

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI  
(APPELLATE JURISDICTION)**

**APPEAL NO. 41 of 2018**

**Dated : 07<sup>th</sup> January, 2020**

**PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON  
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

**IN THE MATTER OF :**

**M/s. Hinduja National Power Corporation Limited**

C/o Gulf Oil Corporation Limited,  
Post Bag No. 1 Kukatpally,  
Shanthnagar I.E., Hyderabad 500 108  
Telangana

.... **APPELLANT**

**Versus**

- 1. Andhra Pradesh Electricity Regulatory Commission**  
4<sup>th</sup> Floor, 11-4-660, Singareni Bhawan,  
Red Hills, Hyderabad- 500 004,  
Telangana
- 2. Southern Power Distribution Power Company Limited  
of Andhra Pradesh (APSPDCL)**  
Srinivasapuram, Thiruchanoor Road,  
Tirupati-517503, Andhra Pradesh  
Represented by Andhra Pradesh Power Purchase Centre  
Vidyuth Soudha, Khairatabad,  
Hyderabad- 500 082, Telangana
- 3. Eastern Power Distribution Company  
of Andhra Pradesh (APEPDCL)**  
P&T Colony, Seethammadhara,  
Visakhapatnam- 530 013, Andhra Pradesh

Represented by Andhra Pradesh Power Purchase Centre  
Vidyuth Soudha, Khairatabad,  
Hyderabad- 500 082, Telangana

.... **RESPONDENTS**

**Counsel for the Appellant(s)** : Mr. M.G. Ramachandran, Sr. Adv.  
Mr. Shubham Arya  
Ms. Purva Kohli  
Ms. PoorvaSaigal  
Ms. AnushreeBardhan  
Mr. Abhishek Sharma  
Ms. Nandita Bajpai

**Counsel for the Respondent(s)** : Mr. K.V. Mohan  
Mr. K.V. Balakrishna  
Mr. R.K. Sharma **for R-1**

Mr. Basava Prabhu Patil, Sr. Adv.  
Mr. Guntur Pramod Kumar  
Ms. Purna Singh  
Mr. Geet Ahuja  
Mr. Prashant Mathur  
Mr. K. Siva Rao **for R-2 & 3**

## **J U D G M E N T**

### **PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON**

1. The present Appeal is directed against the impugned order dated 31.01.2018 on the file of Respondent No. 1 – Andhra Pradesh Electricity Regulatory Commission (**hereinafter referred to as “APERC” or “State Commission”**) in O. P. Nos. 19 of 2016 and 21 of 2015 wherein IA Nos. 1, 2 and 3 of 2018 came to be disposed of by a common order.

2. It is necessary to narrate genesis for filing this Appeal so as to have complete and proper perspective of the entire matter.

(i) In response to a notification dated 30.03.1992 by the Ministry of Power, Government of India wherein policy to privatise generation of power was conceived, the then Andhra Pradesh State Electricity Board transferred the development of a power project situated at Devada near Visakhapatnam to Hinduja National Power Corporation Limited (for short **hereinafter referred to as “the Appellant”**).

(ii) The Appellant was entrusted with the development of power project since it had already obtained all statutory clearances including coal linkage. A Power Purchase Agreement (PPA), after some amendments, came into existence between the Appellant and the then Andhra Pradesh State Electricity Board on 15.04.1998. It is not in dispute that Ministry of Power, Government of India directed the State Government to prevail upon the Appellant to reduce the capital cost of the project in tune with NTPC Simhadri Stage-1.

(iii) APERC was constituted in the State of Andhra Pradesh in 1999.

(iv) The Appellant entered into Fuel Supply Agreement (FSA) on 04.08.2011 with Mahanadi Coal Fields. Subsequently, the FSA came to be revised on 26.08.2013 in line with the new model FSA.

(v) On 26.12.2012, Government of Andhra Pradesh expressed its interest to purchase 100% of power from the generating station of the Appellant. This was accepted and agreed upon by the Appellant. A Memorandum of Agreement (**hereinafter referred to as “MoA”**) came into existence between the Appellant and Respondents – Distribution Licensees for continuation of restated and amended PPA dated 15.04.1998 wherein the entire power generated from the generating station of the Appellant was agreed to be supplied to the Distribution Licensees.

(vi) It is not in dispute that way back in 2007, the Appellant offered 25% of power to the State Government at a regulated tariff, but the State Government insisted upon supply of 100% power at the tariff similar to Simhadri Stage-2 of NTPC, since all facilities were extended to the Appellant by the State Government for setting up of the said project. By the MoA mentioned above, parties agreed that all the terms and conditions of the restated and amended PPA dated 15.04.1998 shall be subsisting and binding on the parties except to the extent that may be required to be modified or substituted as may be agreed between the parties.

**(vii)** Petition No. 21 of 2015 came to be filed by the Appellant before the State Commission for determination of capital cost for the generating station as well as for determination of multi-year tariff. An addendum came to be filed on 28.07.2015 for determination of capital cost of Rs.8087 crores.

**(viii)** It is not in dispute that on 11.01.2016, the first unit of generating station achieved its commercial operation pertaining to 520 MW. On 01.03.2016, APERC passed an interim order and granted provisional tariff of Rs.3.61 per unit to the Appellant for supply of power to the Respondents – Distribution Licensees. This was subject to the rights and contentions of both the parties.

**(ix)** On 30.03.2016, the Appellant filed IA No. 05 of 2016 asking for direction to the Respondents – Distribution Licensees to pay Rs.1.80 per unit as variable cost and Rs.2.16 as fixed cost (total Rs.3.96 per unit) at 80% availability with effect from 01.04.2016.

**(x)** Continuation Agreement to the restated and amended PPA dated 15.04.1998 came to be entered into between the Appellant and Distribution Licensees on 28.04.2016. The licensees are Southern Power Distribution Power Company Limited of Andhra Pradesh (in short “**APSPDCL**”) and Eastern Power Distribution Company of Andhra

Pradesh (in short “**APEPDCL**”) – Respondent No.2 and 3 respectively herein.

(xi) On 11.05.2016, the Distribution Licensees filed Petition under Section 86(1)(b) of the Electricity Act 2003 (in short “**the Act**”) in OP No. 19 of 2016 seeking approval of the Continuation Agreement dated 28.04.2016.

(xii) On 01.06.2016, the State Government, vide Government Order, accorded approval of purchase of 100% of power, i.e. 1040 MW generated from Appellant’s generating station through Andhra Pradesh Power Coordination Committee (in short “**APPCC**”), a Committee constituted to represent Respondents – Distribution Licensees.

(xiii) The second unit also achieved its COD on 03.07.2016.

(xiv) On 06.08.2016, APERC passed an order enhancing the interim tariff to Rs.3.82 from Rs.3.61 per unit. On 30.11.2016, Respondents – Distribution Licensees filed two Petitions – O.P 28 and 29 of 2016 for determination of Aggregate Revenue Requirements (**ARR**) and tariff for the retail supply business for the Financial Year 2017-2018.

(xv) On 31.03.2017, the Appellant filed submissions in IA No. 05 of 2016 in O.P. No. 21 of 2015 seeking fixation of interim tariff at Rs.4.51 per unit since the same tariff of Rs.4.51 per unit was fixed by APERC in Tariff

Order 2016-2017 for other similarly situated projects of Andhra Pradesh Generation Corporation Limited, namely, Sri Damodaran Sanjeevaiah Thermal Power Station.

**(xvi)** On 31.03.2017, APERC disposed of Petitions 28 and 29 of 2016 filed by the Respondents – Distribution Licensees for determination of ARR and tariff for the retail supply business for the year 2017 -2018. Aggrieved by the said common order, the Appellant filed Review Petition before the State Commission. The Receiving Officer returned the papers of Reivew to explain within 15 days with regard to maintainability of the Review Petition.

**(xvii)** On 28.04.2017, APERC heard O.P No. 21 of 2015 along with IA No. 05 of 2016 and so also IA No. 09 of 2016 pertaining to determination of capital cost for the generating station. The matter was posted for further arguments on 15.05.2017. Apparently, O.P. No. 19 of 2016 filed by Respondents – Distribution Licensees seeking approval of the Continuation Agreement dated 28.04.2016 to the restated and amended PPA of 1998 was also heard.

**(xviii)** On 29.04.2017, the Appellant received a letter from APPCC pertaining to the subject of quantum of energy to be despatched from the generating station of the Appellant in terms of the Order dated 31.03.2017 passed by APERC wherein the Retail Supply Tariff of Respondent –

Distribution Company was determined. They also asked regarding quantum of purchase to be made by such distribution company from the Appellant's generating station.

**(xix)** On 13.05.2017, an Appeal came to be filed before this Tribunal challenging the common order dated 31.03.2017 passed by the State Commission in Petition Nos. 28 and 29 of 2016. The Appeal No. 153 of 2017 was numbered.

**(xx)** On 15.05.2017, APERC reserved the orders in O.P. No. 19 of 2016 and O. P. No. 21 of 2015 after hearing lengthy arguments.

**(xxi)** On 01.06.2017, Tribunal in Appeal No. 153 of 2017, passed orders directing Respondent – APERC to dispose of the two Petitions pending before it within a period of three months, i.e. on or before 14.08.2017. It also directed the Appellant to withdraw the Review Petition filed by it before the State Commission – APERC.

**(xxii)** On 05.08.2017, an IA came to be filed in the Appeal No. 153 of 2017 seeking extension of time for disposal of the two OPs pending before APERC. The Tribunal granted time till the end of October 2017 rejecting the extension of time sought till December 2017.

**(xxiii)** The Appellant also filed a Memo before the Tribunal endorsed by Respondents – Distribution Licensees seeking indulgence of the

Tribunal to extend time till 16.12.2017 in the light of the proposal from Respondents – Distribution Licensees for a discussion between the parties with the State Government on terms and conditions of generation and supply of power. This Tribunal extended time till 16.12.2017 for disposal of the O.Ps before the State Commission. Again an application was made by Respondents – Distribution Licensees for extension of time for disposal of the O.Ps till 16.04.2018 and the same came to be extended upto 15.01.2018.

**(xxiv)** There seems to be change of stand by Respondents – Distribution Licensees from 04.01.2018 when they filed IA No. 01 of 2018 in O.P. No. 19 of 2016 before the State Commission whereby they sought permission to reopen the case and permit it to withdraw the O.P. No. 19 of 2016 together with the initial PPA in public interest and resubmit the same if necessary. Similarly, IA No. 02 of 2018 came to be filed in O.P. No. 21 of 2015 seeking permission to reopen the case and the State Commission to return O.P. No. 21 of 2015 after permitting the distribution companies to withdraw O.P No. 19 of 2016.

**(xxv)** Respondents - Distribution Licensees filed IA Nos. 34 and 38 of 2018 before this Tribunal to direct APERC to pass orders on IA No. 01 of 2018 in O. P. No. 19 of 2016 and IA No. 02 of 2018 in O.P. No. 21 of 2015 at first instance and if necessary to pass appropriate orders on the

said two Petitions. APERC also filed a Memo on 05.01.2018 before the Tribunal to allow the State Commission to dispose of IA Nos. 01 and 02 of 2018 filed by the Respondents – Distribution Licensees in O.P. Nos. 19 of 2016 and 21 of 2015 respectively. On 10.01.2018, this Tribunal disposed of the IA granting extension of time to APERC to decide O.P. Nos. 19 of 2016 and 21 of 2015 by 31.01.2018.

**(xxvi)** On 31.01.2018, APERC passed the impugned order allowing the Distribution Licensees to withdraw O.P. No. 19 of 2016 rejecting the prayer of the Appellant to transpose itself as a petitioner in O.P. No. 19 of 2016 and in consequence of withdrawal of O.P. No. 19 of 2016, Respondent – APERC rejected O.P. No. 21 of 2015 without deciding the issues on merits pertaining to the subject of approval of capital cost and determination of multi-year tariff.

**(xxvii)** On 02.02.2018, the Appellant received an email from Andhra Pradesh State Load Dispatch Centre (**in short “APSLDC”**) informing that it would not schedule any power from the Appellant’s generating station since Respondent – Distribution Licensees till 02.02.2018 had scheduled power of 3273.83 MU which has crossed scheduling figure of 2822 MU projected in the Order dated 31.03.2017 passed by the State Commission in O.P. Nos. 28 and 29 of 2016. Aggrieved by this, the Appellant is before us filing the instant Appeal challenging the impugned order.

3. According to the Appellant, APERC was wrong in permitting the Respondents – Distribution Licensees to withdraw the Petition No. 19 of 2016 despite serious objections of the Appellant. The Appellant also contends that the State Commission was wrong in rejecting the Appellant's application for transposition as a petitioner in place of the Respondents – Licensees when the Respondents – Licensees sought to withdraw O.P. No. 19 of 2016. The Appellant further contends that Respondent – State Commission was not justified in rejecting O.P. No. 21 of 2015 without deciding the issue of determination of capital cost and tariff.

4. The Appellant, in the Grounds of Appeal, contends that the impugned order amounts to high handedness of Respondents – Distribution Licensees because subsequent to significant change in the position of the parties wherein substantial investment was made for the power project by the Appellant that too after achieving CODs dated 11.01.2016 and 03.07.2016 in respect of Unit-I and Unit-II respectively, they went back on their agreement.

5. Eversince COD, the Licensees have been scheduling and taking electricity till 02.02.2018. The State Commission, after hearing the two O.P. Nos. 19 of 2016 and 21 of 2015, reserved decision for a long time and repeatedly sought time from this Tribunal for pronouncing the orders. At that stage, entertaining the application for withdrawal of O.P. No. 19 of

2016 filed by Respondents – Distribution Licensees is perverse and capricious.

6. The Appellant further contends that APERC and Respondents – Distribution Licensees have over-reached the orders of the Tribunal in the earlier proceedings in Appeal No. 153 of 2017 wherein specific directions were given to pass orders in the two O.Ps pending from time to time. The Respondent – APERC ought not to have passed the impugned order without deciding the two Petitions on merits. It amounts to gross abuse of process.

7. The Appellant contends that APERC has mixed up the issue of duty of the Distribution Licensees to approach APERC for approval of PPA with the privilege of the generating company to seek such approval if circumstances warrant so. Placing reliance on the decision of the Tribunal in Appeal No. 47 of 2009 dated 19.04.2010 in “**Velagapudi Power Generation Limited vs. SPDCL and others**” is wrong since the said decision refers to only the duties of Distribution Licensees. APERC failed to appreciate the basic fact that a statutory duty is foisted on the Distribution Licensee in not only filing the petition for approval of PPA but also to maintain and prosecute the said proceedings to its logical end. The Distribution Licensees, no doubt, have the duty to file Petition for approval of PPA, but after filing the same, it has no right to withdraw at its

whims and fancies when the other/opposite party has already altered its position.

8. The Appellant further contends that in Appeal No. 153 of 2017, the Appellant had sought directions to Respondents – Distribution Licensees to continue to honour purchase of electricity from Appellant’s project and/or pay the fixed charges in case such electricity is not scheduled. The Appellant also accepted that, thinking that in case APERC decides O.P. Nos. 21 of 2015 and 19 of 2016 before this Tribunal disposing of the Appeal No. 153 of 2017, the Tribunal can dispose of the Appeal No. 153 of 2017 without any further orders. The Appellant had altered its position and proceeded on the basis that APERC would render its decision on merits in the two OPs by 14.08.2017. On the other hand, Respondent – APERC in passing the impugned orders has proceeded on wrong basis in considering the entire matters as if it is a civil suit or inter-se *lis* between the Respondents – Distribution Licensees as plaintiff and the Appellant as a defendant. In the case of a civil suit, claim of the plaintiff is to seek a decree against the defendant and defendant’s stand would be to oppose the said claim of the plaintiff. In such situations, the unconditional withdrawal of the suit under Order 23 Rule 1 of CPC will have no adverse impact on the interest of the defendant, since the claim against the defendant would be closed, which is beneficial to the defendant. Similar

exercise cannot be applied to regulatory jurisdiction to be exercised by the Respondent – State Commission.

**9.** The Appellant further contends that the State Commission without properly deciding the interest of the electricity sector in the State, the interest of consumers at large and without even considering the impact on the future investments in the State ought not to have proceeded in permitting the Respondents – Distribution Licensees to withdraw the Petition filed for approval of restated and amended PPA. This is nothing but defying the basic objective of the very constitution of Regulatory Commission for discharging various functions under Section 86 of Electricity Act 2003. The Appellant contends that the Respondent – APERC failed to discharge its duties to balance the interest of stakeholders for an organized and coordinated growth of the electricity industry in the State.

**10.** The Appellant further contends that the State Commission failed to appreciate that there is no absolute rule to permit withdrawal of suit or petition at the instance of the plaintiff/petitioner since nature of proceedings and the impact of such withdrawal need to be considered from the point of all stakeholders. The State Commission, according to the Appellant, has misapplied the law laid down by several Courts. According to the Appellant, once the matters were reserved for judgment, question of withdrawing the petition would not arise. There is no absolute right vested

with the Respondents – Distribution Licensees to withdraw unconditionally. The Respondent – APERC failed to note that Section 94 of the Electricity Act 2003 provides for application of limited provisions of CPC and Order 23 is not listed as one of the provisions in Section 94. The opinion of the State Commission that the Appellant has no common interest in the approval sought by the Respondent - State Commission is erroneous. Both O.P Nos. 21 of 2015 and 19 of 2016 pending before the State Commission was for common purpose of seeking approval of the State Commission to the continuation of the agreement including the capital cost and tariff related to the purchase of electricity by the Respondents – Distribution Licensees. Commonality of the approach in both the Petitions was at large.

**11.** According to the Appellant, APERC failed to understand that if O.P. No. 19 of 2016 is withdrawn, O.P. No. 21 of 2015 would become infructuous, thereby it has adverse impact on Appellant's interest who has invested substantial amount in the project in question. If the Appellant was transposed as the Petitioner in O.P. No. 19 of 2016 in place of the Distribution Licensees as the Appellant had valid and legitimate interest in pursuing the matter and the reliefs, it would have been a justified approach. The State Commission (APERC) by misapplying the principles laid down in the decisions has wrongly proceeded to dismiss the application of the Appellant seeking transposition.

**12.** According to the Appellant, APERC ought to have disposed of O.P. No. 21 of 2015 on merits even if O.P. No. 19 of 2016 was withdrawn. APERC failed to appreciate that in fact Respondents – Distribution Licensees had prevented the Appellant from selling a part of the capacity to the State of Telangana or others and rather insisted on taking 100% of the available capacity thereby the entire capacity of the Appellant's plant was encumbered to the State of Andhra Pradesh.

**13.** The Appellant further contends that termination of PPA has to be in terms of the agreement envisaged in the PPA. When a procedure is prescribed, the procedure and manner agreed between the parties cannot become null and void for not getting the PPA approved by the State Commission. The agreement dated 15.04.1998 has come into existence much prior to the constitution of the State Commission. Government of Andhra Pradesh approved the same. Respondent Nos. 2 & 3 (Distribution Licensees) are the successors to the Andhra Pradesh State Electricity Board and are bound by the decisions taken by the then Board. This is totally ignored by the Respondent – State Commission (APERC). The terms of restated and amended PPA were agreed to be modified to the extent provided in the Continuation Agreement dated 28.04.2016. The withdrawal of the Petition filed for approval of continuation agreement does not affect enforcement of amended and restated PPA dated 15.04.1998. The Respondent – State Commission failed to appreciate that the claim of

the Respondents – Distribution Licensees that the tariff of the Appellant's project being high is an afterthought since the Respondents – Distribution Licensees had full knowledge of the entire capital cost including interest during construction period. When they sought for approval of Continuation Agreement, this was very much within their knowledge. Therefore, reason of high capital cost at a later stage cannot be a good ground to withdraw the Petition.

**14.** The Appellant further contends that Section 21 of Andhra Pradesh Reforms Act, 1998 does not create any exclusive right in favour of the Respondent – Distribution Licensee alone to seek approval/consent to the PPA. The obligation and the restrictions referred to in the said Section 21 are applicable to both generators as well as licensees. The basic function of the State Commission is to be neutral and determine tariff and to regulate electricity purchase and procurement process. Therefore, the procurement process needs to be looked into irrespective of whether a generating company or distribution licensee chooses to file an application or not. Regulators can, on their own (*suo motu*), take up the task of determining the tariff and approving the PPA. Therefore, there is no exclusive right vested in the Respondent – Distribution Licensee to submit PPA for approval and seek withdrawal at its whims and fancies.

**15.** According to the Appellant, the State Commission failed to appreciate that the Respondents – Distribution Licensees are not making the payment for the electricity which the Appellant has declared available in accordance with the Regulations applicable. Interim payments were made in terms of the directions of the State Commission and this Tribunal. Despite this clear position, the State Commission failed to grant direction to make immediate payment of the outstanding amounts together with delayed payment surcharge. This has resulted in serious financial difficulties for the Appellant. The action of the Respondents – Distribution Licensees which is approved by the Respondent – State Commission has shaken the faith of the Appellant generator as an investor besides serious concern of the consortium of 14 public sector banks led by the State Bank of India who has financed the project to the extent of Rs.5330 crores apart from working capital which also runs into crores. The fixed standing charges including import of power due to forced shut down of the plant will cost about Rs.15 crores per month. The total outstanding money from the Respondents – Distribution Licensees is about Rs.486 crores. If the situation is continued, operation of the power station will come to a standstill is the stand of the Appellant.

**16.** With the above said grounds, the Appellant has sought for the following reliefs:

(a) Allow the appeal and set aside the order dated 31.01.2018 passed by the State Commission in OP No. 19 of 2016 and OP No. 21 of 2015 in regard to decision taken by the State Commission as listed in paragraph 1 of the Memo of Appeal;

(b) Pass such other Order(s) as this Hon'ble Tribunal may deem just and proper.

**17.** The contesting Respondents 2 & 3 placed on record their replies to the Appeal in brief as under:

**(i)** In terms of Section 61, 62, 86(1B) read with Section 181 of Electricity Act 2003 and also in terms of National Tariff Policy, the first Respondent – Commission passed Regulation 1 of 2008. In the said Regulation, Clause 5 of Regulation is relevant. According to Respondents 2 & 3, in terms of Regulation 1 of 2008, particularly Clause 5, the first Respondent is empowered to determine capital cost of generating station, only whose PPA has been concluded and was pending before the State Commission as on 06.01.2006. Further, appraisal of the project started prior to 06.01.2006 by the financial institutions for lending funds to the project on the basis of evidence of process of procurement of power by distribution licensee and the final PPA was filed before the State Commission by 30.09.2006. Therefore, the first Respondent is

precluded from entertaining any application subsequent to 30.09.2006 either with regard to approval of PPA or pertaining to determination of capital cost or tariff. The initial PPA was in 1994 which came to be revised in 1998 which expired by 2001. Thereafter, there was no extension of the PPA. In 2007, through a letter dated 05.01.2007, the Appellant approached Government of Andhra Pradesh seeking certain facilities to establish the project as merchant power plant. The Appellant achieved Financial Closure of the project by 29.06.2010 on its own without any PPA with the DISCOMs. Thereafter, the Appellant, in the year 2011 participated in case 1 bidding process initiated by the Respondents and offered 60% of the capacity. However, it was found to be L2 in the evaluation process.

**(ii)** On 06.08.2012, the Appellant submitted letter to the Chief Minister mentioning that its project was in advanced stage of completion and will be able to supply power by July 2013. The appellant also requested Government of Andhra Pradesh to cause directions to the concerned authorities to resolve all pending issues pertaining to the project, so that delay in commissioning of the project could be avoided. At this stage, since the State of Andhra Pradesh was having severe shortage of power, it intended to get

supply of 100% capacity of power from the project of the Appellant, entered a Memorandum of Agreement dated 17.05.2013.

**(iii)** Respondents 2 & 3 further contend that since the commencement of the project is subsequent to cut-off date i.e. 05.01.2006/30.09.2006, the parties are precluded from entering into any agreement to procure power for which tariff is to be determined under Section 62 of the Electricity Act of 2003. Since O.P. No. 21 of 2015 filed by the Appellant is contrary to National Tariff Policy and so also contrary to Regulation 1 of 2008, the first Respondent has no jurisdiction to entertain the said petition. Similarly, O.P. No. 19 of 2016 filed by Respondents 2 & 3 seeking approval of Continuation Agreement is not permissible in law to be considered by the first Respondent. Therefore, the impugned order is justified.

**(iv)** Since the Continuation Agreement has not seen the approval of the first Respondent as required under law, it cannot bind the parties. Therefore, the dispute in question being prior to the stage of valid PPA, the first Respondent has no power to adjudicate or decide the disputes now raised by the Appellant. In order to get jurisdiction to adjudicate, the first Respondent – State Commission must deal with a dispute that arise subsequent to the valid PPA. The Respondents had filed two writ petitions - 10814 and 13689 of 2018

against the orders passed by the Tribunal in admitting the Appeal and the interim order dated 16.03.2018. However, the said writ petitions are pending.

**(v)** Since the impugned order is passed prior to the approval of the PPA, there is no vested right to the Appellant. The proceedings under the Appeal relates to withdrawal of Petition No. 19 of 2016 filed by Andhra Pradesh DISCOMs. The right to withdraw a petition is absolute right of the party who files the petition; therefore, the said order does not come within the meaning of the order contemplated under Section 111 of the Electricity Act 2003.

**(vi)** Procurement of power for the financial years 2016-2017 and 2017-2018 is not in terms of the Continuation Agreement together with the PPA, but is in terms of Retail Supply Tariff Orders passed by the first Respondent – State Commission. The said quantum of power could not be supplied by the Appellant on account of want of Railway corridor and other problems. The power was procured at the adhoc rate of Rs.3.61 per unit at first instance and thereafter, it was at Rs.3.82 per unit subject to true-up as per the final order that may be passed. There was no separate order to pay any fixed charges for the balance capacity. Therefore, the PPA dated 15.04.1998 and the Continuation Agreement were never acted upon.

**(vii)** Respondents 2 & 3 also contend that the Appellant failed to achieve Financial Closure within the stipulated period and sought extension of the PPA which came to be extended up to 30.09.2001. Subsequently, request for extension of PPA was not accepted; therefore, the said PPA expired subsequent to 30.09.2001. For about six years, the Appellant abandoned the project. Thereafter, for the first time in 2007, wrote a letter to Government of Andhra Pradesh seeking certain facilities to develop their project as merchant power plant. Thereafter, it achieved the Financial Closure on its own in the year 2010.

**(viii)** The first Respondent has rightly considered the entire issues and passed orders permitting withdrawal of O.P.19 of 2016 and there is not any question of law to be decided. There is no mala fide or abuse of the process of the Court at the instance of Respondents 2 & 3. Withdrawal of O.P. 19 of 2016 together with Continuation Agreement to the PPA of 1998 has been approved by Council of Ministers which is clearly reflected in the Government Order dated 06.02.2018.

**(ix)** In the year 1994 itself, the Respondents have transferred all the licenses, approvals, permits, coal linkage, water required for setting up of the project to the Appellant. However, the Appellant

failed to achieve the Financial Closure in respect of extension of PPA up to 2001.

**(x)** Subsequent to closure of PPA, any investment made by the Appellant is on its own volition by availing loans from various banks and institutions for development of the project as a merchant power plant without any purchase agreement. Respondents 2 & 3 agreed to avail 100% power from the Appellant's project because of shortage of power in the year 2012-2013. Thereafter, both the parties entered into Memorandum of Agreement on 17.05.2013 whereby facilities sought by the Appellant were extended. However, the Appellant failed to complete the project as agreed upon; but completed only in the Financial Year 2016-2017 by which time the power supply position of Andhra Pradesh State was improved and in fact was surplus. Therefore, the Appellant's contention that they have altered its position based on the assurance of Respondents 2 & 3 is far from truth. Similarly, the Appellant's contention that they made substantial investment in the project and undertook supply of power based on the assurance of Respondents 2 & 3 is baseless.

**(xi)** In respect of Retail Supply Tariff, the required quantity of power was not supplied for want of railway corridor clearance for transportation of coal to its project. This is for the Financial Year

2016-2017 and so far as the Year 2017-2018, there was surplus power in the State of Andhra Pradesh; therefore, APERC permitted these Respondents to procure only 2822.55 MU i.e., 50% of the capacity of the project. Power supply was scheduled by Respondents 2 & 3 accordingly and stopped availing of power with effect from 02.02.2018. During the course of petition in O.P. No. 21 of 2015, these Respondents made several requests and first Respondent – State Commission issued direction to furnish actual cost reports reflecting capital cost of the project as was informed to lenders at the time of Financial Closure. But the Appellant failed to furnish such details of actual cost reports reflecting the project capital cost of all items. On 30.10.2017, the Appellant filed memo before the Tribunal and sought extension of time to comply with the Tribunal's Order dated 16.08.2017 till 16.12.2017 on the ground that there has been a review by State Government on the PPA entered between Respondents 2 & 3 with Independent power Producers including the Appellant herein.

**(xii)** The contention of the Appellant that generating company can also seek approval of the PPA before the State Commission is incorrect. In terms of Section 21 of AP Electricity Reforms Act, it is the licensee alone who can seek approval of PPA and not the generator. Therefore, it is a clear misunderstanding of the law by the

Appellant so far as the Section 21 of AP Electricity Reforms Act. Till the PPA gets its approval by the State Commission, the same is not enforceable like other civil contracts/agreements. Therefore, parties are entitled to rescind the agreement for appropriate reasons prior to the approval. In pursuance of the review of the PPAs by Government of Andhra Pradesh as admitted by the Appellant, it was these Respondents who decided to withdraw O.P. 19 of 2016 together with Continuation Agreement to the PPA of 1998.

**(xiii)** The Appeal filed before this Tribunal in Appeal No. 153 of 2017 was withdrawn by the Appellant on its own once Respondents 2 & 3 have complied with the Retail Supply Tariff Orders for the year 2017-2018. The settled law declared by the Hon'ble Supreme Court about right of withdrawal of proceedings filed by a party is very much clear and the first Respondent has followed the said precedent law declared by the Hon'ble Supreme Court in permitting the Respondents to withdraw the proceedings in O.P. No. 19 of 2016. If law permitted the Appellant, they could have initiated separate proceedings, if they were not happy with the withdrawal of the proceedings. The first Respondent has clearly mentioned the reason to avoid unjustified burden to the consumers in public interest for a long period of 30 years; it has passed the impugned order; therefore, it does not warrant interference.

**(xiv)** There is no settled law for the Court to permit withdrawal after the matter is reserved for orders and no vested right accrued to the generator; therefore, in the cases pertaining to power purchase, the judgments/precedents relating to civil cases are not ipso facto applicable.

**(xv)** To achieve the object of National Tariff Policy together with the object of Section 62, the first Respondent – State Commission was justified in passing the impugned order covering both the O.P Nos. 21 of 2015 and 19 of 2016. Apparently, PPAs were not pending as on the cut-off date to get jurisdiction for APERC to entertain the matters. This Tribunal also cannot entertain an Appeal against the orders of the first Respondent (impugned order).

**(xvi)** Similarly, the first Respondent – State Commission was justified in dismissing IA No. 03 of 2018 in O.P. No. 19 of 2016 seeking transposition of the Appellant in place of Respondents 2 & 3. In the absence of PPA, question of intendment of supply of power to the DISCOMs would not arise. Therefore, the first Respondent has no jurisdiction to determine the capital cost. As such, O.P. No. 21 of 2015 was closed in accordance with law. The claim of the Appellant that their case is on similar lines in O.P. 14 to 25 of 2012 is incorrect and the Appellant's case is not comparable. Even in accordance

with Clause 10.5 of the PPA, the generator/Appellant has the only right to terminate the PPA, but not otherwise. Therefore, the claim in the Appeal is not tenable.

**(xvii)** Since the Appellant is seeking approval of the PPA even after 17 years of its expiry, the terms of alleged PPA are not binding on the parties.

**(xviii)** Respondents 2 & 3 further contend that withdrawal of O.P. No. 19 of 2016 was not on the ground that tariff of the Appellant's project is being high. These Respondents withdrew its application well before it conferred any right on the parties on the ground that the circumstances that existed when Memorandum of Agreement dated 17.05.2013 ceased to exist due to default of the Appellant in completion of the project and failure to supply power as assured by the Appellant. To avoid unjustified burden on the end consumer, since the State of Andhra Pradesh had surplus power, O.P 19 of 2016 was withdrawn. These Respondents did not have the knowledge of IDC and aggregate capital cost as contended by the Appellant. In terms of the letter of the Appellant dated 14.01.2013, the project cost as per Financial Closure was Rs.5545 crores and work of the project was completed mostly since it was in advanced stage of completion. But to the surprise of these Respondents, the

Appellant came out with a huge project cost of Rs.8087 crores in 2016-2017.

**(xix)** The Appellant is not able to show any other provision of law to seek approval of the PPA. The provisions of AP Reforms Act except which are inconsistent are saved in terms of Section 185(3) of Electricity Act 2003. Even otherwise, Respondents 2 & 3 contend that, in terms of judgment of the Hon'ble Supreme Court in **TATA Power's** case, until PPA is approved, it remains as plan but not enforceable at law; therefore, not binding on the parties.

**(xx)** The claim of the Appellant that interim payment towards fixed charges is to be paid in terms of breakup of fixed and energy charges provided in the Tariff Order dated 31.03.2017 passed by the first Respondent – State Commission is factually incorrect. In terms of the impugned order, the Appellant has liberty to pursue first Respondent - State Commission for all remedies available to it under law for fixation and payment of a reasonable price for electricity supply to Respondents 2 & 3 by the Appellant.

**(xxi)** Respondents 2 & 3 also deny contention made by the Appellant that there is substantial investment made in the project through debts from the consortium of 14 public sector banks led by State Bank of India will render to bad financial position on account of

discontinuation of power procurement and non-approval of appropriate tariff by first Respondent. The power project of the Appellant, according to Respondent 2 & 3, has nothing to do with the financial burden or problems of the Appellant. These Respondents also deny claim of the Appellant that Respondents 2 & 3 – distribution companies owe a sum of Rs.486 crores towards supply of power from the date of COD.

**(xxii)** With the above averments Respondents 2 & 3 sought for dismissal of the Appeal.

**18.** Based on the above pleadings, the following questions of law arise for our consideration:

**A.** “Whether, in the facts and circumstances of the case, the State Commission was right in allowing the Respondent – Distribution Licensees to withdraw OP No. 19 of 2016 filed for approval of the Continuation Agreement dated 28.04.2016?”

**B.** “Whether, in the facts and circumstances of the case the State Commission was right in not allowing the transposition of the Appellant as the petitioner in OP No. 19 of 2016 when the Respondent – Distribution Licensees had filed the application for withdrawal of OP No. 19 of 2016?”

- C.** “Whether in the facts and circumstances of the case, the State Commission was right in disposing of OP No. 21 of 2015 filed by the Appellant without determination of capital cost and tariff?”

**19.** According to learned senior counsel, Mr. M. G. Ramachandran arguing for Appellant is, the very fact that the Appellant and Respondent entered into amended and restated PPA by virtue of Continuation Agreement dated 28.04.2016 and insistence of AP DISCOMs and State of Andhra Pradesh that 100% of energy generated from Appellant’s plant has to be supplied to the State of Andhra Pradesh and none else, on long term basis for more than 30 years, is established from a Memorandum of Agreement (MoA) which was executed on 17.05.2013 and letters of Government of Andhra Pradesh in 2012 and 2016. Therefore, according to Appellant, the PPA dated 15.04.1998 will get revived by virtue of MoA in 2013 and Continuation Agreement dated 28.04.2016. He further brought to our notice that both the parties to the documents agreed that tariff including admissible capital cost and capacity charges would be in accordance with the decision of the State Commission. They also agreed for fuel cost to be a pass through.

**20.** According to Appellant, having insisted upon 100% supply of energy, in fact consuming such energy from both the units now, it is not open to

the AP DISCOMs to retract from their commitment that too after filing OP No. 19 of 2016 for approval of Continuation Agreement which would revive the PPA dated 15.04.1998.

21. Learned senior counsel for Appellant further contends that OP No. 21 of 2015, entertained by the Commission, was filed for determination of capital cost; though it was initially for Rs.6998 crores, the Respondent-Commission entertained addendum filed by the Appellant when they sought for increase in the total estimated cost amounting to Rs.8087 crores. Therefore, according to Appellant, it was not justified on the part of the Respondents to raise objections at this stage that National Tariff Policy of 2006 and so also Regulation 1 of 2008 of Andhra Pradesh would come in the way of approval of Continuation Agreement (PPA) so also determination of capital cost.

22. Further, learned senior counsel for Appellant contends that it is well settled by this Tribunal in the case of “**BSES Rajdhani Power Limited vs Delhi Electricity Regulatory Commission**” in Appeal No. 106 and 107 of 2009 so also “**Noida Power Company Limited vs Uttar Pradesh Electricity Regulatory Commission and others**” in Appeal No. 88 of 2015 that National Tariff Policy does not in any manner affect the jurisdiction of the State Commission to determine tariff of a generating

company if it sells power to the distribution licensee in terms of Section 62 of the Act.

**23.** Learned senior counsel further contends that after reserving the orders in both OP Nos. 21 of 2015 and 19 of 2016, that too after a long process of three years and conclusion of lengthy arguments, it was not proper on the part of Respondent-DISCOMs to seek withdrawal of OP No. 19 of 2016, especially when the matters were reserved for orders by the Commission after taking several extensions to dispose of the OPs from this Tribunal. Therefore, he contends that it is nothing but with an ulterior motive on the part of the DISCOMs they have gone back on their commitment. He further contends that once the matter was reserved for judgment, question of reopening the petition would not arise, that too for the purpose of entertaining whims and fancies of AP DISCOMs to withdraw OP No. 19 of 2016 pending for orders. This would only show that the State Regulatory Commission which is expected to be a neutral entity and is expected to consider the matters before the Commission in a judicious manner has totally ignored its obligation and responsibility.

**24.** Learned senior counsel for Appellant further contends that Respondent-Commission ought to have taken into consideration that apart from interest of both the Appellant and AP DISCOMs, interest of consumers at large was involved, thereby philosophy underlying Section

86(i)(b) of the Act was given a go by. Even to consider the withdrawal application, there was no change of circumstances which prevailed at the time of conclusion of arguments by all the parties on merits. In the absence of any significant change i.e., reason for altering the position of the parties which would come in the way of approval of PPA in O.P. No. 19 of 2016, the State Commission ought not to have passed the impugned order is the stand of the Appellant.

**25.** Learned senior counsel for Appellant further submits that since both the Appellant and Respondent-DISCOMs were interested in the approval of Continuation Agreement, therefore they did not have any dispute with regard to determination of capital cost petition. Hence, the State Commission ought to have at least allowed the Appellant to transpose as Petitioner in OP No. 19 of 2016, since Appellant's interest was also involved in the matter having invested huge sums.

**26.** According to learned senior counsel for Appellant, the circumstances prevailed prior to 2013 including the allegation of delay on the part of the Appellant cannot be taken into account, since subject matter in MoA of 2013 and Continuation Agreement indicate that both the parties agreed upon terms and conditions indicated in the PPA which has to be revived; therefore, past events have no relevance. He further contends that the allegation of contingent contract i.e., condition of approval of PPA

contended by Respondent-DISCOMs has no ground to stand and has to be rejected, since the said defence was not the stand of AP DISCOMs when presented OP No. 19 of 2016 and while taking part in OP No. 21 of 2015. Therefore, the decision referred to by Respondents pertaining to contingent contract does not apply.

**27.** Further, it is submitted that the fundamental duty of the State Commission was to proceed with consideration of determination of capital cost by prudence check. Similarly, approval of PPA and determination of tariff is within the domain of Regulatory Commission where the State Commission has to exercise its judicious mind by taking into consideration interest of all the stake holders in the facts and circumstances presented before it. There could not have been unilateral disposal of the matter at the instance of AP DISCOMs. Therefore, after deciding OP No. 21 of 2015 on merits, the State Regulatory Commission ought to have proceeded to consider Continuation Agreement to arrive at the conclusion whether capital cost and resultant tariff would be conducive to the interest of the consumer at large. There is no analysis in this direction by the State Commission.

**28.** According to the learned senior counsel arguing for Appellant, once 100% available energy was insisted upon by AP DISCOMs, and after signing the firm agreement by both the parties, the Respondent-

Commission ought to have considered why additional capital expenditure on account of *force majeure* issues had occurred. Therefore, according to the Appellant, if prudence check was conducted in OP No. 21 of 2015, the Respondent-Commission would have understood the reasons and circumstances why capital cost was increased. Therefore, without proceeding with such exercise, when Appellant was legitimately expecting that the capital cost and approval of Continuation Agreement would be considered in accordance with the procedure contemplated, the Respondent Commission ought not to have passed the impugned order.

**29.** The Appellant also contends that a vested right had accrued to the Appellant to pursue both the petitions; therefore, allowing the withdrawal of application and rejecting transposition of Appellant as petitioner was not justified on the part of the Commission.

**30.** Learned senior counsel further contends that since the petition under 86(i)(b) cannot be considered as a regular suit where plaintiff seeks certain reliefs against defendant and defendant refuses or opposes the same, the Respondent Commission ought to have considered the adverse impact or prejudice which would be caused to the interest of the Appellant. The Appellant relies upon judgment in Appeal No. 285 of 2016“ ***DANS Energy Private Limited vs Uttrakhand Electricity Regulatory Commission***” to contend that approval of Continuation Agreement is not only in the interest

of Appellant, but also for the benefit of AP DISCOMs, and there was no lis as such between the parties. They also referred to "**Hulas Raj Baij Nath vs Firm K.B. Bass and Co**", (1967) 3 SCR 886 to contend that this decision was referred to by AP DISCOMs before the Commission and even in this decision, it was held that such withdrawal can be allowed if no prejudice or loss is caused to the other party.

**31.** *Per contra*, the Respondents-DISCOMs made the following contentions:-

According to learned senior counsel, Mr. Basava Prabhu Patil arguing for Respondents, the Appellant had not invested monies at the instance of Respondents. According to them, the initial PPA between the Appellant and the then APTRANSCO pertains to 1994 and in terms of the said agreement, the Appellant was expected to achieve Financial Closure within 12 months from the date of PPA and commence operations thereafter. However, the same could not be achieved by the Appellant within the stipulated time frame; therefore, the PPA came to be revised in 1998. Though the Appellant was expected to achieve Financial Closure and commercial operation in terms of agreement, the Appellant could not complete its target; therefore, further extension was refused and PPA expired in September 2001.

**32.** Subsequently, between 2007 and 2008, the Appellant again approached Government of Andhra Pradesh asking for certain facilities to establish the project to supply power in open access to the consumers of its choice (Merchant Power Plant) and the same came to be permitted under the Act. Therefore, on 29.06.2010, if the Appellant had achieved Financial Closure of the project, in the absence of any PPA, the said expenditure for the project was on its own is the stand of Respondents 2 & 3.

**33.** Learned senior counsel, Mr. Basava Prabhu Patil further contends that in the year 2011, the Appellant participated in the case-1 bidding and offered 60% of the capacity. However, the Appellant became L2 with a tariff of Rs.3.48 per unit during the evaluation process. As per the Construction Monitoring Report furnished in the month of November 2013, overall progress of the project as per Lender's Engineers report was 93.12%. Therefore, according to Respondents-DISCOMs, the Appellant is not justified in saying that the Appellant had invested huge money at the behest of Respondent Nos. 2 & 3 and achieved Financial Closure and completed 93.12% of the project before MoA/Continuation Agreement was entered into between the parties.

**34.** Next argument of learned senior counsel arguing for Respondents-DISCOMs is with regard to the contention of the Appellant to claim that the

Appellant ought to have been transposed as petitioner before the Respondent-Commission in terms of their application. Respondents-DISCOMs contend that a bare reading of provision of Order 23, Rule 1A of the CPC clearly indicate that such transposition of defendant is permissible in a case where the Appellant withdraws the suit then the defendant/respondent could be transposed as a petitioner if the said defendant/respondent has similar dispute with another defendant/respondent. Transposition provision does not contemplate inter change of parties and therefore, what the Appellant sought before the Respondent-Commission is absolutely impermissible before law as it is contrary to all settled principles.

**35.** Learned senior counsel arguing for Respondents-DISCOMs further contends that the applicability of Civil Procedure Code to proceedings of this nature is well settled. Though the Hon'ble Supreme Court, several High Courts and the Tribunal have held that the words in the Act, 2003, which says that Tribunal not bound by Civil Procedure Code, would not mean that Tribunal/Commission/forum is precluded from applying the principles of CPC. It only means that the Tribunal is not bound by the rigours of procedure, but it is free to apply the principles contemplated or the philosophy underlying a particular provision as long as it does not conflict with any express provisions of the Act. For this proposition, the Respondent-DISCOMs rely upon "***Srei Infrastructure Finance Limited***

***vs. Tuff Drilling Private Limited” (2018) 11 SCC 470 Paragraph 26 and 27, and New Bombay Ispat Udyog Ltd. vs Maharashtra Electricity Distribution Company Ltd & Anr.” (Appeal No. 55 of 2009) Paragraphs 12, 14, 17 to 27*** before this Tribunal.

36. He also relies upon ***“Anil Kumar Singh vs Vijay Pal Singh” (2018) 12 SCC 584, Paragraphs 23 and 24*** so far as withdrawal of suit under Sub Rule-1 and Sub Rule-3 of Order 23 Rule1 CPC.

37. Another argument raised by Respondents-DISCOMs is that in terms of Clause 4.1.1 (ii) of the Continuation Agreement, the procurers shall apply to the Commission for approval of the Amendment Agreement; therefore, the Appellant after having agreed that DISCOMs alone are required to file the petition before the Commission for approval of PPA, the Appellant cannot approach the Regulatory Commission for approval of PPA.

38. They also rely upon Regulation 3.3 & 3.4 of Regulation 1 of 2008 framed by APERC to contend that Distribution Licensee shall procure power in conformity with the plan as approved by the Commission.

39. Respondent-DISCOMs further contend that as per Section 21 of the Electricity Reform Act, only licensees are competent to seek approval/consent of PPA; therefore, question of transposing the Appellant

as a petitioner to OP No. 19 of 2016 would not arise. They also refer to Section 86(1)(b) of the Act to substantiate their contention that the State Regulatory Commission's duty is to refer electricity purchase and procurement made by distribution licensee including the price at which the electricity is procured. This is so when purchase of power was for the distribution and supply within the State.

40. They also bring to our notice the decision in "**Tata Power vs. Maharashtra Electricity Regulatory Commission**" (2009 (16) SCC 659) to contend that the duty of the Regulatory Commission is to regulate purchase and procurement of electricity made by the licensee and so far as generation, function of the Commission is to determine the tariff and in relation to supply of transmission and wheeling of electricity. For this proposition, they also rely upon decision of this Tribunal in "**Velagapudi Power Generation Limited vs. Southern Power Distribution Co. of A.P. &Ors.**" in Appeal No. 47 of 2009 to contend that the terms and conditions of PPA dated 25.02.2002 as amended on 23.08.2002 should receive the consent of the State Commission in terms of Electricity Reform Act, 1998, since the rights and obligations vested with the distribution licensee have to be approved by the Regulatory Commission. Therefore, in the said case, it was held that in the absence of no consent of the State Commission, such PPA was not enforceable.

41. They also refer to disputes with reference to Section 86(1)(f) to contend that the Respondent-Commission gets jurisdiction to adjudicate the disputes between the parties only post contract (PPA). They further contend that only DISCOMs are permitted under law to seek approval of the PPA and not the generator. The licensee alone has to approach the Commission for approval of PPA with the generator, once the Electricity Act, 2003 comes into force even if the tariff between the parties was approved by the concerned Commission. For this proposition, they rely upon decision of this Tribunal in “**Tamil Nadu Generation and Distribution Corporation Limited vs. M/s. Penna Electricity Limited & Anr.**” in Appeal No. 112 of 2012 and also “**Saheli Export Private Limited vs. Joint Electricity Regulatory Commission & Ors.**” in Appeal No. 22 of 2012.

42. Learned senior counsel for Respondent-DISCOMs further contends that the status of Agreement dated 28.04.2016 has to be considered as contingent contract till it is approved by appropriate Commission. According to the Respondent-DISCOMs, the right, if any, is created in favour of the Appellant would be only a right which may be one, that the parties agree, shall be enforceable only on the happening of some future event, as to which, neither of the parties makes any promise and which is therefore, collateral to the contract; its import being merely to mark the

moment at which a right is created, the contract become enforceable. Therefore, according to Respondents-DISCOMs, in every contract, it constitutes a relation between the parties to it and rights arising out of that relation, however, it does not follow that every contract creates a right which can be enforceable immediately. According to Respondents-DISCOMs, this proposition if compared to the facts of the present case, the PPA entered into between the parties is subject to approval of APERC; therefore, the PPA is only in the nature of contingent contract in terms of Section 31 of Indian Contract Act. Therefore, the enforceability of this document can happen only on happening of event that is contemplated in the contract i.e., approval of APERC. Since such condition did not happen, parties would not get any vested right is the stand of Respondents-DISCOMs.

**43.** Respondents contend that the Continuation Agreement is contrary to Regulation 1 of 2008 therefore it is invalid in the light of Clause 5.2(b) of the said Regulation and paragraph (h) of the Continuation Agreement.

**44.** Respondents-Discoms contend that neither the Respondent-Commission nor this Tribunal has any jurisdiction to entertain the issue in controversy i.e., to determine the capital cost of the project of the Appellant in the light of Clause 5.2(b) of Regulation 1 of 2008.

45. They again contend that in terms of Clause 5(i)(ii)(b) of Regulation 1 of 2008, Continuation Agreement so also MoA cannot be implemented.

46. Further, Respondent-DISCOMs rely upon Petition No. 1123 of 2016 dated 27.10.2017 on the file of Uttar Pradesh Electricity Regulatory Commission, Lucknow between **“Sukhbir Agro Energy Limited vs. U.P. Power Corporation Ltd. & Anr.”** for the following proposition:

*“In the light of pleading by both the parties the Commission has to first examine that whether the procurer is under any obligation to get the Power Purchase Agreement approved from the Commission or not because the petitioner has stated that since the PPA was as per the model PPA approved by the Commission therefore, the approval of the Commission was not required.”*

According to us, this judgment is not binding on us since it pertains to State Regulatory Commission.

### **DISCUSSION AND REASONING :**

47. The following documents clearly indicate that 100% of available power from the plant of the Appellant from both the units was agreed to be purchased by AP DISCOMs which was approved by Government of Andhra Pradesh, therefore, the same came to be committed on a long term basis for about 30 years.

(a) Amended and restated PPA dated 15.04.1998.

- (b)** Letter dated 26.12.2012 addressed to the Appellant from Principal Secretary, Government of Andhra Pradesh.
- (c)** Reply letter dated 14.01.2013 from the Appellant to Government of Andhra Pradesh.
- (d)** Memorandum of Agreement dated 17.05.2013 between the Appellant and Respondent – DISCOMs.
- (e)** Continuation Agreement dated 28.04.2016, and
- (f)** GO issued by Government of Andhra Pradesh dated 01.06.2016.

**48.** It is the case of the Appellant that in terms of the above documents, the restated PPA dated 15.04.1998 will stand revived. On reorganization of State of Andhra Pradesh in 2014, though State of Telangana could get 54% share of electricity from the Appellant's plant, the State of Andhra Pradesh specifically directed the Appellant not to sell electricity to any other person including the State of Telangana. This restriction on Appellant that the Appellant should not opt for sale of electricity in any other manner or to any other person is not denied by Respondent-DISCOMs. All these facts are reflected in the Memorandum of Agreement of 2013, Continuation Agreement and correspondences between the parties. The contention of Respondent-DISCOMs that the Appellant was a

merchant trader, therefore it cannot be concluded that there was an obligation of purchasing 100% energy from Appellant on the part of the DISCOMs was not in existence has to be rejected, for the simple reason that character of merchant trader if any to the Appellant comes to an end when 100% power available from the Appellant's project was insisted to be supplied to the two DISCOMs of Andhra Pradesh by Government of Andhra Pradesh at least from December 2012 onwards. Both the parties agreed that tariff including the admissible capital cost and capacity charges shall be decided by the State Commission (APERC). It was further agreed that the fuel cost will be a pass-through.

**49.** From the Continuation Agreement dated 28.04.2016 it is seen that COD of the first unit was achieved on 01.01.2016 and COD of second unit was achieved on 03.07.2016. It is pertinent to mention that on 01.06.2016, Andhra Pradesh Government by GO dated 01.06.2016 granted approval for purchase of 100% of power generated from the Appellant's generating plant at the tariff to be determined by APERC.

**50.** In terms of firm agreement dated 17.05.2013 between the parties it clearly indicates responsibilities undertaken till January 2018 would be implemented. These terms include Fuel Supply Agreement to be entered with Mahanadi Coalfields Limited (MCL), filing of a petition for

determination of capital cost based on claim of capital cost of Rs.6998 crores, completion of generating units and declaration of CODs, and supply of required electricity from Unit-1 with effect from 11.01.2016 and Unit-2 with effect from 03.07.2016.

**51.** The intention of the Respondent-DISCOMs to proceed with the terms of firm agreement dated 17.05.2013 which is approved by State of Andhra Pradesh is reflected through the following acts of Discoms.

- (a)** Signing of Continuation Agreement.
- (b)** Government Order dated 01.06.2016.
- (c)** Filing of O.P. No. 19 of 2016 by AP DISCOMs for approval of Continuation Agreement dated 28.04.2016.
- (d)** Scheduling electricity from Unit-1 and Unit-2 of the Appellant's generating station on respective dates, and
- (e)** agreeing to interim provisional tariff fixed by the State Commission at Rs.3.61 per kWh from 01.03.2016 and Rs.3.82 per kWh from 06.08.2016.

**52.** It is seen the Respondent-State Commission entertained O.P. No. 21 of 2015 filed by the Appellant for determination of capital cost of Rs.6998 crores. It also entertained the addendum filed on 28.07.2015 for

increase in the estimated capital cost of Rs.8087 crores; the O.P. No. 19 of 2016 filed by two DISCOMs for approval of Continuation Agreement was also entertained wherein they had sought for determination of provisional tariff of Rs.3.61 per Kwh which was increased to Rs.3.82 per Kwh from 06.08.2016.

**53.** The detailed public hearings, consultation process and hearing on merits in O.P. No. 21 of 2015 and O.P. No. 19 of 2016 were conducted by the State Commission. Both OPs were reserved for Judgment on 15.05.2017 after hearing all the stake holders. It is seen from the records as narrated above that in both OPs time for pronouncement of judgment/orders came to be extended from time to time by orders of this Tribunal. Ultimately, judgment/orders were pronounced on 31.01.2018. It is relevant to mention here that on 10.01.2018 when the Tribunal extended time for pronouncement of Judgment, this Tribunal did not express any opinion on the attempt made by AP DISCOMs in filing interlocutory applications before the State Commission for withdrawal of O.P. No. 19 of 2016 and consequential disposal of O.P. No. 21 of 2015, since these applications were already filed on 04.01.2018.

**54.** According to the Appellant there was no change of any circumstance that prevailed at the time of conclusion of submissions of all the parties, which could have caused serious or significant impact on the position of

the parties compelling the Respondent DISCOMs warranting withdrawal of O.P. No. 19 of 2016.

**55.** Appellant contends that the impugned order suffers from several legal infirmities. The Appellant contends that the State Commission totally ignoring the responsibility to discharge its functions by exercising powers conferred on it under Section 86(1)(b) of the Electricity Act 2003 to consider approval or rejection of the PPA, proceeded to allow withdrawal of the petition filed for approval of the Continuation Agreement. It ought to have looked into whether the amended and restated PPA and subsequent Agreement were in the interest of consumers and public interest at large. While exercising powers under Section 86(1)(b) of the Electricity Act 2003, the interest of all stakeholders has to be taken into consideration. Without expressing any opinion on the above stated agreements, the State Commission ought not to have allowed the AP DISCOMs to withdraw O.P. No. 19 of 2016 and consequently rejection of O.P. No. 21 of 2015.

**56.** It is also seen from records that as on the date of the impugned order, Respondent – DISCOMs have been scheduling power and were procuring electricity from the Appellant's project till 02.02.2018. It is further contended that the State Commission having repeatedly sought extension of time for pronouncing the decision in O.P. No. 21 of 2015 and O.P. No. 19 of 2016 and especially after obtaining extension of time from this

Tribunal ought not to have passed the impugned order. According to the Appellant, the State Commission totally ignored the interest of the Appellant since the Appellant had significantly advanced its position with the implementation of the Continuation Agreement dated 28.04.2016 and according to Appellant at least the Appellant ought to have been allowed to pursue the matter after transposing the Appellant as petitioner in O.P. No. 19 of 2016 since approval of Continuation Agreement pertains to the interest of the Appellant also.

**57.** Respondent-DISCOMs contended that the Appellant had not invested money at the instance of Respondents. Therefore, the capital cost now presented i.e., Rs.8087 Crores is exorbitant. As against this, the material brought on record clearly indicates that the amended and restated PPA was signed way back on 15.04.1998. The history narrated in the pleadings of the Appellant clearly indicate from 2007 onwards especially from the year 2011-12 when Appellant expressed interest to sell power to others, Government of Andhra Pradesh and AP DISCOMs insisted that 100% of the power generated by the Appellant plant has to be sold to the Respondent-DISCOMs. The Appellant was not allowed to sell power even to State of Telangana after reorganization of State of Andhra Pradesh. As already stated, the character of merchant trader of the Appellant came to an end when it agreed to sell entire power to Respondent-DISCOMs.

**58.** It is also noticed from records, that financial closure was achieved in the year 2010 and investments were made till 2013, thereafter, decision of 100% of energy being sold to AP DISCOMs came into existence, therefore the investment made by the Appellant cannot be said to be made voluntarily by the Appellant. 100% of electricity to be sold by Appellant was at the instance of State of Andhra Pradesh and AP DISCOMs. Revival of amended and restated PPA of 1998 was at the instance of AP DISCOMs since AP DISCOMs insisted supply of 100% of power generated by Appellant's plant. Therefore, now it is too late in the day for DISCOMs to blame failure or default or violation on the part of the Appellant.

**59.** The Respondents contend that the Appellant has no vested right till Continuation Agreement subject matter in O.P. No. 19 of 2016 is approved. In response to these arguments, Appellant contends that Respondent-Discom cannot approbate and reprobate because having committed to purchase/insisted for purchase of 100% of power generated from the Appellant's plant when there was scarcity of power in the State, cannot be permitted to back out on this promise on the ground of surplus power especially when O.P. No. 19 of 2016 was reserved for orders to consider approval of Continuation Agreement. The Respondent-

DISCOMs to strengthen their stand also contend that amended and restated PPA of 1998 read with Continuation Agreement of 2016 are void since they are contrast to National Tariff Policy of 2006 as notified by the Central Government in terms of Section 3 of the Act. According to Appellant, the said contention is absolutely incorrect on the part of the Respondents. Appellant contends that the procurement of power under PPA through negotiated route is not contrary to National Tariff Policy as contended by DISCOMs. They rely on the scope of provisions contained in National Tariff Policy.

**60.** The provisions contained in National Tariff Policy 2006 providing for competitive bidding process for procurement of electricity by the distribution licensee is not applicable to the facts of the case is the stand of Appellant. As contended by the Appellant, the Electricity Act provides two alternatives for procurement of power i.e., Section 62 of the Electricity Act wherein the tariff of a generating company selling power to distribution licensee in terms of Section 62 has to be decided based on the capital cost and prudent expenditure to be approved by the State Commission. The other procedure is under Section 63 of the Act where determination of tariff is done through competitive bidding process. In this process, it is not open to the Central Government to restrict the procurement source under Section 63 of the Act. This is only with regard to section 63 of the Act.

61. In the case of “**BSES Rajdhani Limited vs. Delhi Electricity Regulatory Commission**” (Appeal Nos. 106 & 107 of 209) and “**Noida Power Company Limited vs. Uttar Pradesh Electricity Regulatory Commission and others**” (Appeal No. 88 of 2015) this Tribunal opined that National Tariff Policy does not in any manner affect the jurisdiction of the State Commission to determine the tariff of a generating company selling power to the distribution licensee in terms of Section 62 of the Act. Therefore, it is clear under section 62 of the Electricity Act, 2003 – Determination of tariff for negotiated PPA is valid despite National Tariff Policy, 2006. The gist and relevant paragraphs are as under:

- i) Section 62(1)(a) of the Act provides that appropriate commission shall determine the tariff in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee, whereas Section 63 of the Act provides that the tariff arrived through a transparent competitive bidding process shall be adopted by the appropriate commission. These two sections provide for two alternatives to the concerned parties to procure power with the approval of tariff by the appropriate commission. In terms of Section 62, the appropriate commission shall determine the tariff, but under Section 63 when the tariff has been arrived at or determined by the competitive bidding process, in

such a case the appropriate commission has to adopt such tariff subject to a condition that such tariff is the outcome of transparent process of bidding in accordance with the guidelines issued by the Central Government. The powers of the Commission under Section 62(1)(a) and Section 86(1)(b) cannot be in any manner be restricted or whittle down by way of a policy document or subordinate legislation or notification issued by the Government/Executive.

ii) The relevant paragraphs in *BSES Rajdhani Power Limited's* case are as under:

*"19. Clause 5.1 of National Tariff Policy provides that the power procurement for future should be through a transparent Competitive Bidding Process using the guidelines issued by the Central Government on 19.01.2005. Further, giving a clarification, Ministry of Power issued a circular dated 28.08.2006 clarifying the above position. The relevant extracts of the said clarification issued by the Ministry of Power is reproduced below:*

*".....3. Therefore, the concerned State Commission has a jurisdiction to regulate electricity purchase and procurement process of a distribution licensee under [Section 86\(1\)\(b\)](#) of the Act except the tariff and the tariff related matters of the PPA.*

*4. It is further, clarified that the PPA in cases where tariff has been determined through Competitive Bidding Process under [Section 63](#) of the Act and in accordance with the relevant guidelines issued by the Central Government, it is finalised within the bidding process and the Appropriate Commission is required to adopt the tariff in accordance with the provisions of the law".*

20. The above relevant quoted portions of the clarification would make it clear that [Section 63](#) is optional route for procurement of power by a distribution licensee and in case the same is followed, the Appropriate Commission is required to adopt the said tariff. Therefore, the power under [Section 62\(1\)\(a\)](#) and [Section 86\(1\)\(b\)](#) conferred on the State Commission cannot in any manner be restricted or whittled down by way of a policy document or a subordinate legislation or notification issued by the Government/Executive. Any rules, or executive instructions or notification which are contrary to any provisions of the tariff statute shall be read down as ultra vires of the parent statute. This is a settled law as laid down by the Supreme Court in (2006) 4 SCC 327 in Kerala Samsthana Chethu Thozhilali Union vs State of Kerala and Ors. (quoted below)

"17. A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by Parliament or the State Legislature:

21. Another decision cited by the Ld. Counsel for the Appellants is (1992) Supp (1) SCC 150 in State of Madhya Pradesh versus M/s G.S. Dall and Flour Mills (quoted below)

"19. The second ground on which the Full Bench has sought to invoke the instructions is also not correct. Executive instructions can supplement a statute or cover areas to which the statute does not extend. But they cannot run contrary to statutory provisions or whittle down their effect".

22. In the light of the above rationale laid down by the Supreme Court, clause 5.1 of the NTP which is a subordinate legislation would not restrict or whittle down the scope of the statutory powers conferred to a State Commission under [Section 62\(1\)\(a\)](#) especially when it is noticed that

clause 5.1 of NTP would apply to [Section 63](#) only and not to [Section 62](#) which is a substantive provision. As stated above, [Section 63](#) is an exception to [Section 62](#) and the same cannot be taken away by way of a policy document like guidelines - clause 5.1 of NTP.

23. Secondly it has been held that clause 5.1 of the NTP which is a policy direction cannot be held to control or override [Section 62](#) of the Act and when these two provisions cannot be reconciled, [Section 62](#) alone must prevail.

25. In regard to the first aspect, it has to be stated that the procurement of power by distribution licensees and the price at which the same is done is approved by the State Commission under [Section 86\(1\)\(b\)](#) of the Act. The power to regulate the procurement process of a distribution licensee is a wide ranging power vested exclusively with the State Commission. This cannot be curtailed in any manner by the tariff policy. In fact, even for inter-State transactions, the State Commission has been conferred with the power under [Section 64\(5\)](#) of the Act to determine the tariff for the supply of power by a generating company situated outside the State from whom a distribution licensee is procuring the power.

26. In regard to the second aspect, it is to be pointed out that [Section 79\(1\)\(a\)](#) and (b) of the Act confers the power on the Central Commission to regulate the tariff of a central generating station and of generating stations with a composite scheme to supply power to more than one State. The clear demarcation of the separate and independent jurisdiction exercised by the Central Commission and the State Commissions in discharging their statutory functions has been underlined in Rule 8 of the Indian Electricity Rules, 2005.

31. In regard to the third aspect it is to be stated that clause 5.1 of the NTP which relates to the power under [Section 63](#) of the Act cannot be read to debar the State Commission from exercising its statutory power

for determination of tariff under [Section 62\(1\)](#) of the Act for all future procurement of power.

32. In the light of the above discussions, the argument advanced by the Ld. Counsel for the Appellants that resort to tariff determination under [Section 62\(1\)\(a\)](#) without adopting the Competitive Bidding Process will render clause 5.1 of the NTP redundant as the distribution licensees in the future will procure power from the generating companies only through the negotiated route, cannot be accepted as it is always open to the State Commission to direct the distribution licensee to carry out power procurement through Competitive Bidding Process only in case where the rates under the negotiated agreement are high. In other words, the State Commissions have been given discretionary powers either to chose [Section 62, 62\(1\)\(a\)](#) to give approval for the PPA or to direct the distribution licensee to resort to the Competitive Bidding Process as per clause 5.1 of the NTP read with [Section 63](#) of the Act. As such, the main contention urged by the Ld. Counsel for the Appellant would fail.

33. Nextly, it was contended by the Ld. Counsel appearing for the Appellant that by approaching the State Commission for the approval of the PPA, MPL (R-3) and NDPL (R-2) have achieved and obtained orders indirectly from the State Commission what they could not achieve directly before the Central Commission in respect of claim for exemption from the applicability of clause 5.1 of NTP. This contention also, in our view, lacks substance. The MPL (R-3) has merely approached the Central Commission to seek a clarification for the question as to whether it will fall within the exempted category from clause 5.1 of NTP as it is state owned by virtue of the nature of control exercised by the Damodar Valley Corporation, a Central Government company. In the said petition the Central Commission did not give any findings with regard to the issues concerning the determination of tariff of MPL (R-3). It is clear from the order dated 17.01.2007 passed by the Central Commission that the Central Commission carefully refrained from finding any issue relating to clause 5.1 of NTP and instead the Central Commission directed the MPL

(R-3) to approach the Central Government to seek such clarification as it felt that it does not have the jurisdiction in adjudication of such matters. This order cannot be treated as one relating to tariff determination. As a matter of fact, the Central Government has clearly observed in its order dated 28.08.2006 that it is for the Central Government to interpret its policy to determine whether a particular utility falls outside the scope of clause 5.1 of the NTP. Such an observation cannot be construed to be a finding nor a direction of the Central Commission. As such the observation does not have a binding effect. Nowhere in the order the Central Commission observed that clause 5.1 of the NTP will be binding on the State Commission while exercising their powers under [Section 86\(1\)\(b\)](#) to approve all future procurement of power by the distribution licensee. The fact that MPL (R-3) did not chose to approach the Central Government as directed by the Central Commission for a clarification cannot prevent the MPL (R-3) from entering into any contract with a distribution licensee through negotiated route nor would it prevent the NDPL (R-2) to procure power from the MPL (R-3), the generating company through a contract to be approved by the State Commission. It cannot be said that MPL (R-3) has done anything which it otherwise is restricted in law to do. So far as NDPL (R-2) is concerned, it is purely a decision of the State Commission to decide whether to approve a negotiated tariff for the NDPL (R-2) under [Section 62](#) or to direct the licensee to adopt the Competitive Bidding Process under [Section 63](#) read with clause 5.1 of the NTP. Therefore, the principle that a person cannot be allowed to do something indirectly that he cannot do directly is not applicable to the present facts of the case.”

iii) In **Noida Power Company Limited’s** case, the decision in BSES Rajdhani Power Limited’s case was re-affirmed. The relevant paragraphs at 21, 22 read as under:

“21. The points which arose for consideration before this Tribunal inter alia were whether the compliance with Competitive Bidding Process as envisaged in Clause 5.1 of the National Tariff Policy is mandatory for

procurement of power by a distribution company and whether [Section 63](#) of the Electricity Act is the exception to [Section 62](#) and the guidelines issued by the Central Government will operate only when the tariff is being determined by the Competitive Bidding Process. This Tribunal observed that there are two routes and options provided under the [Electricity Act](#): (a) tariff determination under [Section 62\(1\)\(a\)](#) by the Appropriate Commission in terms of [Section 79](#) and [Section 86](#) of the Electricity Act and (b) tariff discovery in terms of the Competitive Bidding Process in accordance with the Guidelines issued by the Government of India which shall be binding on the Appropriate Commission under [Section 63](#) of the Electricity Act. This Tribunal considered [Section 63](#) of the Electricity Act and Clause 5.1 of the National Tariff Policy which provides that the power procurement for future should be through a transparent Competitive Bidding Process using Guidelines issued by MoP on 19.1.2005 and also considered clarificatory circular dated 28.8.2006 issued by MoP and held that [Section 63](#) is optional route for procurement of power by a distribution licensee through Competitive Bidding Process and in case the same is followed, the Appropriate Commission is required to adopt the said tariff. However, after referring to relevant judgments of the Supreme Court, this Tribunal held that the power under [Section 62\(1\)\(a\)](#) and [Section 62\(1\)\(b\)](#) conferred on the State Commission for determination of tariff through negotiated route cannot in any manner be restricted or whittled down by way of a policy document or a subordinate legislation or notification issued by the Government/Executive and any rules or executive instructions or notifications which are contrary to any provisions of the tariff statute shall be read down as ultra vires of the parent statute. This Tribunal rejected the contention that tariff determination under [Section 62\(1\)\(a\)](#) without adopting Competitive Bidding Process will render Clause 5.1 of the National Tariff Policy redundant as the distribution licensees in future will procure power from the generating companies through the negotiated route. This Tribunal observed that the said submission cannot be accepted as it is always open to the State Commission to direct the distribution licensee to carry out power procurement through Competitive Bidding Process only in case where the rates under the negotiated agreement are high. This Tribunal

clarified that the State Commissions have been given discretionary powers either to choose [Section 62, 62\(1\)\(a\)](#) to give approval to the PPA or to direct the distribution licensee to resort to the Competitive Bidding Process as per Clause 5.1 of the National Tariff Policy read with [Section 63](#) of the Electricity Act.

22. We find that the State Commission was mindful of this judgment. It has made a reference to it, but it has not discussed it at length or applied it to the facts of the instant case. The State Commission has taken a view that the said judgment relates to period prior to 5.1.2011. The State Commission has observed that after 5.1.2011 no MoU route long term agreement has been allowed by it in line with MoP Guidelines. It has then given a categorical finding that after 5.1.2011 for long term power purchase only competitive route is available. It is pointed out to us that on 5.1.2011, MoP had only brought in the procurement of power from the Government Generating Companies also under the Guidelines for Competitive Bidding Procurement which was notified in 2006. There was no other change in the Guidelines to conclude that the procurement of power from non-Governmental Generating Companies was modified on 5.1.2011 and, therefore, BSES Rajdhani will continue to apply to the present case. We do not want to express any opinion on this aspect but we find that the State Commission has not considered this submission. We say so because there is no discussion in the impugned order in regard to this submission. The State Commission's observation that for long term power purchase, only competitive route is available appears to be in teeth of the clear finding of this Tribunal in BSES Rajdhani that the procurement of power through the negotiated route and not through the competitive route is permissible under [Section 62](#) of the Electricity Act notwithstanding [Section 63](#) thereof and MoP Guidelines mandating such Competitive Bidding Process for procuring power on long term basis. Undoubtedly, this Tribunal has also laid down that the State Commissions have been given discretionary powers either to choose [Section 62, 62\(1\)\(a\)](#) to give approval to PPA or to direct the distribution licensee to resort to the Competitive Bidding Process as per Clause 5.1 of the National tariff Policy. The State Commission,

*therefore, can in its discretion choose either course. But, exercise of discretion has to be based on rules of reason and justice. Arbitrary exercise of jurisdiction is opposed to principles of fair play. While passing discretionary orders, regard must be had to relevant as well as irrelevant considerations (Delhi Science Forum). In this case, we find that the impugned order is sans reasons. It has not taken into consideration the Appellant's case regarding amended Guidelines. There is also no discussion on the factual aspect particularly the data submitted by the Appellant. The State Commission must state, after taking into considerations all relevant facts as to why it has exercised its discretion in favour of Competitive Bidding Process."*

**62.** Therefore, it is well settled that National Tariff Policy does not in any manner affect the jurisdiction of the State Commissions to determine the tariff of a generating company selling power to the distribution licensee in terms of Section 62 of the Act.

**63.** Respondents-DISCOMs rely on Regulation 3.3 & 3.4 of Regulation 1 of 2008 framed by APERC in support of its contention that Distribution Licensee shall procure power in conformity with the plan as approved by the Commission, which read as under:

*"3.3 The Distribution Licensee shall procure power, under this Regulation, in conformity with the Power Procurement Plan as approved by the Commission.*

*3.4 Each application for power procurement or the proposals referred to in clause 5 of this Regulation shall contain an*

*explanation as to how the proposed procurement conforms to the Power Procurement Plan, or the reasons for deviations.”*

64. They further contend that in terms of Cause 5.2(b) of Regulation 1 of 2008 and Paragraph (h) of the Continuation Agreement and in terms of settled law, if such Continuation Agreement is contrary to the Regulation 1 of 2008, the Continuation Agreement is invalid and consequently, APERC has no power to approve PPA and determine capital cost. Hence, question of transposition of the Appellant as petitioner would not arise. For this proposition, they rely upon the case of **“PTC India Limited Vs Central Electricity Regulatory Commission” (Civil Appeal No. 3902 of 2006) Paragraph 59** which reads as under:

*“59(ii) A Regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities in as much as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said Regulations.”*

65. The next argument of the Respondents-DISCOMs is that the Respondent-Commission or this Tribunal has no jurisdiction to entertain the issue in controversy i.e., to determine the capital cost of the project of the Appellant or to consider PPA entered between the Appellant and Respondents since the same is not permitted under Clause 5.2 (b) of Regulation 1 of 2008. They rely upon the decision in **“Official Trustee,**

**West Bengal &Ors. vs. Sachindra Nath Chatterjee & Anr.” (AIR 1969 823)**, which read as under:

*“From the above discussion it is clear that before a Court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject matter' of the suit. Its jurisdiction must include the power to hear and decide the questions at issue, the authority to hear and decide the particular controversy that has arisen between the parties”.*

**66.** Respondents-DISCOMs further contend that DISCOMs cannot be bound by Estoppel in light of Regulation 1 of 2008 framed by APERC. According to Respondents-DISCOMs, in terms of Clause 5(i)(ii)(b), the Continuation Agreement dated 28.04.2016 so also MoA dated 17.05.2013 cannot be implemented, since they are violative of the above said Regulations. For this proposition, they rely upon the case of Hon'ble Supreme Court in **“H.S. Rikhy and Others vs. New Delhi Municipal Committee” Para 21 of AIR 1962 SC 554**, so also **“APTRANSCO vs. Sai Renewable Power Pvt. Ltd” Para 41 of (2011) 11 SCC 34**, which read as under:

**Para 21 of (AIR 1962 SC 554)** in the case of **H.S. Rikhy and Others vs. New Delhi Municipal Committee:**

*“In this connection, it is also convenient here to notice the argument that the Committee is estopped by its conduct from challenging the enforceability of the contract. The answer to the argument is that where a statute makes a specific provision that a body corporate has to act in a particular manner, and in no other that provision of law being mandatory and not directory, had to be strictly followed. The statement of the law in paragraph 427 of the same volume of Halsbury's Laws of England to the following effect settles the controversy against the appellants:*

*"Result must not be ultra vires - A party cannot by representation, any more than by other means, raise against himself an estoppel so as to create a state of things which he is legally disabled from creating. Thus, a corporate or statutory body cannot be estopped from denying that it has entered into a contract which it was ultra vires for it to make. No corporate body can be bound by estoppel to do something beyond its powers, or to refrain from doing what it is its duty to do....".*

**Para 41 (2011(11) SCC 34) in the case of *APTRANSCO Vs Sai Renewable Power Pvt. Ltd.:***

*“41. In our country, the law of promissory estoppel has attained certainty. It is only an unambiguous and definite promise, which is otherwise enforceable in law upon which, the parties have acted, comes within the ambit and scope of enforcement of this principle and binding on the parties for their promise and representation. It will be difficult for the Court to hold that the guidelines can take the colour of a definite promise which in the letters of the Central Government itself were proposals to the State Government. Besides that, if for the sake of argument, we treat the State letters/circulars as promise or representations to the private parties*

*like the respondents, even then, they led to the execution of a definite contract between the parties which will purely fall in the domain of contractual law. These contracts specifically provided for review and when reviewed in the year 2001 parties not only accepted the order but executed contracts (PPAs) in furtherance of it. In these circumstances, we are unable to accept the argument that the State or the Regulatory Commission or erstwhile State Electricity Board were bound to allow same tariff and permit third party sales for an indefinite period. To this extent, authorities, in any case, would not be bound by the principle of estoppel.”*

67. Appellant also contends that the argument of AP DISCOMs that Regulation 5 of AP Regulations of 2008 would also come in the way of considering OP NO. 19 of 2016 has no ground to stand. According to Appellant, AP DISCOMs could not have raised such contention having entered into a firm agreement on 17.05.2013 especially when they had sought for implementation of the same in O.P. No. 19 of 2016. The Appellant contends that Regulation 5 of A.P. Regulations of 2008 does not prohibit in any manner purchase of power from Appellant in pursuance of amended and restated PPA entered into in the year 1998, which was agreed to be continued in terms of continuation agreement of 2016. Appellant is justified in saying that this argument was never raised before the State Commission by the DISCOMs till the impugned order came to be passed. In other words, the State Commission has proceeded on the basis that it has jurisdiction to deal with the matter. Similar objection came to be

raised at the time of admission of the appeal. However, this Tribunal rejected such objection of AP DISCOMs at that stage. It is seen APDISCOMs filed two writ petitions being W.P. No. 10814 and 13689 of 2018 contending that in the absence of approved or valid PPA between the parties either State Commission or Tribunal have no jurisdiction to consider the disputes between the parties. These writ petitions came to be dismissed reserving liberty to AP DISCOMs to avail remedy under the Electricity Act. This was at the stage when the orders dated 16.03.2018 and 26.02.2018 passed by this Tribunal at the time of admitting the present appeal. The order dated 26.02.2018 and order dated 16.03.2018 passed by this Tribunal are valid and enforceable in law, since they are not challenged before the Hon'ble Supreme Court.

**68.** It is the contention of the Appellant that the State Commission totally ignored its responsibility to discharge functions conferred upon it under Section 86 (1)(b) of the Act when a petition is filed to consider approval of a PPA. On the other hand, it proceeded with withdrawal of petition filed for approval of Continuation Agreement. Therefore, the Appellant contends that without considering the terms of restated PPA and subsequent agreement meant for the benefit of consumers at large, the Commission ought not to have allowed the AP DISCOMs to withdraw O.P. No. 19 of 2016 and consequential rejection of O.P. NO. 21 of 2015. They

contend that the interest of all the stake-holders including Appellant and AP DISCOMs apart from consumers at large was to be considered by Respondent-DISCOMs. Therefore, in the absence of applying its mind to the facts and circumstances prevailing especially when the two petitions were reserved for judgment ought not to have allowed the withdrawal petition.

**69.** The Appellant also contends that the application for transposing the Appellant as petitioner in O.P. No. 19 of 2016 ought to have been considered since the interest of the Appellant and the consumers at large was involved in the procurement of electricity.

**70.** The Appellant rely upon following judgments on the issue of withdrawal of petition.

- i. R. Ramamurthi v. V. Rajeswara Rao (1972 (2) SCC 721)*
- ii. M.Radhakrisna Murthy v. Government of A.P. &Ors. ((2001) 3 ALD 330 [DB])*
- iii. Madhu Jajoo -v- State of Rajasthan (AIR 1999 Raj 1)*
- iv. Hulas Raj Baij Nath -v- Firm K.B. Bass and Co ((1967) 3 SCR 886)*
- v. Basudeb Narayan Singh and Ors. v. Shesh Narayan Singh and Ors (AIR 1979 Patna 73)*
- vi. Kiran Girhotra & Ors. v. Raj Kumar & Ors. ((2009) 164 DLT 483)*
- vii. SmtAjita Debi v. Musst. Hossenara Begum (AIR 1977 Cal 59)*
- viii. The Registrar, Manonmaniam Sundaranar University v. Suhura Beevi (AIR 1995 Mad 42)*

ix. *Mathura Lal v. Chiranji Lal (AIR 1962 Raj 109)*

The gist of the above judgments is as under:

- a) Withdrawal of the petition or suit by the petitioner/plaintiff is not absolute, since entitlement of the other party also has to be considered. Withdrawal of the suit under Section XXIII, Rule 1 CPC will depend upon nature of right/privilege which vests in the opposite party, and one has to see whether withdrawal after such acquisition of privilege is justified or not. A plaintiff cannot be permitted to withdraw the suit to defeat the claim of the defendant. One has to see at what stage such privilege has occurred to a party. Once a privilege or advantage has occurred to a party, it would not be proper to permit opposite party to withdraw the suit abruptly. If seeking permission to withdraw is with some ulterior motive, the same cannot be permitted. No doubt, the law envisaged under Order XXIII sub-rule (1) of Rule(1) CPC envisages unqualified right to a plaintiff to withdraw from a suit, but the same cannot be permitted if such withdrawal affects any vested right accrued to a party. If there was no permission to file a fresh suit under Sub-Rule (2) of Rule (1) of Order XXIII, normally in the absence of any counter claim or set-off, such withdrawal could

be allowed. The right of the plaintiff to withdraw the suit unconditionally accrues to him as long as it aids justice but not to defeat justice. If any right accrues to a defendant by virtue of a direction of the Court directing the plaintiff not to do a particular thing, in such case, defendant definitely enjoys a right. This right cannot be allowed to be withdrawn if it was meant to defeat the right enjoyed by the defendant. In such a situation, the transposition of parties can be allowed. If a party tries to withdraw the suit with *malafide* intention of depriving the valuable right accrued to the other side, such withdrawal of the petition cannot be allowed. If the Court finds that there is affinity or identity of interest between the plaintiff and one or more defendants, the plaintiff cannot be allowed to withdraw the suit, if an application on behalf of such defendants having an interest in the suit is made for their transposition to the category of plaintiff. Transposition of a party under Order I Rule 10 should be allowed where such transposition is required for complete adjudication upon the questions involved in the suit, since that would avoid multiplicity of proceedings. The course of law is meant for imparting justice between the parties. One who comes to the Court must come with clean hands. Process of court cannot be abused. If a suit is

dismissed under Sub-Rule (1) of Rule (1) of Order XXIII, it does not amount to a decree as there is no adjudication on any of the issues which are in controversy. If rights had occurred in favour of the opposite party, the suit cannot be allowed to be withdrawn.

- b) In the case of **M. Radhakrishna Murthy Vs. Government of Andhra Pradesh & Others** [2001 SCC Online AP 234 : (2001) 3 ALD 330 (DB) : (2001) 5 SLR 629 (AP) (DB)], an interesting question arose with regard to interpretation of Order XXIII, Rule 1 CPC vis-à-vis the power of the Administrative Tribunal to entertain an application under Section 19 of the Administrative Tribunals Act. While analyzing the controversy, Their Lordships opined that the object of constitution of Administrative Tribunal as envisaged under Article 323-A of the Constitution was that the Tribunal is a substitute to all other Courts which had jurisdiction to decide disputes of civil nature including service disputes.
- c) After referring to the decision in **L. Chandra Kumar Vs. Union of India**, Their Lordships opined that the Tribunal, though cannot exercise the power of judicial review but its power somehow is akin thereto. Therefore, they opined that Order

XXIII, Rule 1 CPC cannot be said to be applicable *strictosensu* to the proceedings of the Tribunal and they refused to interfere with that part of the order of the Tribunal whereby the Tribunal had refused to grant permission to withdraw the application in favour of the petitioner. While analyzing this position, Their Lordships referred to various decisions pertaining to right of withdrawal of the suit i.e., when it could be allowed and when it has to be rejected. It is well settled that in the absence of any vested right being created in favour of the opposite party, there cannot be any ground on which the Court could refuse to allow the withdrawal of the suit. It is also well settled that even in the writ proceedings, if the petitioner has not come with clean hands, clean mind and with clean objective and has come with some ulterior motive, in such circumstances, the petitioner cannot be permitted to withdraw the suit because equity is always known to prevent the law from crafty evasion and subtleties invented to evade law. Therefore, Their Lordships of the Apex Court opined that every litigant who approaches the Court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

- d) There is no bar in law to a defendant asking transposition as plaintiff provided the claim is based on the same cause of

action. The Court should not allow the withdrawal of the suit if it prejudices the right of the other party and the party withdrawing the suit wants to achieve ulterior goal by adopting an oblique method. Even in the case of a compromise or adjustment between the parties if the terms of settlement are not based upon any lawful agreement or compromise within the meaning of Order XXIII, Rule 3, the Court can refuse to record the terms of settlement.

- e) If a plaintiff does not act *bona fide* in its move to abandon a part of the claim or whole of the claim by withdrawing the suit, such move of the plaintiff cannot be allowed especially if the plaintiff plays fraud on the Court as well as on the opposite party with a deliberation to deceive the opposite party by taking undue advantage of position of the plaintiff.
- f) In a case where some appropriate relief has to be granted in favour of the defendant, the plaintiff cannot be allowed to end the suit by withdrawal of the suit and in such a case, the Court can substitute the plaintiff by another person as a party or transpose the defendant as plaintiff and direct for the continuation of the suit.

71. In support of the contention that the principles on which transposition is to be allowed, learned counsel for the Appellant relies upon the following judgments:

- i. Kiran Tandon v. Allahabad Development Authority and Another ((2004) 10 SCC 745)*
- g) Piyush Hasmukhlal Desai v. International Society for Krishna Consciousness (ISKCON) (AIR 2015 Orissa 43)*
- h) Jethiben v. Maniben & Another (AIR 1983 Guj 194)*
- i) Verabhadrapa and another v. Smt. Gangamma and Another (AIR 2003 Kar 348)*

The gist of these judgments is as under:

- a) Even at the stage of appeal before a High Court transposition of parties can be entertained. Sub-Rule (2) of Rule (10) of Order I CPC provides for transposition of a party to the category of opposite party. If the other party has no objection for such transposition, it must be done forthwith. To effectuate complete justice and complete adjudication of the issues involved, such transposition of parties could be allowed. If such procedure is adopted at the appellate stage one cannot take exception to such adoption of procedure. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined irrespective of

whether it is plaintiff or defendant, be struck out and add the name of any person who ought to have been joined to adjudicate upon and settle all questions involved in the suit. The language used in Rule (10) of Order I is wide enough to allow transposition of defendant as plaintiff. But such transposition of defendant as plaintiff can occur only when defendant has some interest in common with that of the plaintiff. A person whose interest is adverse to the plaintiff cannot be permitted to be transposed as plaintiff.

- b) Courts would not permit such transposition just to give a chance to litigant to avoid filing a suit or permit him to take advantage of the suit filed by his adversary against him. Transposition is normally permissible and necessary in suits between partners for accounts, possession of partnership property or for partition. Transposition of a party cannot be allowed, if by virtue of such transposition the scope or character of the suit will be altered.
- c) On the issue of withdrawal and transposition, another judgment on which the learned counsel places reliance is “**HPA International vs. Bhagwandas Fateh Chand Daswani**” (2004 6 SCC 537).

72. Respondents contend that bare reading of order XXIII clearly indicates that the transposition of defendant (like AP DISCOMs) is permissible only in a case when the Appellant withdraws the suit if defendant has similar dispute with another defendant/respondent, therefore, according to them transposition provision does not contemplate inter change of parties. Hence, Respondent-Commission was justified in rejecting the claim of the Appellant to transpose the Appellant as Petitioner in O.P. No. 19 of 2016. They also contend that the Tribunal/Commission are not bound by the principles of procedure contemplated under CPC, but they are free to apply principles underlying a particular provision of CPC as long as it does not end up in conflict with the provisions of the Act. For this proposition, the Respondent-DISCOMs rely upon in **Srei Infrastructure Finance Limited's case, Paragraph 26 and 27**, and **New Bombay Ispat Udyog Ltd's case (Appeal No. 55 of 2009), Paragraphs 12, 14, 17 to 27** before this Tribunal which read as under:

**"Srei Infrastructure Finance Limited's case [(2018) 11 SCC 470]**

*"26. There cannot be a dispute that the power exercised by the arbitral tribunal is a quasi-judicial. In view of the provisions of the 1996 Act, which confers various statutory powers and obligations on the arbitral tribunal, we do not find any such distinction between the statutory tribunal constituted under the statutory provisions or Constitution in so far as the power of procedural review is concerned. We have already noticed that Section 19 provides that arbitral tribunal shall not be bound by the Rules of procedure as contained in Code of Civil Procedure. Section 19 cannot be read to mean that arbitral tribunal is incapacitated in drawing*

sustenance from any provisions of Code of Civil Procedure. This was clearly laid down in *Nahar Industrial Enterprises Limited v. Hong Kong and Shanghai Banking Corporation* (2009 (8) SCC 646. In Paragraph 98(n), following was stated:

*(n) It is not bound by the procedure laid down under the Code. It may however be noticed in this regard that just because the Tribunal is not bound by the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. "Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice," (See ICICI Ltd. v. Grapco Industries Ltd.)*

27. We thus are of the view that principles underlying Order 9 Rule 13 can very well be invoked by the arbitrator. There is nothing on record to indicate that parties have agreed to the contrary. The issue, which has arisen for consideration has engaged attention of different High Courts from time to time. Patna High Court in *M/s. Senbo Engineering Ltd. v. State of Bihar and Ors.* (AIR 2004 Patna 33), had occasion to consider the order terminating the proceedings Under Section 25(a). Patna High Court after considering the provision has held that arbitral tribunal has power to review on sufficient cause being shown. In paragraph 32, following has been laid down:

32. *I find the submissions of Mr. Chatterjee well founded. Mr. Chatterjee has relied upon the provisions of the Act itself (that is to say, the internal aids to interpretation) in support of the point that on sufficient cause being shown, the arbitral tribunal has full authority and power to recall an order Under Section 25(a) of the Act. I think that one would arrive at the same conclusion on the basis of some external aids to interpretation."*

**New Bombay Ispat Udyog Ltd's (Appeal No. 55 of 2009)**

"12. In the light of the rival contentions of both the parties with reference to the maintainability of this Appeal, the following questions would arise

*for consideration: (i) Whether the Appellate Tribunal is excluded from invoking provisions of the Code of Civil Procedure in a proceeding before the Tribunal, in view of Section 120 of the Electricity Act, 2003. (ii) Whether the present Appeal is maintainable in view of the prohibition contained in Order 47, Rule 7 of the Code of Civil Procedure.*

*14. At the outset it shall be stated that the contention of the Learned Counsel for the Appellant that the Appellant has not only filed an Appeal as against the order passed in the review by the order dated 04.09.2008 but also challenging the main order dated 20.10.2006, is patently wrong because in the appeal no such prayer has been made. The relevant paragraph indicating the prayer of the Appellant in the Appeal are to be quoted in this context, which are as follows.*

*“Reliefs sought:*

*...*

*17. Now let us come to the other main questions. The first question is as to whether the Appellate Tribunal is precluded from invoking provisions of the Code of Civil Procedure in a proceeding before the Tribunal, in view of Section 120 of the Electricity Act, 2003. In this context it is necessary to refer to Section 120(1) of the Electricity Act, 2003. Section 120(1) of the Electricity Act is reproduced below:*

*“The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice and, subject to the other provisions of this Act. The Appellate Tribunal shall have powers to regulate its own procedure.”*

*18. In the light of the wordings contained in the said section which says that the Tribunal shall not be bound by the procedure laid down by the CPC, it is contended by the Appellant that the right of appeal as contemplated under Section 111 of the Electricity Act 2003 is an unrestricted and unfettered right given to the aggrieved person to file an*

*appeal to this Tribunal as against any order passed by the State Commission under the Electricity Act, 2003. Under those circumstances, the right of appeal provided under Section 111 of the Electricity Act, 2003 cannot be abrogated unless specifically denied. He has quoted Section 111 of the Electricity Act, 2003 which reads as follows:*

*“Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity: Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filling the appeal, deposit the amount of such penalty: Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realization of penalty.”*

*19. In reply to the said submission, the Counsel for R-1 would submit that Section 120(1) of the Electricity Act, 2003 only states that the Tribunal shall not be bound by the procedure laid down by the CPC but the said section does not state that the Tribunal shall be precluded or prohibited from invoking provisions of the CPC. In order to substantiate this plea, he has cited the various decisions. Let us refer to those decisions:*

*(1) In 1992 (4) SCC 736 in A.A. Haja Muniuddian vs. Indian Railways, the Hon'ble Supreme Court while referring to the analogues provisions of the Railways Claim Tribunal Act, 1987 has held as under:*

*“Nowhere in the Act is there any provision which runs counter to or is inconsistent with the provisions of the Order XXXIII of the Code. Although the Act and the rules do not provide for application of Order XXXIII of the Code, there is nothing in the Act or in the rules which*

*preclude the Tribunal from following that procedure if the ends of justice so require.”*

*“Section 18(1) only says that the Claim Tribunal shall not be bound by the procedure laid down by the Code but does not go so far as to say that it shall be precluded from invoking the provisions laid down by the Code even if the same is not inconsistent with the Act and the Rules.”*

20. *In another decision 1999 (4) SCC 710 in the case of Industrial Credit and Investment Corporation of India vs. Grapco Industries Ltd &Ors., the Hon’ble Supreme Court has held as follows:*

*“When section 22 of the Act says that the Tribunal shall not be bound by the procedure laid by the CPC, it does not mean that it will not have jurisdiction to exercise powers of a Court as contained in the CPC. Rather, the Tribunal can travel beyond the CPC and the only fetter that is put on its power is to observe the principles of natural justice”.*

21. *In another decision in 1997 (6) SCC 473 in the case of Ajith Babu and Ors vs. Union of India and Ors., the Hon’ble Supreme Court has held as follows:*

*“The right of Review\*\* is not right to appeal where all questions decided are open to challenge. The right of review is possible only on limited grounds, mentioned in Order 47 of the CPC. Although strictly speaking the Order 47 of the CPC may not be applicable to the Tribunal, but the principles contained therein surely have to be extended. Otherwise there being no limitation on the power of review, it would be an appeal and there would be no certainty of the finality of the decision”.*

22. *A careful perusal of these judgments would make it abundantly clear that provisions of Section 120(1) of the Electricity Act, 2003 was not*

*enacted with the intention to curtail the power of Tribunal with reference to the applicability of the Code of Civil Procedure to the proceedings before the Tribunal. On the contrary, the Hon'ble Supreme Court has clearly held that the words "shall not be bound by" do not imply that the Tribunal is precluded or prevented from invoking the procedure laid down by the CPC. It further, says the words "shall not be bound by the procedure laid down by CPC" only imply that the Tribunal can travel beyond the CPC and the only restriction on its power is to observe the principles of natural justice.*

*23. Under those circumstances, the submission made by the Appellant that the person aggrieved is entitled to challenge any order passed by the Commission including the dismissal order in the review petition since the right of Appeal as under Section 111 of the Electricity Act, 2003 is an unrestricted and unfettered right, is misplaced. The right of appeal provided to an aggrieved person under Section 111 of the Electricity Act, 2003 cannot be read in isolation as the said section shall necessarily be read harmoniously along with the other provisions in the Electricity Act, 2003 namely Section 120 of the Act. The conjoint reading of both Section 111 along with Section 120 would make it clear that the right of Appeal available to an aggrieved person under Section 111 of the Electricity Act 2003 is subject to the procedure adopted by this Tribunal under Section 120 of the Electricity Act, 2003 and as such it cannot be said that the Tribunal is precluded from invoking procedure and provisions contemplated under the CPC. It is to be stated that the Tribunal is well within its right to adopt its own procedure as well as the procedures contemplated under the CPC.*

*24. The Learned Counsel for the Appellant would submit that the Electricity Act, 2003 is a special statute containing special provisions whereas CPC contains general provision and procedures and they cannot override or prevail over the special provision as contemplated under the Act, 2003 being the special statute and therefore CPC cannot be invoked. Pointing out various regulations framed by the Commission*

*as Conduct of Business Regulations (CBR 2004, the learned counsel for the Appellant submitted that the regulations provide for the power of review prescribing limitation period of 45 days whereas no such restriction has been found in Order 47 of the CPC and therefore the special procedure and special regulations framed by the Commission under the Act alone shall be applicable and not CPC. On this issue the Learned Counsel for the Appellant cited the following authorities:*

- 1) 2009 (6) SCC 235 in UP Power Corporation Ltd. Vs. NTPC.*
- 2) 2008 (9) SCC 763 in KSL and Industries Ltd. Vs. Arihant Threads Ltd. and others.*
- 3) 1981 (1) SCC 315 in LIC vs. DJ Bahadur and others.*
- 4) 1997 (7) SCC 300 in Reliance Industries vs. Pravinbhai Jasbhai Patel and others.*

*25. There is no dispute regarding the settled position of law that general provisions must yield to the special provisions. But this principle would apply only when there is a conflict between the provisions of the special statutes and the general provisions. In this case there is nothing to indicate that the provisions of the CPC are in conflict with the provisions of the Electricity Act. As a matter of fact it is held in Gujarat Urja Vikas Nigam Ltd. Versus Essar Power in 2008 (4) SCC 755 by the Hon'ble Supreme Court as follows:*

*“This can be done by holding that when there is any express or implied conflict between the provisions of the Electricity Act and any other Act that the provisions of the Electricity Act, 2003 would prevail but when there is no conflict, express or implied, both the acts are to be read together”.*

*26. It is contended by the Appellant that the regulations framed by the Commission i.e. MERC (CBR 2004) are in conflict with CPC and therefore, these will override the provisions of the general provision contained in CPC. This contention, in our opinion, is not tenable. The*

MERC (CBR 2004) are framed by the Commission under the powers vested in it under the Electricity Act, 2003 to frame its own regulations. It is noticed that all the State Electricity Commissions situated in different States in India have the same powers under the Electricity Act, 2003 and have framed their respective CBR regulations to regulate the procedure. Each of the State Commission has provided different procedures in respect of its power to review etc. In some States limitation period for filing a review is fixed as 30 days and in some other States it is fixed as 45 days. These Regulations are subordinate regulations framed by the State Commissions to regulate their own procedure and these regulations have a bearing on the appeal before this Tribunal. On the other hand, as indicated above, this Tribunal can establish its own separate procedure or it may invoke the provisions of the CPC in respect of the same for which there is no bar.

27. Therefore, it has to be held in answering the first question that this Tribunal is adequately empowered to regulate its own procedure and that there is no embargo on this Tribunal from invoking provisions of the CPC.”

**73.** Respondents also rely upon the decision in **Anil Kumar Singh's** case so far as withdrawal of suit under Sub Rule-1 and Sub Rule-3 of Order 23 Rule1 CPC. Relevant paragraphs at 23 and 24 read as under:

**“23.** In our considered opinion, when the plaintiff files an application under Order 23 Rule 1 and prays for permission to withdraw the suit, whether in full or part, he is always at liberty to do so and in such case, the defendant has no right to raise any objection to such prayer being made by the plaintiff except to ask for payment of the costs to him by the plaintiff as provided in sub-rule (4).

**24.** *The reason is that while making a prayer to withdraw the suit under Rule 1(1), the plaintiff does not ask for any leave to file a fresh suit on the same subject-matter. A mere withdrawal of the suit without asking for anything more can, therefore, be always permitted. In other words, the defendant has no right to compel the plaintiff to prosecute the suit by opposing the withdrawal of suit sought by the plaintiff except to claim the costs for filing a suit against him.”*

**74.** The scope and function of the State Commission as contemplated under Section 86(1)(b) of the Act provides that the Commission is under an obligation to determine capital cost, tariff terms and conditions for generation and sale of electricity since it is within their domain to do so, but does it mean that Commission can decide such matters at the whims and fancies of AP DISCOMs? Since the State Commission being a statutory authority (a quasi judicial authority), it has to exercise its judicial discretion on the touchstone of reasoning, fair play and justice. The Commission is to protect overall public interest in the electricity matters. It should be much more cautious while exercising such judicial discretion. For this preposition reliance is placed on a decision in **Aero Traders (P) Ltd. V. Ravinder Kumar Suri** [(2004) 8 SCC 307].

*“6. The question which, therefore, requires consideration is whether the appellant has made out any ground for exercising discretion in his favour of not striking out his defence. According to Black’s Law Dictionary “judicial discretion” means the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to*

*demand the act as a matter of right. The word "discretion" connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard-and-fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate. (See 27 Corpus Juris Secundum page 289). When it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice and not according to private opinion; according to law and not humour. It only gives certain latitude or liberty accorded by statute or rules, to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him."*

**75.** If the State Commission fails in discharging its duties by deciding the matter without proper reasoning and justification, it is nothing but failure of its duty. Since proceedings before the State Commission are not in the nature of a *lis* as in the case of a Civil Suit, it has to take within its fold the interest of various stakeholders concerned. Therefore, utmost duty of the State Commission while discharging its functions must be public interest and decide the matter on merits so far as adoption of capital cost and Continuation Agreement. The functions provided under Section 86(1)(b) of the Act is not merely a formality to approve the Power Purchase Agreement. In other words, it does not mean one of the parties to the petition can interdict the implementation of Power Purchase Agreement at its whims and fancies totally ignoring the fact that the Commission's duty is to regulate electricity purchase and procurement process of a distribution

licensee including the price at which electricity shall be procured from generating companies through agreements.

**76.** Procurement of power has to be in conformity with the procurement plan approved by the State Commission. The Appellant's project and vis-a-vis power was part of procurement plan submitted by AP DISCOMs and approved by the concerned Commission, which is referred to as sources of power purchase with reference to Retail Supply Tariff of AP DISCOMs for FY 2016-17 and 2017-18. This is not controverted by the Respondent-DISCOMs. When the matter was pending for approval of the State Commission on determination of capital cost, the terms and conditions, the consequent approval to the Continuation Agreement incorporating the terms and conditions of tariff, based on the guidelines contained in Section 61 of the Act, was it justified at that stage for AP DISCOMs to seek withdrawal of the petition in O.P. No. 19 of 2016. Therefore, the issue involved in O.P. No. 19 of 2016 cannot be brought in the realm of offer and acceptance with no firm agreement having been entered into. The basic approach of the AP DISCOMs contending that it was only an offer/proposal is untenable, since there cannot be a proposal by distribution licensee or for that matter a generator to a distribution licensee.

**77.** The Petition in O.P. No. 19 of 2016 was to fulfil requirement of Section 86(1)(b) of the Act to get statutory authority's approval. Can AP DISCOMs contend that they could wriggle out of the agreement even before consideration of the matter on merits by the State Commission? Therefore, the question before us is whether AP DISCOMs at that stage could have sought for withdrawal of the petition? The very prayer in the said application clearly goes to show that it is not adversarial in nature for the purpose of granting a decree/order to the Appellant to fulfil, which the Appellant was otherwise refusing to fulfil. It is seen the relief claimed in O.P. NO. 19 of 2016 is not only for the benefit of AP DISCOMs but also for the benefit of the Appellant since the Appellant was equally interested in getting the reliefs sought in the O.P. No. 19 of 2016. Therefore, by proposed withdrawal, we are of the opinion, it is nothing but making the agreement entered into between the parties redundant and non-est.

**78.** The plea of the AP DISCOMs that suitable action can be sought for claim of compensation is not tenable in these matters. The Respondent-Commission being a regulator has the obligation to consider the merits of O.P. No. 19 of 2016 together with O.P. No. 21 of 2015 in discharge of its obligations under the Act. There is no provision in the Memorandum of Agreement or Continuation Agreement for foreclosure of the agreement or prior determination or an exit clause either to the Appellant or to the A.P.

DISCOMs when both OPs were reserved for orders. Therefore, the impugned order is without any justification. All parties including the State Commission did act for procurement of power from Appellant's power plant and the same is subject to tariff terms and conditions which ought to be decided by the State Commission. This was the subject matter in O.P. No. 21 of 2015, and the Continuation Agreement approval was pending in O.P. No. 19 of 2016.

**79.** To substantiate our opinion, we rely upon the following decisions:

- i. P. D'Souza v. Shondrilo Naidu ((2004) 6 SCC 649)*
- ii. Prakash Chandra v. Angadlal and Ors ((1979) 4 SCC 393)*
- iii. M.L. Devender Singh v. Syed Khaja ((1973) 2 SCC 515)*
- iv. M/s. Adani Power Ltd. V. Gujarat Electricity Regulatory Commission & Ors (Order dated 07.09.2011 passed by this Hon'ble Tribunal in Appeal No. 184 of 2010)*

The gist of the above decisions is as under:

- a) In a suit for specific performance it was contended that terms of Clause 7 of the agreement of sale providing for liquidated damages would be attracted only in case where the vendor is in breach of the terms of agreement. It was for the plaintiff to file a suit for specific performance of contract despite an option to invoke the provision of liquidated damages. Their Lordships held that it would not be correct to contend that only because such a clause exists, a suit for specific performance of contract would not

be maintainable. The contention of the parties before the Hon'ble Supreme Court was that the Hon'ble Supreme Court should not exercise its discretionary jurisdiction in view of hardship which would be faced by defendant as contended by him came to be rejected. It is settled law that where a party could foresee the hardship, and where the performance of contract would not cause any hardship to the other party, their Lordships opined that the terms of contract between the parties must be specifically enforced. The specific performance of contract ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief.

- b) In the case of ***“Adani Power Limited vs. Gujarat Electricity Regulatory Commission”*** (Appeal No. 184 of 2010 dated 07.09.2011), this Tribunal opined that the provision for liquidated damages in the PPA does not in any manner affect the right of Gujarat holding company to seek specific performance of the PPA particularly when conditions subsequent are fulfilled. Therefore, the Bench opined that there is no bar to give a direction for specific performance, if in a given case specific performance would be an appropriate remedy.

**80.** As stated above, so far as the procurement of power is concerned, it must be in the interest of the consumer. Between April 2017 to January 2018 as against the declared capacity, 3273.83 million units were delivered to the Respondent DISCOMs from the Appellant's project. Since it was conducive for AP DISCOMs to schedule and take delivery of electricity for maintaining the retail supply to its consumers the above number of units was taken by the DISCOMs. To decide the matter pertaining to capital cost or approval of Continuation Agreement, one has to see whether it is in the interest of the consumers at large. The State Commission is the ultimate authority to decide procurement of power including the price, but unfortunately the Commission declined to decide the matter on merits. In this process what Commission ought to have done in OP No. 21 of 2015 is to determine whether the capital cost and resultant tariff would be conducive to the interest of the consumers at large, since it is incumbent to do so as a regulatory authority. Therefore it was possible to first decide O.P. No. 21 of 2015 on merits, and based on its decision it should have proceeded to consider Continuation Agreement instead of passing the impugned order.

**81.** In the above circumstances, when the two OPs were reserved for judgment/orders whether Respondent-Commission could have entertained withdrawal application to withdraw O.P. No. 19 of 2016 and closure of O.P. No. 21 of 2015?

**82.** Whether AP DISCOMs can raise the reason that capital cost being high with reference to the period prior to 2013 at that stage? According to the Appellants this is not a genuine contention. To substantiate this argument, they contend that though the claim of the Appellant towards capital cost projected is at Rs.8087 Crores, however, this is subject to prudence check by the State Commission. It is seen AP DISCOMs fully knew about this capital cost figure at the time when they signed Continuation Agreement on 28.04.2016 and when they filed O.P. No. 21 of 2015. An addendum came to be filed in O.P. No. 21 of 2015 explaining why the capital cost was increased (the reasons for enhancement). If this was considered as exorbitant by AP DISCOMs as well as Government of AP, question of AP DISCOMs filing of O.P. No. 19 of 2016 would not have arisen. After signing the Continuation Agreement and pursuing determination of tariff petition, DISCOMs ought not to have raised the issue of increase in capital cost as reason to withdraw the petition. It was well within the powers of the State Commission to allow the capital cost after prudence check.

**83.** AP DISCOMs contend that delay in COD with reference to the period prior to 2013 is also to be considered. Is this reason raised by AP DISCOMs is reasonable and justifiable? The Appellant contends that in terms of Continuation Agreement dated 28.04.2016, COD has to be

achieved in the year 2016 and this was in supersession of earlier agreement and date of COD in the year 2013-14 as agreed in MoA dated 17.05.2013. This clearly indicates that the parties have mutually agreed on the revised COD. Therefore, in terms of Sections 62 and 63 of the Contract Act, 1872 the DISCOMs ought not to have raised such allegation of delay in COD and this allegation of delay was used as a ruse to withdraw O.P. No. 19 of 2016, when the matter was reserved for judgment/orders.

**84.** According to us the delay so far as period prior to 2013 is not relevant. One has to take note of relevant developments that occurred from the year 2013 onwards. State of Andhra Pradesh and DISCOMs insisted 100% of supply of power generated from Appellant's project. Though Appellant requested to participate in competitive bidding, this was rejected. After agreeing to supply 100% of power and memorandum of agreement dated 17.05.2013, parties filed above two OPs. Therefore, the contention of the AP DISCOMs with reference to delay if any on the part of the Appellant prior to 2013 has to be rejected.

We also rely upon the following judgment on this issue.

- i. Colgate Palmolive India Limited vs. T.J. George (S.A. No. 95 of 2006 - High Court of judicature at Madras)*

*"Sec.62. Effect of **novation**, rescission, and alteration of contract - If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.*

*It would obviously and axiomatically exemplify and portray that if parties to the contract agreed to substitute a new contract, in view of **novation**, rescission or alteration, then the parties cannot fall back to the terms and conditions as contemplated in the original contract. In fact, the trial Court should have framed a very important issue as to whether as in the alleged year of breach of contract, i.e. in 1994, Ex.A1 was in vogue at all, but to that extent, no issue was framed.*

*9. The burden was on the plaintiff to prove that during the year 1994, Ex.A1 was in vogue and that was sine qua non for contending that there was breach of Clause 8 of Ex.A1. In the written statement as well as during trial, the defendant contended that the parties had already started doing business based on the understanding which was not strictly in accordance with Ex.A1, and in such a case the core question arises as to how the Courts below failed to take note of the said crucial fact."*

**85.** Appellant contends that the Respondent-DISCOMs having committed mistake/wrong cannot take advantage of their own wrong to unilaterally put an end to the implementation of the agreement. Apparently, there was no clause in any of the agreements for foreclosure of terms of contract. Appellant had altered their position based on the demand of AP DISCOMs to purchase 100% of power generated from their plant. Therefore, AP DISCOMs proceeded to sign the firm agreement. Then Appellant proceeded to file O.P. NO. 21 of 2015 placing the capital cost including additional capital expenditure on account of force majeure

issues for seeking approval of the State Commission. Both parties signed Continuation Agreement which was to be approved by State Commission. This definitely gives an assurance that 100% available capacity of power would be purchased by Respondent-DISCOMs. This creates vested right in Appellants to pursue O.P. No. 21 of 2015 as well as take active part in O.P. No. 19 of 2016. Definitely, Appellant has a legitimate expectation that capital cost admissible process and approval of the Continuation Agreement would be considered by prudence check in a judicious manner. We opine that State Government cannot interfere in regulatory matters though they could give policy directives in terms of Section 108 of the Act.

**86.** It is also seen impugned order came to be pronounced on 31.01.2018 and Cabinet decision came on 02.02.2018 and this definitely has no relevance. The State Commission cannot abdicate its regulatory jurisdiction to allow the intention of AP DISCOMs to withdraw O.P. NO. 19 of 2016 unilaterally wherein the paramount consideration was to consider public interest. By allowing Respondent-DISCOMs to withdraw petition they totally ignored the fact, whether the Appellant would be prejudiced by such withdrawal. More than that, they ought to have verified from every angle whether the interest of the consumers at large is jeopardised or not. No such analysis seems to have been made by Respondent-Commission.

For this preposition, we rely upon the decision of this Tribunal in “**DANS ENERGY PRIVATE LIMITED V. UTTRAKHAND ELECTRICITY REGULATORY COMMISSION**” (APPEAL NO. 285 OF 2016). The relevant portion is as under:

*“ii. From the above it can be seen that the State Commission has rejected and dismissed the tariff petition of the Appellant and petition filed by UPCL for approval of draft PPA in view of the requirement of power by UPCL for next three financial years. While doing so the State Commission based on the submissions made by UPCL has also discussed about the excessive cost of power from the Project and cautioned UPCL for the same in future for power procurement. The decision of the State Commission related to the rejection of the tariff petition filed by the Appellant for determination of Tariff of the Appellant’s Project and the petition filed by UPCL for approval of the draft PPA for purchase of electricity from the Appellant on grounds of non requirement of electricity seems to be in narrow compass. In the proceedings before this Tribunal certain issues related to exercise of regulatory functions have been raised. The rejection of the petitions relating to the Appellant’s Project is only on grounds of surplus availability of the power as assessed by the State Commission at the time of the passing of the Impugned Order. This has been categorically stated in the Impugned Order passed and the reply filed by the State Commission. In the reply filed by the State Commission, it has been stated that the Appellant’s Petition was rejected on the grounds of non - requirement of Power by UPCL and not on the issue of tariff of the project.*

.....

*v. The Gas Power projects have also filed petitions for determination of Tariff and the same have been pending. In the case of Gas Power projects also, UPCL had filed petitions for approval of draft PPA. The Gas Power projects as well as the hydro power projects have been in the similar time frame of consideration by the State Commission. There is no rationale for the State Commission to abruptly reject the two petitions filed*

relating to the Appellant's Project and proceed with the three Gas Power projects only.

vi. The regulatory commission's function in such circumstances should obviously be to consider the merits and demerits of all the available sources of power and decide the sourcing from such projects which would be most economical, cheaper and in the interest of the consumers at large. The State Commission ought to have considered the selection of the project safeguarding the consumer interest, as envisaged under Section 61 of the Act. The State Commission has however rejected the petitions relating to the Appellant's Project without any such consideration and has deprived the consumer of the State with a possibility of getting electricity to the extent of 96 MW at economical and cheaper cost.

vii. The State Commission was required to evaluate all the four projects in order to decide on the economical and cost effective purchase of power. The most important function to be discharged by the State Commission is to ensure that the procurement of power by the distribution licensees is economical so that no extra burden is placed on the consumers. This has been duly recognised by the State Commission itself in the Order dated 30.7.2015 in case of M/s Sravanthi. The State Commission had then rejected the approval for purchase of power from M/s Sravanthi on the ground that UPCL had not examined the availability of cheaper power. This Tribunal has also emphasised economical purchase of power in the judgement dated 23.9.2016 passed in Appeal No. 53 of 2016 in case of Tamil Nadu Generation and Distribution In the matter of Corporation Limited (TANGEDCO) Vs. M/s. Century Flour Mills Ltd and Anr.

.....

x. The contention of the State Commission that it did not consider the case of the Appellant on 20.9.2016 in view of the Appellant's project being not included in the business plan filed by UPCL on 1.9.2016 cannot be sustained. The most important function to be discharged by the State

Commission while dealing with the approval for purchase of power by a distribution licensee from a generating company is to ensure that the power is purchased in an economical manner. The approval of the power purchase plan price is entirely the function of the State Commission and it is not open to the licensee to dictate to the State Commission that it will purchase power from a particular source. Here in this case purchase of power by UPCL generated by the Gas Power Stations and not by the Hydro Power Station. UPCL itself had approached the State Commission for approval of the draft PPA in respect of the Appellant and the said petition was pending before the State Commission. Further, the tariff petition of the Appellant was also pending. The State Commission was fully aware of the availability of the power from the Appellant's Project. The State Commission should not have ignored the omission by UPCL regarding purchase of power from the Appellant's Project. The State Commission is not justified in stating that it cannot compel UPCL. This is contrary to the basic principle of exercise of regulatory functions safeguarding consumer interest.

.....

xxii. The reliance placed by the State Commission on the decision of the Hon'ble Supreme Court in Uttar Pradesh Cooperative Cane Unions Federation case on the regulatory functions of the State Commission being wider has no implication to the present case. It can't be disputed that the functions exercised by the Electricity Regulatory Commission should be construed wider. But such regulatory functions are to be exercised in the larger interest of the consumers as well as balancing the rights of the generator. The dominant objective of the Regulator is to protect the interest of the consumers.

xxiii. In view of discussions as above, we are of considered opinion that the State Commission is not justified in dismissing the tariff petition of the Appellant at the admissibility stage without going into the detailed analysis by comparing the tariff of the Appellant's Project vis-à-vis gas based projects considered by

*the State Commission while approving their tariff and PPAs. Accordingly, the impugned Order passed by the State Commission deserves to be set aside. The petition filed by UPCL before the State Commission for approval of the draft PPA and the petition filed by the Appellant before the State Commission for determination of tariff should be restored for consideration of the State Commission. The matter needs to be remanded to the State Commission for fresh consideration of the said two petitions (i.e. tariff petition of the Appellant and draft PPA petition of UPCL) to decide on the appropriate source or sources including that of the Appellant on merits from which the requirement of electricity of UPCL on long term basis should be made with the primary objective of safeguarding the interest of the consumers of the State at large.”*

**87.** In the light of the law referred to above pertaining to withdrawal of petitions since the philosophy underlying the provisions of civil procedure code has to be looked into, one has to bear in mind whether the interest of anyone including the Appellant apart from Respondent-DISCOMs was jeopardised. State Commission has to apply its judicious mind to decide whether such withdrawal should be allowed or not.

**88.** The State Commission while allowing the withdrawal of OP 19 of 2016 referred to “**Hulas Raj Baij Nath vs Firm K.B. Bass and Co.**” ((1967) 3 SCR 886). In this decision also it says withdrawal can be allowed if no prejudice or loss is caused to other party. AP DISCOMs sought withdrawal of O.P. NO. 19 of 2016 at a belated stage. Having reserved the

matter for orders for determination of capital cost after extensive hearing for more than three years, the Commission ought not to have passed the impugned order.

**89.** We also refer to ***Arjun Singh vs Mohindra Singh*** (1964 SC 993) for this preposition.

**90.** On facts it is noticed that AP DISCOMs are not pointing out how the Appellant's project is not economical and competitive when compared to other tariffs. State Commission was at the stage of considering whether the capital cost projected by the Appellant should be admissible after prudence check.

**91.** It is also seen that when the matter was heard before this Tribunal on 10.01.2018, counsel for Respondent-Commission stated before the Tribunal that Commission would pass orders in both OPs on merits before 31.01.2018.

**92.** In terms of Clause 10.5 whether DISCOMs could terminate PPA? Article/Clause 10.5 of PPA is only an option provided, which could be exercised by Appellant indicating default of the DISCOMs. It is well settled that the defaulting party who is responsible for frustration of the contract cannot invoke such provision or such defence.

**93.** APERC passed orders dated 06.08.2016 enhancing interim tariff to 3.82.DISCOMs filed two petitions OP NOs. 28 and 29 of 2016 for determination of ARR and tariff for retail supply business for the FY 2017-18. Meanwhile, Appellant had sought interim fixation of tariff at Rs.4.51 per unit since similarly situated projects were getting such tariff per unit. These petitions were disposed of on 31.03.2017. Appellant generator filed Review Petition which came to be rejected. This order came to be challenged in Appeal No. 153 of 2017 before this Tribunal.

**94.** On 15.05.2017 OP 19 and 21 were reserved for orders after hearing lengthy arguments. This Tribunal in Appeal No. 153 of 2017 on 01.06.2017 directed Respondent-Commission to dispose of two petitions within three months i.e., on or before 14.08.2017. However, interim application came to be filed by Discom in the above appeal seeking extension of time till December 2017. While refusing such time extension, the Tribunal however extended time till end of October 2017. Appellant also supported Respondent-DISCOMs to extend time for pronouncing orders in two OPs Time came to be extended up to 16.12.2017. Again application was filed for extension of time for disposal of OPs till 16.04.2018, but it was granted up to only 15.01.2018.

**95.** At this stage, the Respondent-DISCOMs seems to have changed their stand and sought for reopening the case so as to permit them to

withdraw O.P No. 19 of 2016 in public interest and return O.P NO. 21 of 2015 to the Appellant. Though AP DISCOMs filed two IAs before this Tribunal seeking direction to Respondent-Commission to pass orders on two IAs filed in the OPs for withdrawal and return of OP, this Tribunal granted extension of time to dispose of O.P. NO. 19 of 2016 and O.P. No. 21 of 2015 by 31.01.2018. At this stage, the impugned order came to be passed without complying with the directions of the Tribunal.

**96.** In the above circumstances, was it proper on the part of the Respondent-Commission to allow withdrawal of petition in O.P. No.19 of 2016 that too after reserving the petitions for pronouncement of orders and seeking several extensions of time to pronounce the orders? One has to see what is the settled law when once the matter is reserved for judgment.

- i. Arjun Singh v Mohindra Singh (AIR 1964 SC 993)*
- ii. Rabia Bi Qasim v. Countrywide Consumer Financial Services Limited (ILR 2004 Kar 2215)*
- iii. Bharati Behera v. Jhili Prava Behera (W.P No. 26254 of 2013 decided by Orissa High Court on 18.04.2014)*
- iv. Pujya Sindhi Panchayat v. Prof. C.L. Mishra (AIR 2002 Rajasthan 274 (DB))*
- v. Yash Mehra v. Arundhati Mehra ((2006) 132 DLT 166)*
- vi. Dharani Sugars and Chemicals Limited v. TMN Engineering Industry*

The gist of the above decisions is as under:

- a) The inherent powers cannot override the express provisions of the law. If there are specific provisions of law to deal with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent powers of court cannot be invoked in order to cut across the powers conferred by the code.
- b) Order IX Rule (1) of CPC requires the parties to attend the court on the day fixed for their appearance to answer the claim of the defendant. Rule (2) deals with a case where the defendant is absent. Rule (3) deals with a case where the plaintiff along with the defendant is absent when the suit is called on and empowers the Court to dismiss the suit.
- c) Where the hearing is completed, the parties have no further rights or privileges in the matter, except judgment to be delivered after hearing is completed. Once the matter has been heard and posted for judgment, nothing is required to be done by the Court except to pronounce the judgment. To reopen the case for recording further evidence after the matter is reserved for pronouncement of judgment is not permissible. If parties were given sufficient opportunity to put-forth their case and were heard completely, and when the matter was reserved for

pronouncement of Judgment, an application to reopen and pass different order deviating the very object and purpose for which the petition was filed is not permissible. Once the matter is closed for pronouncement of judgment after concluding hearing, question of reopening the same for any other purpose is not justified. The matter comes to an end only with the pronouncement of the judgment, when the matter is posted for judgment where it is reserved. Even in a case where the application for impleadment is filed after the judgment was reserved, if such application would have no effect on the merits of the case, such application would be treated as if no such application was filed before the Court. Once the hearing of the suit is completed in its entirety even in the case of divorce petition by mutual consent under Section 13 (b) of the Hindu Marriage Act, 1955 it was held that one of the parties to the proceedings cannot be allowed to approach the Court for reopening of the same on the ground that the terms of agreement by one of the parties were violated. It was held that it was not a dispute that no such terms were recorded in the settlement. Though the trial court opined that divorce decree could not be passed to allow the mutual consent application, the High Court opined that once a judgment is reserved, nothing more is required to be done other than pronouncement of judgment since hearing

of the suit was completed in its entirety and the matter was adjourned only for the purpose of pronouncement of judgment.

**97.** It is seen APDISCOMs after proceeding with the matter on merits, once the matter was reserved for orders on two OPs intended to wriggle out from the proceeding in two OPs after several extensions by this Tribunal. As already pointed out there was no substantial change so far as position of the parties as on the date of filing applications for withdrawal of O.P. No. 19 of 2016 and return of O.P. No. 21 of 2015. It was AP DISCOMs who wanted to put an end to the implementation of agreement unilaterally. We are of the opinion a party who commits wrong cannot take advantage of its own wrong to unilaterally put an end to the implementation of agreement. We rely upon the following judgments for the said proposition.

- i. Kushweshwar Prasad Singh -v- State of Bihar and Others ((2007) 11 SCC 447)*
- ii. Union of India -v- Major General Madan Lal Yadav (1996 (4) SCC 127)*
- iii. B.M. Malani -v- Commissioner of Income Tax and Anr. (2008 (10) SCC 617)*
- iv. Eureka Forbes -v- Allahabad Bank ((2010) 6 SCC 193)*
- v. PanchananDhara -v- Monmatha Nath Maity (Dead) through LRs. ((2006) 5 SCC 340)*

The gist of the decisions in the cases quoted above is as under:

- a) Where an obligation is cast on a party and if he commits breach of such obligation, he cannot be permitted to take advantage of such situation. The authorities cannot be allowed to take undue advantage of their own fault in failure to act in accordance with law. A party who is at fault cannot be permitted to take undue and unfair advantage of his own fault to gain favourable interpretation of law. In other words, a wrong doer ought not to be permitted to make a profit out of his own wrong.
- b) In the case of detention issue, the accused had frustrated the trial by escaping from detention. He re-appeared after a period of limitation, by that time the trial of the offence has lapsed. The accused took up a contention that the trial cannot be allowed on the ground of delay. The Supreme Court opined that the maxim "*nullus commodum capere potest de injuria sua propria*", which means accused himself being responsible for delay by escaping from detention, cannot take advantage of his own wrong to contend that trial was barred by time.
- c) In a suit for specific performance of contract of sale, the vendor causing delay in performance by failing to comply with applicable statutory requirements, in such a situation it was held that the

vendor being a wrong doer cannot be permitted to take advantage of his own wrong so as to raise the plea of limitation.

98. It is also well settled that a party to the contract who commits frustration and if such frustration of contract is self induced, such party cannot take advantage of its own breach or frustration. For this proposition, we rely upon the following judgments also:

- i) **“Boothalinga Agencies v V.T.C. Poriaswanmi Nadar”** (AIR 1969 SC 110)

*“12. Counsel on behalf of the respondent, however, contended that the contract was not impossible of performance and the appellant cannot take recourse to the provisions of Section 56 of the Indian Contract Act. It was contended that under clause 1 of the Import Trade Control Order No. 2-ITC/48, dated March 6, 1948 it was open to the appellant to apply for a written permission of the licensing authority to sell the chicory. It is not shown by the appellant that he applied for such permission and the licensing authority had refused such permission. It was therefore maintained on behalf of the respondent that the contract was not impossible of performance. We, do not think there is any substance in this argument. It is true that the licensing authority could have given written permission for disposal of the chicory under, clause 1 of Order No. 2-ITC/48, dated March 6, 1948 but the condition imposed in Ex. B-9 in the present case is a special condition imposed under clause (v) of paragraph (a) of Order No. 2-ITC/48, dated March 6, 1948 and there was no option given under this clause for the licensing authority to modify the condition of licence that " the goods will be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion thereof will be sold to any party". It was further argued on behalf of the*

respondent that, in any event, the appellant could have purchased chicory from the open market and supplied it to the respondent in terms of the contract. There is no substance in this argument also. Under the contract the quality of chicory to be sold was chicory of specific description - "Egberts Chicory, packed in 495 wooden cases, each case containing 2 tins of 56 lb. nett". The delivery of the chicory was to be given by "S. S. Alwaki" in December, 1955. It is manifest that the contract, Ex. A-1 was for sale of certain specific goods as described therein and it was not open to the appellant to supply chicory of any other description. Reference was made on behalf of the respondent to the decision in *Maritime National Fish, Limited v. Ocean Trawlers, Limited*. In that case, the respondents chartered to the appellants a steam trawler fitted with an otter trawl. Both parties knew at the time of the contract that it was illegal to use an otter trawl without a licence from the, Canadian government. Some months later the appellants applied for licences for five trawlers which they were operating, including the respondents' trawler. They were informed that only three licences would be granted, and were requested to state for which of the three trawlers they desired to have licences. They named three trawlers other than the respondents', and then claimed that they were no longer bound by the charter-party as its object had been frustrated. It was held by the Judicial Committee that the failure of the contract was the result of the appellants' own election, and that there was therefore no frustration of the contract. 'We think the principle of this case applies to the Indian law and the provisions of [section 56](#) of the Indian Contract Act cannot apply to a case of "self-induced frustration". In other words, the doctrine of frustration of contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party. But for the reasons already given, we hold that this principle cannot be applied to the present case for there was no choice or election left to the appellant to supply chicory other than under the terms of the contract. On the other hand, there was a positive prohibition imposed by the licence upon the appellant not to sell the imported chicory to any other party but he was permitted to utilise it only for consumption as raw material in his own

factory. We are accordingly of the opinion that Counsel for the respondent has been unable to make good his argument on this aspect of the case.”

ii) We also rely upon the judgment in “**G.A. Galia Kotwala and Co. Ltd vs K.R.L. Narasimhan and Brother by Managing Partner, K.R.L. Narasimhan**” (AIR 1954 Mad 119).

“19. If the doctrine of frustration applies to a particular case, there could not be any breach of contract. The discharge of a contract by frustration is not the result of an act or volition of a party to it nor the carrying out of a condition, express or implied, in a contract, but the presence of already existent or supervening of certain set of circumstances, which excused the performance of the contract and discharges the same. It amounts to an automatic dissolution of the contract not dependent upon the attitude of the parties to the contract. In a case, where a defence of frustration is raised, what the Court has to consider is not whether one party or the other has done anything from which his responsibility for any breach of contract could be ascertained, but to see whether the circumstances pleaded did exist which could reasonably be considered as sufficient to hold that the parties are absolved from their obligations under the contract.

20. The doctrine of frustration has assumed importance in commercial contracts due to the introduction of control orders by executive authorities for the purpose of defence of the realm, especially during the war. Where there is absolute prohibition as to sale, the fact that there is such a legislation is sufficient to make the defence of frustration complete.”

99. The Respondents contend that approval of Continuation Agreement so that PPA of 1998 could get revived is based on the principle enunciated

in contingent contracts. According to Respondents, the right if any to Appellant gets created only on approval of Continuation Agreement dated 28.04.2016. They contend that happening of approval is happening of some future event, therefore question of neither of parties making any offer and acceptance would arise. In a contingent contract happening of something marks the moment at which a right is created, so that the contract becomes enforceable. As against this, Appellant contends that no doubt status of agreement dated 28.04.2016 can be treated as a contingent contract. The contract comes in to effect once approval is given by the Commission. It is also not the case of Appellant that approval of the State Commission is unnecessary. It is seen that agreement for the purchase of energy was duly finalised and agreed between the parties, which came in the form of a document pertaining to confirmation of terms agreed. By virtue of this agreement parties agreed to continue the amended and restated PPA dated 15.04.1998 with modifications which are clearly mentioned in the agreement. Parties also had consensus that tariff will be as determined by the State Commission in Petition No. 21 of 2015 filed by the Appellant. The Continuation Agreement in a way becomes concluded terms and conditions subject to approval by the State Commission. It was not an inchoate or incomplete contract as contended by AP DISCOMs.

**100.** At this stage, one has to see whether AP DISCOMs could terminate this contract at the whims of AP DISCOMs before happening of contingency i.e., approval by the State Commission especially when State Commission had reserved two OPs for orders on merits after elaborate proceedings for three years. We place reliance on the decisions relied upon by the Appellant.

**“Mrs. Chandnee WidyaVati Madden v Dr.C.L. Katial & Ors”** (AIR 1964 SC 978). Relevant Paragraphs 1, 2, 3, 4 & 5 read as under:

*1. This appeal on a certificate granted by the High Court of Punjab arises out of a suit for specific performance of a contract of sale in respect of a house property situate in Tughlak Road, New Delhi, belonging to the appellant and built on a lease-hold plot granted by the Government in the year 1935, to her predecessor-in-title. It appears that the plaintiffs entered into a contract of sale in respect of the disputed property for the sum of Rs. 1,10,000/-. The deed of agreement is dated September 4, 1956. In so far as it is necessary to notice the terms of the document, the agreement provided that the vendor shall obtain the permission of the Chief Commissioner to the transaction of sale within two months of the agreement, and if the said permission was not forthcoming within that time, it was open to the purchasers to extend the date or to treat the agreement as cancelled. As the necessary permission was not forthcoming within the stipulated time, the purchasers extended the time by another month. The appellant had made an application to the proper authorities for the necessary Permission, but withdrew her application to the Chief Commissioner by her letter dated April 12, 1957. The plaintiffs called upon the defendant several times to fulfil her part of the agreement but she failed to do so. It was averred on behalf of the plaintiffs that they had always been ready and willing to perform their part of the contract and that it was the defendant who had backed out of it.*

*Hence, the suit for specific performance of the contract for sale or in the alternative for damages amounting to Rs. 51,100/-. The suit was contested on a large number of grounds of which it is necessary now to take notice only of the plea on which issue No. 8 was joined. Issue No. 8 is as follows :*

*"(8) Is the contract contingent or impossible of performance and is uncertain and vague and is therefore void ?"*

*The other material issues were concurrently decided in favour of the plaintiffs, and, therefore, need not be referred to.*

*2. The trial Court in a very elaborate judgment dismissed the suit for specific performance of contract and for a permanent injunction and decreed the sum of Rs. 11,550/- by way of damages, with proportionate costs, against the defendant. Though the Court found that the plaintiffs had been throughout ready and willing, indeed anxious, to perform their part of the contract, and that it was the defendant who backed out of it, it refused the main relief of specific performance of the contract on the ground that the agreement was inchoate in view of the fact that the previous sanction of the Chief Commissioner to the proposed transfer had not been obtained.*

*3. The High Court on appeal came to the conclusion that the agreement was a completed contract for sale of the house in question, subject to the sanction of the Chief Commissioner before the sale transaction could be concluded, but that the Trial Court was in error in holding that the agreement was inchoate, and that, therefore, no decree for specific performance of the contract could be granted. The High Court relied mainly on the decision of their Lordships of the Judicial Committee of the Privy Council in *Motilal v. Nanhelal*, for coming to the conclusion that there was a completed contract between the parties and that the condition in the agreement that the vendor would obtain the sanction of the Chief Commissioner to the transaction of sale did not render the contract incomplete. In pursuance of that term in the agreement, the vendor*

*had to obtain the sanction of the Chief Commissioner and as she had withdrawn her application for the necessary sanction, she was to blame for not having carried out her part of the contract. She had to make an application for the necessary permission. The High Court also pointed out that if the Chief Commissioner ultimately refused to grant the sanction to the sale, the plaintiff may not be able to enforce the decree for specific performance of the contract but that was no bar to the Court passing a decree for that relief. Though it was not necessary in the view the High Court took the rights of the parties, it recorded a finding that a sum of Rs. 5,775/- would be the appropriate amount of damages in the event of the plaintiffs not succeeding in getting their main relief for specific performance of the contract.”*

4. *The main ground of attack on his appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion, there is no substance in this contention. So far as the parties to the contract are concerned, they had agreed to bind themselves by the terms of the document executed between them. Under that document it was for the defendant- vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and willing to perform their part Of the contract, and that it was the defendant who wilfully refused to perform her part of the contract, and that the time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction.*

5. *In this view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract. The High Court should have further directed the defendant to make the necessary application*

*for permission to the Chief Commissioner, which was implied in the contract between the parties. As the defendant vendor, without any sufficient reasons, withdrew the application already made to the Chief Commissioner the decree to be prepared by this Court will add the clause that the defendant, within one month from today, shall make the necessary application to the Chief Commissioner or to such other competent authority as may have been empowered to grant the necessary sanction to transfers like the one in question, and further that within one month of the receipt of that sanction she shall convey to the plaintiffs the property in suit. In the event of the sanction being refused, the plaintiffs shall be entitled to the damages as decreed by the High Court. The appellant sought to raise certain other pleas which had not been raised in the High Court, for example, that this was not a fit case in which specific performance of contract should be enforced by the Court. This plea was not specifically raised in the High Court and the necessary facts were not pleaded in the pleadings. It is manifest that this Court should not allow such a plea to be raised here for the first time.”*

**101.** Next question is whether Appellant being a generating company is prohibited seeking approval of PPA i.e., the subject matter in O.P. No. 19 of 2016. For this preposition, we rely upon the following decision of this Tribunal dated 26.07.2011 in ***Raghu Rama Renewable Energy Limited vs. Tamilnadu Electricity Board and Ors ( Appeal No. 126 of 2010):***

*“20. Tamil Nadu Electricity Regulatory Commission was established in the year 1999. The Respondent TNEB approved Permanent BP (FB) no 59 on 11.04.2000 fixing the price payable for procurement of power from Nonconventional Sources of Energy Power Plant. TNEB entered in to PPA with the 1st Appellant on 15.3.2004 and with the 2nd Appellant on 20.6.2002 respectively. From these facts it is evident that*

*these transactions took place after establishment of the State Commission. It was, therefore, incumbent on TNEB and the Appellants generating companies to get the PPAs approved from the State Commission. Admittedly this had not been done.”*

**102.** Reliance is also placed upon the judgment of this Tribunal in Appeal No. 194 of 2016 dated 11.10.2018 in “**Punjab State Power Corporation Limited v. Everest Power Pvt. Ltd.**” The relevant portions read as under:

*6. It is not in dispute that the project declared commercial operation on 12-7-2012. Meanwhile, PTC filed a petition before the State Commission under Punjab State Conduct of Business Regulations, 2005 for approval to allow the PSPCL (Appellant) to purchase electricity in accordance with the tariff calculated as per Central Commission Tariff Regulations, 2009. By an order dated 17-8-2012, the State Commission disposed of this petition, after examining the maintainability of the petition, capping of tariff and determination of tariff including status of PSA in respect of which conditional approval was accorded. As per the directions of the State Commission in the order dated 17-8-2012, the parties were to get the PSA suitably amended to incorporate directions of the State Commission issued in the order dated 24-1-2007 and thereafter they can file application for determination of tariff along with the audited accounts of the project cost and other relevant documents. Same came to be communicated to the Appellant (PSPCL) by PTC India Ltd. expressing willingness to make suitable amendments in terms of the directions of the State Commission. In response to the same, PSPCL requested PTC India Ltd. through a letter dated 29-8-2012 to submit amended draft of the PSA which came to be submitted as per the letter dated 21-9-2012. PSPCL accepted all the amendments except the one relating to the determination of the tariff as per Clause 10.1 of the PSA.*

Therefore, PTC was compelled to file a review petition seeking review of the order dated 17-8-2012 for modification of directions. Both the parties filed a joint submission asking for the same relief that the Clause relating to tariff in the PSA may not be amended as a precondition for filing Petition for determination of tariff. Review petition came to be disposed of on 6-11-2012 directing the parties to suitably amend the PSA to incorporate the directions issued in the order dated 24-1-2007 except in respect of condition relating to [Article 10.1](#) of the PSA.

11. According to PSPCL, the State Commission failed in appreciating the scope of [Section 86\(1\)\(b\)](#) of the Electricity Act 2003 which empowers the Commission to regulate the entire electricity purchase and procurement process of distribution licensees including the price at which electricity is purchased by the distribution licensee through the agreements for supply within the State. PSPCL contends that the scope of approval under the above Section/Regulations, the Commission has to examine the cost of power purchase, reasonability of price and terms of the agreement which means actual price as contemplated under [Section 61](#) and working out of the tariff in terms of [Section 62](#) of the Electricity Act. It is further stated that the State Commission in its order dated 24-1-2007 had finally concluded that the tariff being capped was reasonable and therefore, the power purchase came to be approved.

12. Under [Section 86\(1\)\(b\)](#), power to regulate is much wider than the power to determine the tariff is the stand of PSPCL and for this proposition, relies upon the judgment of the Apex Court quoting *Energy Watchdog Versus CERC &Ors.* (2017) 4 SCC 80. PSPCL further contends that the determination of tariff under [Section 62](#) will not remove the scope or mandate under [Section 86\(1\)\(b\)](#) of the Act. It is stated that determination of tariff under [Section 62](#) is a precondition for consideration of approval under [Section 86\(1\)\(b\)](#). Therefore, the State Commission has an obligation to decide whether the

power is to be purchased or not in terms of [Section 86\(1\)\(b\)](#). It is further contended that the power under [Section 86\(1\)\(b\)](#) is vested with State Commission for protection of public interest at large since the power purchase cost is ultimately passed on to the consumers for the entire period of PPA. Therefore, the State Commission has an obligation to look into various aspects and decide whether power purchase is to be approved or not to be approved which includes the exercise to consider that the power at the cost quoted is not necessary since it may be available at cheaper price elsewhere. He refers to *Tamil Nadu Generation and Distribution Corporation Limited Versus Penna Electricity Ltd. &Ors. in Appeal No. 112 of 2012 dated 10-7-2013* so also *Rithwik Energy Generation Private Ltd. Versus Karnataka Power Transmission Corporation Ltd. in Appeal No. 51 of 2011 dated 21-10-2013* to contend that [Section 86\(1\)\(b\)](#) confers vital power on Commission and therefore, the PPA is not valid, if approval is not granted under [Section 86\(1\)\(b\)](#). He also refers to *Tata Power company Ltd. Versus Reliance Energy Company Ltd. (2009) 16 SCS 659* to contend that PPA is subject to grant of approval by the Commission and the Commission has a duty to check if the allocation of power is reasonable or not. According to PSPCL, primary consideration for approval under [Section 86\(1\)\(b\)](#) being the price, the same can be considered only after the price is fixed. Since the only consideration of power purchase under [Section 86\(1\)\(b\)](#) was enumerated in the order dated 24-01- 2007 wherein all requirements and reasonability of the price was gone into on the specific and basic premise that the tariff was capped and the capped tariff was found reasonable, since the same is removed now, fresh approval is required as the said condition of capped tariff ceases to exist as on today.

20.1 Questions of Law raised in the appeal are as under:

A. Whether under [Section 86\(1\)\(b\)](#) of the Electricity Act, 2003, it is not the duty of the State Commission to go into the aspect of price of electricity to

grant approval especially when the entire power purchase cost of the Appellant is passed on to consumers in the State?

B. Whether the Order dated 24.01.2007 of the State Commission having been held to be inoperative by the State Commission itself and approved by this Tribunal and the Hon'ble Supreme Court, can it be said that the approval under [Section 86\(1\)\(b\)](#) accorded by the Order dated 24.01.2007 continues to have effect?

C. Whether in any of the previous Orders of the State Commission including the Orders dated 17.08.2012, 06.11.2012 or 27.11.2013 or the Judgment dated 12.11.2014 of the Hon'ble Tribunal, the issue of price vis a vis approval of power purchase under [Section 86\(1\)\(b\)](#) of the Electricity Act, 2003 has indeed been decided?

20.10 Findings and decision of the Commission is to the effect that the Petition filed by the trader and not the generator is also maintainable.

20.24 [Section 86\(1\)\(b\)](#) of the Electricity Act reads as under:

"The State Commission shall discharge the following functions, namely:-

... ..

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the state.

Reading of [Section 86\(1\)\(b\)](#) makes it clear that this is a provision of regulating purchase of electricity and the procurement process of distribution licensee. [Section 86\(1\)\(b\)](#) not only provides to regulate electricity purchase and procurement process of distribution licensees but also the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements. It is

*well settled that as part of the Regulation, it can also adjudicate if any dispute arises between the licensees and generating companies with regard to the implementation, application or interpretation of the provisions of the PPA.*

*20.25 There cannot be a second opinion so far as the obligation of the Commission to consider the aspect of price of power while considering the grant of approval. It also has to bear in mind that the entire cost involved in procuring power ultimately passes on to consumers. However, the contention of the Appellant that once tariff is certain, fresh approval of the PSA is required has to be looked into with reference to provisions of [Section 86\(1\)\(b\)](#) of the Electricity Act of 2003. Though [Section 86\(1\)\(b\)](#) refers to price / cost of power as one of the factors to be considered while considering the grant of approval of PSA, but nowhere in the Act it is said there has to be certain and definite tariff to provide approval.”*

**103.** From the above discussion, it is seen that though there is no mandate that provisions of CPC are applicable to the proceedings before a Commission/Tribunal, but the philosophy underlying a particular provision of CPC if not contravening the provisions of Electricity Act pertaining to procedure, the Tribunal can follow the said principles as guidelines. Further, Tribunal is entitled to have its own procedure to meet ends of justice. If we go through the facts and circumstances pertaining to this appeal it is seen that substantial investment was made by the Appellant in commissioning the two units of its power project when AP DISCOMs insisted for 100% supply of power only to them and not even to State of Telangana on reorganisation of the State of AP. Apart from this, parties

entered into Memorandum of Agreement in 2013 and amended and restated PPA in the form of Continuation Agreement on 28.04.2016, which means the terms and conditions of these agreements were in accordance with the procurement of electricity plan of the State which was approved by the State Commission. They further fortified their intention indicated in the terms and conditions of contracts by filing petition for determination of capital cost in O.P. No. 21 of 2015 and approval of Continuation Agreement to revive past PPA in O.P. No. 19 of 2016.

**104.** For three years these petitions were pending during which period public opinion/suggestions were taken and after hearing lengthy arguments, two OPs were reserved for orders on merits by the regulatory commission of the State.

**105.** On issues pertaining to provisional tariff, matter came up to this Tribunal in Appeal No. 153 of 2017. In these proceedings, on several occasions the Commission and AP DISCOMs sought extension of time to pronounce orders on merits in O.P. No. 19 of 2016 and O.P. No. 21 of 2015.

**106.** Meanwhile, for the reasons best known to the AP DISCOMs they sought for withdrawal of O.P. No. 19 of 2016 after reopening of the matter since it was reserved for final orders on merits. They also sought for

rejection of O.P. No.2 1 of 2015 filed for determination of capital cost. We have already opined in the above paras that there was no justification or substantial change in the position of the parties which legally would entitle a party to the contract to seek withdrawal of the petition for approval. At this stage, one has to remember that the matters were reserved for final orders for determination of capital cost and fixation of tariff after approval of Continuation Agreement. Consideration of these two OPs on merits was not yet exercised by the State Commission and it was yet to consider these two petitions on merits since arguments were concluded. It was not justified on the part of the State Commission to permit one party to create hurdles/stumble blocks for another party who was waiting for orders on merits in these two OPs with legitimate expectation having invested huge amount. If party to a contract (like AP DISCOMs) are allowed to withdraw petition for approval of PPA at a stage like the subject matter in this appeal, it would create uncertainty in the electricity sector for any investor to think hundred times before investing in the sector. If one party is allowed to back out after substantial procedure is completed without a genuine and good reason no investor would come forward to invest money in the sector.

**107.** There is yet another factor we cannot ignore i.e., regulatory commission having heard the matter for three years and after reserving

the petitions for pronouncement of orders proceeded to allow the application for reopening of the petition and withdrawal of the O.P. No. 19 of 2016, which is contrary to settled law referred to by us in the above paragraphs. The only compliance on the part of the Respondent/Commission was to dispose of O.P. No. 19 of 2016 and O.P. No. 21 of 2015 on merits. Till date those petitions are not considered on merits. They are yet to be considered on merits. Therefore, we are of the opinion, there was no justification for the regulatory commission to pass the impugned order.

**108.** In the light of the above discussion and reasoning, we are of the opinion the appeal deserves to be allowed warranting interference with the impugned order. Accordingly, we allow the appeal and direct the State regulatory commission to dispose of O.P. No. 21 of 2015 filed for determination of capital cost and O.P. No. 19 of 2016 for approval of amended and restated PPA (Continuation Agreement) on merits.

**109.** The above exercise has to be complied with as expeditiously as possible but not later than three months.

**110.** Meanwhile, AP DISCOMS shall continue to pay Rs.3.82 per unit for the power supplied from the Appellant's plant.

**111.** In the facts and circumstances, the parties are directed to bear their own cost.

**112.** Pronounced in the Open Court on this the 07<sup>th</sup> day of January, 2020.

**S.D. Dubey**  
**[Technical Member]**

**Justice Manjula Chellur**  
**[Chairperson]**

Dated: 07<sup>th</sup> January, 2020

**~~REPORTABLE/NON-REPORTABLE~~**