be held to scrupulous standards, since citizens continue to live their lives based on the trust they repose in the State. In the commercial world also, certainty and consistency are essential to planning the affairs of business. When public authorities fail to adhere to their representations without providing an adequate reason to the citizens for this failure, it violates the trust reposed by citizens in the State. The generation of a business friendly climate for investment and trade is conditioned by the faith which can be reposed in Government to fulfil the expectations which it generates****. Professors Jain and Deshpande characterise the consequences of this doctrinal confusion in the following terms:*

> *"Thus, in India, the characterisation of legitimate expectations is on a weaker footing, than in jurisdictions like UK where the courts are now willing to recognize the capacity of public law to absorb the moral values underlying the notion of estoppel in the light of the evolution of doctrines like LE [Legitimate Expectations] and abuse of power.* ***If the Supreme Court of India has shown its creativity in transforming the notion of promissory estoppel from the limitations of private law, then it does not stand to reason as to why it should also not articulate and evolve the***

> ***doctrine of LE for judicial review of resilement of administrative authorities from policies and longstanding practices. If such a notion of LE is adopted, then not only would the Court be able to do away with the artificial hierarchy between promissory estoppel and legitimate expectation, but, it would also be able to hold the administrative authorities to account on the footing of public law outside the zone of promises on a stronger and principled anvil****. Presently, in the absence of a like doctrine to that of promissory estoppel outside the promissory zone, the administrative law adjudication of resilement of policies stands on a shaky public law foundation."*

40. We shall therefore attempt to provide a cogent basis for the doctrine of legitimate expectation, which is not merely grounded on analogy with the doctrine of promissory estoppel. The need for this doctrine to have an independent existence was articulated by Justice Frankfurter of the United States Supreme Court in Vitarelli v. A Seaton [1959 SCC OnLine US SC 87 : 3 L Ed 2d 1012 : 359 US 535 (1959) the principle espoused in this judgment has been followed by this Court in Amarjit Singh Ahluwalia v. State of Punjab, (1975) 3 SCC 503 : 1975 SCC (L&S) 27, Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, (1975) 1 SCC 421 : 1975 SCC (L&S) 101 (concurring opinion of Justice K.K. Mathew) and Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] : (SCC OnLine US SC para 16)

"16. An executive agency must be rigorously held to the standards by which it professes its action to be judged. … Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. … This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

41. However, before we do this, it is important to clarify the understanding of the doctrine of legitimate expectation in previous judgments of this Court. In National Buildings Construction Corpn. v. S. Raghunathan [National Buildings Construction Corpn. v. S. Raghunathan, (1998) 7 SCC 66 : 1998 SCC (L&S) 1770] ("National Buildings Construction Corpn."), a three-Judge Bench of this Court, speaking through S. Saghir Ahmad, J., held that : (SCC p. 75, para 18)

"18. The doctrine of "legitimate expectation" has its genesis in the field of administrative law. ***The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural***

> ***justice. It was in this context that the doctrine of "legitimate expectation" was evolved which has today become a source of substantive as well as procedural rights****. But claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel."*
>
> *(emphasis supplied)*

42. However, it is important to note that this observation was made by this Court while discussing the ambit of the doctrine of legitimate expectation under English law, as it stood then. As we have discussed earlier, there was a substantial conflation or overlap between the doctrines of legitimate expectation and promissory estoppel even under English law since the former was often invoked as being analogous to the latter. However, since then and since the judgment of this Court in National Buildings Construction Corpn. [National Buildings Construction Corpn. v. S. Raghunathan, (1998) 7 SCC 66 : 1998 SCC (L&S) 1770] , ***the English law in relation to the doctrine of legitimate expectation has evolved. More specifically, it has actively tried to separate the two doctrines and to situate the doctrine of legitimate expectations on a broader footing.***

…

44. In a concurring opinion in Monnet Ispat & Energy Ltd. v. Union of India [Monnet Ispat & Energy Ltd. v. Union of India, (2012) 11 SCC 1]

*("Monnet Ispat"), H.L. Gokhale, J., **highlighted the different considerations that underlie the doctrines of promissory estoppel and legitimate expectation. The learned Judge held that for the application of the doctrine of promissory estoppel, there has to be a promise, based on which the promisee has acted to its prejudice. In contrast, while applying the doctrine of legitimate expectation, the primary considerations are reasonableness and fairness of the State action**. He observed thus : (SCC p. 153, paras 289-90)*

…

45. In Union of India v. P.K. Choudhary [Union of India v. P.K. Choudhary, (2016) 4 SCC 236 : (2016) 1 SCC (L&S) 640] , speaking through T.S. Thakur, C.J., the Court discussed the decision in Monnet Ispat [Monnet Ispat & Energy Ltd. v. Union of India, (2012) 11 SCC 1] and noted its reliance on the judgment in Attorney General for New South Wales v. Quin [Attorney General for New South Wales v. Quin, (1990) 64 Aust LJR 327 : (1990) 170 CLR 1] . It then observed : (P.K. Choudhary case [Union of India v. P.K. Choudhary, (2016) 4 SCC 236 : (2016) 1 SCC (L&S) 640] , SCC p. 267, para 56)

> *"56. … **This Court went on to hold that if denial of legitimate expectation in a given case amounts to denial of a right that is guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or in violation of principles of natural***

> ***justice, the same can be questioned on the well-known grounds attracting Article 14 of the Constitution but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles****."*

Thus, the Court held that the doctrine of legitimate expectation cannot be claimed as a right in itself, but can be used only when the denial of a legitimate expectation leads to the violation of Article 14 of the Constitution.

46. As regards the relationship between Article 14 and the doctrine of legitimate expectation, a three-Judge Bench in Food Corpn. of India v. Kamdhenu Cattle Feed Industries [Food Corpn. of India v. Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71] , speaking through J.S. Verma, J., held thus : (SCC p. 76, paras 7-8)

> *"7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law :* ***A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this***

element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. *The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.*

8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. ***Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process****. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise*

> *have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."*
>
> *(emphasis supplied)*
>
> *…*
>
> ***As such, we can see that the doctrine of substantive legitimate expectation is one of the ways in which the guarantee of non-arbitrariness enshrined under Article 14 finds concrete expression**."*
>
> ***(emphasis supplied)***

140. The Hon'ble Supreme Court has categorically held that the doctrine of substantive legitimate expectation is one of the ways in which the guarantee of non-arbitrariness enshrined in Article 14 finds expression. The conduct of KSEBL in retracting on its promise to extend the PPA once it found cheaper sources of power, in our mind, is a clear exhibition of arbitrariness and unfairness. In view of the above, we find no force in KSEBL and KSERC's contentions that the doctrine of legitimate expectation would not apply, since the in-principle approval for extension of the PPA was a conditional one. Even if the principle of estoppel may arguably not apply, the principle of legitimate expectation certainly does.

141. As held by the Hon'ble Supreme Court, legitimate expectation, as opposed

to estoppel, does not require consensus between the parties. The creation of a legitimate expectation is a unilateral act by the concerned State authority. It was thus erroneous on KSERC's part to hold, in the present case, that "…*A contract will be valid only if the parties to the contract make an unconditional agreement of the terms and conditions of the contract. But no agreement could be reached on the terms of the PPA and hence there was no PPA concluded. Hence the question of any promissory estoppels beyond 31.11.2015 does not arise in the present case.".*

142. Even the High Court, in its judgment dated 31.10.2017, which was incidentally passed exactly after two years of the PPA expiring, took note of the representations made by KSEBL and took exception to the way KSERC dismissed the Petition at the threshold, thereby setting aside KSERC's Order dated 26.10.2016. Some relevant extracts from the said judgment are being reproduced below:

> "*4. …. It is significant to note, at this stage, that the KSERC took note of the fact that in respect of the two-year extension period, KSEBL had indicated its in-principle approval to a PPA. Despite this, however, and after considering the clarifications that were offered by KSEBL to the queries put by the regulatory commission, the KSERC, by Ext.P18 order dated 26.10.2016*, *rejected Ext.P8 petition preferred by the petitioner company as not maintainable under Section 86 of the Electricity Act, 2003. The stand of KSERC, as revealed from Ext. P18 order, is that only KSEBL, in its capacity as a distribution licensee, could have filed a petition under Section 86 of the Electricity Act and*

not the petitioner company. Ex. P18 order is impugned in WP(C) No. 540/2017.

5. During the pendency of WP(C) No. 540 of 2017, and acting pursuant to Ex.P18 order of the regulatory commission, KSEBL passed Ext. P51 order indicating that it had decided not to go ahead with the proposal to extend the term of the PPA with the petitioner company.

----

8. Based on the directions in the interim order referred above, the KSERC, vide Ext. P46 order, granted approval to KSEBL for scheduling power and to purchase the power generated on unscheduled interchange basis from the 6500 MT of Naphtha purchased and stored by in the premises of the petitioner and the 6000 KL of Naphtha purchased and stored by the petitioner in the premises of IOCL. While the generation of electricity by the petitioner company and the supply thereof to KSEBL has since taken place during the pendency of these writ petitions, a dispute exists between the petitioner and KSEBL with regard to the tariff that will govern the said supply of electricity based on the interim order of this Court.

----

10. On a consideration of the facts and circumstances of the case and the submissions made across the bar, I am of the view that, for the reasons that are furnished hereunder, ***Ext. P18 order of the KSERC cannot be legally sustained. It will be recalled from the facts already stated in this judgment that, it was at the instance of the KSEBL- the distribution licensee – that the petitioner company preferred the petition under Section 86 of the Electricity Act for a consideration and approval, by***

> ***the regulatory commission, of the clauses of an agreement, to which the KSEBL had granted in-principle approval subject to certain modifications****. The regulatory authority was to consider the grant of approval to an arrangement that was contemplated between the parties before it for the purchase of power. While the KSERC did not go into the merits of the issues raised before it, it chose to reject the petition filed by the petitioner under Section 86 on a technical ground of maintainability. It is the stand of the regulatory commission that insofar as there was no concluded PPA between the KSEBL and the petitioner company, the latter cannot maintain a petition under Section 86 of the Electricity Act. The said finding of the KSERC cannot be legally countenanced for the following reasons viz….."*

143. Amongst the reasons cited by the High Court for setting aside KSERC's Order dated 26.10.2016 were the fact that KSEBL had accorded in-principle approval for extension of the PPA, the parties only differed on the issue of tariff, the fact that it was at the instance of KSEBL that BKPL filed the Petition before KSERC, and the fact that a statutory body such as KSERC shirked from its adjudicatory responsibilities by relying on technicalities.

144. **We are in disagreement with the State Commission that even in the Impugned Order, KSERC has, instead of resolving the points of differences between the parties, once again chosen to adopt a technical and myopic approach by viewing the Petition as one under Section 86(1)(b), rather than exercising its adjudicatory powers as directed by the High Court.**

145. This brings us to the second issue of whether KSERC ought to have

exercised its jurisdiction under Section 86(1)(f) of the Electricity Act. As the State regulator, KSERC is tasked with the responsibility of adjudicating upon disputes between licensees and generating companies and/or between the licensees inter-se. Reliance is placed on the judgment of the Hon'ble Supreme Court in ***Gujarat Urja Vikas Nigam Limited v. Essar Power Limited, (2008) 4 SCC 755.***

146. It is noteworthy that KSERC has refused to entertain the Petition on preliminary grounds, not once, but twice in the past. Section 86(1)(f) of the Electricity Act obliges (using the word "shall") KSERC to "*adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration*". Nowhere to be found in Section 86(1)(f) is the precondition that KSERC can enter the arena of adjudication only if a PPA is subsisting between the parties. It is trite that words cannot be inserted in such a manner into statutes, by courts, let alone by the regulatory authorities such as KSERC.

147. The existence of a PPA or a contractual arrangement of like nature can very well be the subject matter of the dispute to be adjudicated by KSERC. In fact, a jointly initialed PPA was tendered by KSEBL itself to KSERC. By way of an amendment to the Petition, BKPL sought adjudication of disputes arising out of an ongoing transaction, which plea was supported by KSEBL. However, KSERC declined BKPL's prayer for amendment of the Petition for adjudicating the point of difference raised by the parties.

148. In complete disregard of the High Court's judgment dated 31.10.2017, which directed KSERC to adjudicate the dispute on merits, KSERC erred in continuing to treat the Petition as a petition under Section 86(1)(b) rather than one under

Section 86(1)(f). In these circumstances, we are of the view that KSERC could not have held that in the absence of a valid agreement between the parties, it could not render any adjudication under Section 86(1)(f).

149. Notably, while rejecting the request for amendment, KSERC acknowledges that "*negotiation were conducted between the parties for extension of the PPA, but during the negotiation there were points of difference on many issues including, effective date of PPA, the tariff payable till the date of signing the PPA, lease rent, reimbursement of income tax, RoE, etc….".* It is precisely these points of difference that BKPL sought adjudication of, in exercise of KSERC's powers under Section 86(1)(f), which the High Court has categorically held to be wide. BKPL did not ask KSERC to create a contract with an unwilling party. It only wanted the resolution of issues that stood in the way of an extension of an existing PPA, in accordance with the clauses thereof. In these circumstances, we find that KSERC erred in holding that "…*A reading of the above sub-section [referring to Section 86(1)(f)] indicates that the adjudication process can take place between the parties provided, there is a valid agreement between the parties.."*

150. It is evident that the driving force behind the Impugned Order is KSERC's endeavor to protect the interests of the end consumer. However, the State regulator ought to have appreciated that its bounden duty is to balance consumer interests with the financial viability and growth of the electricity sector, as laid out in the National Electricity Policy, 2005, and the National Tariff Policy, 2006. Given that BKPL, at all points in time, acted on the representations of KSEBL and was consistently given the hope that the PPA would be extended and disputes regarding the tariff would be resolved, we find it unacceptable that KSERC has

dismissed the Petition on the ground of lack of *consensus ad idem.*

151. While it is true that a contract, even an implied one, requires a meeting of minds, in the present case, there was indeed a meeting of minds as far as the extension of the PPA is concerned. The points of disagreement between the parties were also crystallized. In these circumstances, it was incumbent upon the State regulator to step in and resolve the differences, in exercise of its powers under Section 86(1)(f), so that the interests of both parties were balanced, especially given that a legitimate expectation of the PPA being extended and the tariff being determined was created.

152. We are thus of the view that KSEBL must be held to its promise of extending the PPA by a period of two years from the date of expiry. Further, since KSERC has repeatedly abdicated its duty as a statutory regulator to exercise its jurisdiction and adjudicate upon the points of disagreement between BKPL and KSEBL, we hold that the PPA dated 03.05.1999 stood extended by a period of two years post expiry, i.e., from 01.11.2015 till 31.10.2017. Consequently, payments to BKPL for the power sold during the extended period would have to be made by KSEBL in accordance with the terms of the PPA.

153. In any case, we are of the view that KSERC has erred in seeking to compensate BKPL based on the average daily RTC price of IEX, instead of awarding a cost-reflective tariff, as it should have, in terms of Section 61 of the Electricity Act. Furthermore, since the Naphtha was procured and stored by BKPL at the direction of KSEBL, the actual cost of the Naphtha ought to have been granted.

154. KSERC was statutorily bound to abide by the commercial principles of recovery of cost, as envisaged under Section 61 of the Electricity Act. KSERC has considered the High Court's observations in its order dated 04.04.2017 to be set in stone, despite the High Court itself directing KSERC, in its judgment dated 31.10.2017, to consider the issue on merits, untrammeled by any of its findings in the order dated 27.04.2017. Though one of the options suggested in the order dated 04.04.2017 was for KSEBL to purchase electricity on UI basis, KSERC was still obliged to consider the issue from a neutral standpoint as the state electricity regulator and apply the first principles of the Electricity Act to determine cost-reflective tariff. This is particularly because the High Court, in its judgment dated 31.10.2017 accepted BKPL's case that "…*in as much as the Naphtha, that was used for the generation of the said electricity, was part of the consignment that was stored to meet the requirements of KSEBL under the PPA that held the field till 31.10.2015, the rates under the said PPA should govern the supply. The Commission shall therefore adjudicate on the said issue, as regards the rate applicable in respect of the above supply of electricity, also, untrammeled by any of the findings in its order dated 27.04.2017…granting approval to KSEBL to purchase the electricity on unscheduled interchange basis".* KSERC never adjudicated the issue in keeping with its statutory obligations and also as directed by the High Court.

155. On the contrary, KSERC almost solely relied on its order dated 27.04.2017, by holding that "…*Any generator can inject power in to the power system of this State, with the approval of the Kerala SLDC only. In the instant case the approval for injection of power was issued on specific direction in the order of this*

Commission dated 27.04.2017 in compliance with the order of the Hon'ble High Court dated 04.04.0217. Hence, the argument of the petitioner that they are eligible for the energy charges based on the cost of Naphtha cannot be agreed to". KSERC has outrightly turned a blind eye to the High Court's categorical direction in its judgment dated 31.10.2017, directing an adjudication of the issue on merits, untrammeled by the order dated 24.04.2017 (and consequently the Hon'ble High Court's own order dated 04.04.2017).

156. What truly stands out is KSERC's failure to consider the fact that BKPL was pushed into a situation where the Plant was kept operational, along with hazardous quantities of Naphtha, basis directions or representations of either KSEBL or the State Government. We find it egregious that the Impugned Order states: "*Here the plaintiff knowingly and voluntarily assumed the risks inherent in storing this explosive material, when he chose to execute the original PPA with the licensee".*

157. Firstly, had KSEBL not directed BKPL, by its letter dated 07.11.2014 to procure enough Naphtha, BKPL would not have procured and stored such huge quantities of the fuel. In fact, the High Court, in its judgment dated 31.10.2017, recognized this fact.

158. Secondly, had KSEBL scheduled power from the Plant in its usual course, instead of availing power from it only for two days between 04.05.2015 and 06.05.2015 in a period of almost one year, BKPL would have, in all probability, disposed of the stocked fuel and shut down the Plant.

159. Thirdly, had KSEBL made it crystal clear that the PPA would not be extended

at all, instead of granting in-principle approvals, securing further approvals from the State Government, and urging BKPL to file a petition for approval before KSERC, BKPL would not have found itself in a situation where it kept the Plant operational by incurring fixed costs.

160. In any case, there is no rationale for adopting the rate of average RTC clearing price of IEX, which is grossly insufficient to meet the fixed and variable costs involved. KSEBL, having enjoyed the stand-by status of the Plant and having consumed the electricity generated by the Plant, is bound to pay at least a reasonable price for the benefits enjoyed under the principles of *quantum meruit,* enshrined in Section 70 of the Contract Act. Reference may be had to the judgment of the Hon'ble Supreme Court in ***Food Corporation of India v. Vikas Majdoor Kamdar Sahkari Mandli Ltd. (2007) 13 SCC 544****.* In our view, the average RTC price is not a reasonable rate, given the extensive capital investment by BKPL for the procurement of Naphtha, O&M costs, and supply of power.

161. KSERC has sought to justify the grant of such an exceedingly insufficient consideration to BKPL by relying on KSEBL's letter dated 25.04.2016, which informed KSERC that KSEBL had contracted a sufficient quantum of cheaper power from outside the State through competitive tenders. KSERC has also relied on its own order dated 30.04.2013 in OP No. 02/2013, where it directed KSEBL that upon expiry of the PPA, power should not be drawn from BKPL's Plant. However, KSERC has turned a blind eye to the fact that, despite KSERC's direction dated 30.04.2013, KSEBL repeatedly represented to BKPL that the PPA would be extended. At the time when these representations were made, KSEBL did not have an alternate source of power and thus required BKPL's plant to

operate. As a statutory regulator and the custodian of the interests of all stakeholders, KSERC ought not to have allowed KSEBL to renege on its representation, especially after BKPL acted upon such representation to its detriment, simply because better options became available at a later point in time.

162. We thus hold that BKPL is entitled to all components of costs as provided for under the PPA, including the actual cost of supply, the annual fixed charges (including O&M expenses, interest on working capital and Return on Equity) and other reimbursements such as land lease charges and tax reimbursement, as claimed in the Petition i.e. Rs. 157.34 crores, subject to prudent check by the State Commission, along with carrying cost in terms of PPA. If any party moves to the Commission under dispute, the Commission is directed to decide the issue within two months.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 352 of 2018 has merit and is allowed.

The Impugned Order dated 05.10.2018 in O.P. No. 35 of 2015 is set aside to the extent as concluded herein above. KSEBL is directed to pay the electricity charges to BKPL for the energy generated and injected into the grid for the period between 25.05.2017 and 24.06.2017 as per the terms of the PPA dated 03.05.1999. KSEBL is also directed to pay to BKPL the fixed cost, lease rent, income tax, and other charges during the period from 01.11.2015 to 31.10.2017. It is also directed that BKPL is entitled to carrying cost @ LPSC or the relevant provision in the PPA from

the date of pending payment till the complete payment including the carrying cost is paid.

The BKPL's claim shall be subject to prudent check by the State Commission, strictly in compliance with the observations and conclusions made herein above. Since the Impugned Order has been set aside on the above grounds, Appeal No. 240 of 2019 stands dismissed.

The Captioned Appeal and IAs, if any, are disposed of in the above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 9th DAY OF SEPTEMBER, 2025.

(Virender Bhat)	**(Sandesh Kumar Sharma)**
Judicial Member	**Technical Member**

REPORTABLE/~~NOT REPORTABLE~~

pr/mkj/kks