IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

ORDER ON IA NO. 1974 OF 2019
IN
Appeal No. 366 OF 2019

Dated : 19th December, 2019

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

IN THE MATTER OF:

Bhoruka Power Corporation Limited
Rep. By its Sr. Vice President & Company Secretary
Mr. M. S. Sreenivas
Regd. Office at Kitchenanda Building
Lavelle Road, Opp Navnit Motors, Ashok Nagar,
Bengaluru, Karnataka – 560001 - Appellant/Applicant

Versus

1. **Bangalore Electricity Supply Company Ltd**
   Through its Managing Director
   K. R. Circle, Bengaluru – 560001

2. **Karnataka Power Transmission Corporation Ltd.**
   Through Chief Engineer (Electricity)
   Race Course Cross Road,
   Bengaluru – 560009

3. **The Government of Karnataka**
   Department of Energy,
   Through the Additional Chief Secretary
   Vikasa Soudha, Dr. B. R. Ambedkar Street,
   Bangalore – 560001

4. Karnatka Electricity Regulatory Commission
No. 16, C-1 Millers Tank Bed Area
Vasanth Nagar, Bengaluru - 565052 - Respondents

Counsel for the Appellant (s) : Rohit Rao N.
Ananga Bhattacharyya
Devahuti Tamuli

Counsel for the Respondent(s) : Balaji Srinivasan for R-1

O R D E R

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The instant Application (IA No. No. 1974 of 2019) has been filed by the Appellant alongwith the present Appeal No. 366 of 2019 for interim relief under Rule 30 of the Appellant Tribunal Rules, 2007 against the Impugned Order dated 24.10.2019 passed by the Karnataka Electricity Regulatory Commission in OP NO. 44/2019 vide which it has held that the Applicant is not entitled to sell the energy to the third party consumers.

2. Gist of Submissions of the Applicant/Appellant

2.1 The Appellant has established a canal based Mini Hydel Electric Power Station of 18 MW capacity (2 x 9 MW) in the State of Karnataka. The power plant was established at a time when there was acute shortage of power in the State and the Government of Karnataka was encouraging power generation by private sector.

2.2 Vide Order dated 30th May 1985, the Government of Karnataka granted permission for setting up of the Mini Hydel Plant and for wheeling of power through the then Karnataka Electricity Board's

(**KEB)** Power System. The permission at this stage admittedly was for Captive Power Generation.

2.3 By a subsequent Order dated 16th December 1985 the Government of Karnataka approved the supply of the energy from the power plant to Bhoruka Group *(`their Companies')* situated in the State of Karnataka.

2.4 Thereafter on 3rd February 1986, the Government of Karnataka agreed for the setting up of the 18 MW Mini Hydro project as a captive unit by the Appellant.

2.5 In 1991 there was liberalization of the power generation, the generation of electricity by private sector was allowed. The amendment of the definition of the term `generating company' in Section 2 (4A) with effect from 15th October 1991 was given effect. The generating company's definition was changed from Government Company to any Company registered under the Companies Act.

2.6 After the above amendment–

(a) On 19th October 1991 the Government of Karnataka amended the earlier permission and extended the period of the approval from 25 years to 40 years in regard to the power projects**;**

(b) The Government of India issued Notification dated 30th March 1992 under Section 43A (1) of the Electricity (Supply) Act, 1948 recognizing in Clause 3.2 the sale of power by a generating company directly to a consumer;

(c) On 8th June 1992 the Government of Karnataka issued an Order stating, inter alia, about the power crisis prevalent and encouraging private participation in the power generation, incentive to be granted, power generation by industrial units, Mini and Micro Hydel Projects, exemption and concession etc;

(d) The Appellant could function as a generating company and not merely a captive Generating Station;

(e) By letter dated 23rd June 1992, the Appellant applied to the Government of Karnataka for permission to sell electricity generated not only within the Appellant's Group but also to others who may be nominated by the Appellant;

(f) On 25th November 1992, an agreement was entered into between the Appellant and KEB whereby the wheeling of electricity through KEB's system was allowed to enable the Appellant to supply electricity to both namely (i) industries of Bhoruka Group and (ii) to the nominees described as Users. The agreement is for a period of 30 years from 25th November 1992;

2.7 The commercial operation of the power project commenced on 27th November 1992.

2.8 In the context of the above, the submissions of the Appellant is that the Appellant was specifically permitted to sell the electricity generated by it not only to the industries in the Appellant's Group but also to any other person nominated by the Appellant.

2.9 Such supply of electricity by the Appellant to third parties nominated by the Appellant is within the scope of the Electricity Laws then prevalent, namely;

(a) Section 43A (1) (c) of the Electricity (Supply) Act, 1948 as amended effective from 15.10.1991;

(b) Sections 2 (4A), 15A, 18A etc whereby the generation in private sector was recognized effective from 15th October 1991 by the

amendment to the Electricity (Supply) Act, 1948 and due to power shortage such generation in private sector was encouraged by the State Government.

(c) Notification dated 30th March 1992 under the Electricity (Supply) Act, 1948 recognizing the supply of electricity by a generating company;

(d) Section 28 of the Indian Electricity Act, 1910 which empowered the State Government to sanction any person to engage in the business of supplying electricity even without a supply licence under Section 3 of the Indian Electricity Act, 1910.

2.10 Though, specific document by the State Government approving the supply of electricity to third parties is not available as on date, the sequence mentioned above, and in particular, the letter dated 23rd June 1992 written by the Appellant and the Agreement dated 25th November 1992 entered into clearly establish the sale of electricity to third parties was sanctioned by the State Government.

2.11 The above is further unambiguously clear from the following.

(a) The Agreement dated 25th November 1992 was executed primarily in the context of the Appellant being considered as a generating company (consequent to the amendment in the Electricity (Supply) Act, 1948 recognizing the private sector generating companies). But for the above, there was no necessity for the agreement if the Appellant was required to supply only to the Group Companies. The position as prevalent earlier could continue.

(b) Consequent to the agreement from the year 1992 till 2019 i.e. for more than 27 years there has been supply of electricity by the

Appellant to third parties without any objection by the KEB or its successor entities, the Respondent Distribution Companies;

(c) After coming into force of the Electricity Act, 2003 and the introduction of payment of Cross Subsidy Surcharge, the Appellant has paid the Cross Subsidy Surcharge on sale to third parties and the same has been duly accepted and appropriated by the distribution companies. This is on the basis that the Appellant is entitled to sell to third parties.

(d) On a petition filed by the Appellant, the Hon'ble High Court of Karnataka had considered the aspect in ILR 1994 KAR 205 (in the context of the liability of the payment of demand charges under Section 49 of the Electricity (Supply) Act, 1948, Wheeling and Banking Agreement dated 25thNovember 1992 along with other documents were duly considered and it was specifically decided that the Appellant was also permitted to supply electricity to third parties apart from the sister concerns of the Appellant. In fact, based on the facts, that the Appellant had already been given the benefit in regard to third party sale, the liability of payment of demand charges to the Electricity Board was upheld.

(e) By Order dated 27th May 2002 the State Commission had also recognized the Appellant being granted permission for supply of electricity;

2.12 The Government of Karnataka was a party in the proceedings before the Hon'ble High Court in ILR 1994 KAR 205 (Writ Petition No. 28054 and 28055 of 1993 decided on 20th October 1993) represented by the Government Pleader besides KEB and the contention of the Respondents in the said writ petition that third party sale was allowed

has been duly recorded and the decision of the Hon'ble High Court was based thereon.

2.13 In the context of the above, there cannot be any dispute that the Government of Karnataka had after the amendment in the Electricity (Supply) Act, 1948 permitted the Appellant to generate and supply electricity to third parties (in addition to the Appellant's Group Companies). Such permission is not prohibited under the provisions of the Electricity Laws then prevalent. Such permission can be traced to the powers under Section 28 of the Indian Electricity Act, 1910 (Power of the State Government to give sanction) and Section 43A (1) (c) of the Electricity (Supply) Act, 1948 (Power of the Competent Government to allow a generating company to sell electricity to any other person).

2.14 The decision of the Hon'ble Supreme Court in the case of AP Gas Power Corporation Limited v Andhra Pradesh State Electricity Regulatory Commission and Another (2004) 10 SCC 511 is distinguishable to the facts of the present case. In that case the AP Gas Power Corporation was allowed only as a Captive Power plant and the permission under Section 43A (a) (c) was confined to the participating industries. In view of the above, the Hon'ble Supreme Court restricted the supply of electricity to the participating shareholders of AP Gas Power Corporation and not to the sister concerns.

2.15 In the present case the Competent Government has not only allowed the sale to the Appellant's Group but also to third parties nominated by the Appellant as would be clear from the decision of the Hon'ble High Court dated 20th October 1993 as well as in the context of the

Agreement dated 15th September 1992 having been executed and above all, the consistent course of dealings from 1992 to 2019.

2.16 In the light of the above, the principles of promissory estoppel by conduct would be clearly applicable in the present case as decided by the Hon'ble Supreme Court, inter alia, in LML Limited v State of Uttar Pradesh (2008) 3 SCC 128; Dewan Singh and Others -v- Rajendra PD Ardevi (2007) 10 SCC 528 and Life Insurance Corporation -v- Lalita Devi AIR 2016 Pat 6.

2.17 The Electricity Act, 2003 came into effect on 10th June 2003. There has been a paradigm shift in the licensing provision in the Electricity Act, 2003 as compared with the Indian Electricity Act, 1910. Under the Electricity Act 2003 (Section 12 read with Section 14) the licensed activities are "transmission", "distribution" and "trading". Earlier under the Indian Electricity Act, 1910 the licensed activities were "supply" and "transmission".

2.18 As per the Act, 2003, the electricity can be supplied by a generating company to an end-user without any licence, authorization or permission. This is specifically provided under Sections 9, 10 and 49 of the Electricity Act, 2003. The tariff terms and conditions of such supply are also to be agreed to bilaterally without the necessity for determination of tariff by the Appropriate Commission.

2.19 The National Tariff Policy dated 06.01.2006 and revised Tariff Policy dated 28.01.2016 notified by the Central Government under section 3 of the Electricity Act, 2003 allows captive power generators to supply energy through the grid to even non captive users. Clause 6.3 of the Policy states as under:

> *"Captive generation is an important means to making competitive power available. The Appropriate*

Commission should create an enabling environment that encourages captive power plants to be connected to the grid.

Such captive plants may supply surplus power through grid subject to the same regulation as applicable to generating companies. Firm supplies may be bought from captive plants by distribution licensees using the guidelines issued by the Central Government under section 63 of the Act taking into account second proviso of para 5.2 of this Policy.

The prices should be differentiated for peak and off-peak supply and the tariff should include variable cost of generation at actual levels and reasonable compensation for capacity charges.

Wheeling charges and other terms and conditions for implementation should be determined in advance by the respective State Commission, duly ensuring that the charges are reasonable and fair.

Grid connected captive plants may also supply power to non-captive users connected to the grid through available transmission facilities based on negotiated tariffs. Such sale of electricity will be subject to relevant regulations for open access including compliance of relevant provisions of rule 3 of the Electricity Rules, 2005."

2.20 In view of the above and notwithstanding any previous dispensation, effective 10th June 2003, the supply of electricity by the Appellant to third parties is fully within the scope of the Electricity Act, 2003. Accordingly, the restriction imposed by the impugned Order on the supply of electricity is patently erroneous, contrary to the provisions of the Electricity Act, 2003 and should be treated as non-est.

3. Gist of Submissions of the Respondent No. 1/BESCOM

3.1 The Applicant/Appellant herein has filed the present application seeking for stay of the impugned order dated 24.10.2019 passed by

the State Commission and allow the Appellant company to wheel energy to its third party consumers in accordance with wheeling and Banking Agreement dated 25.11.2019. The relief sought by the Applicant/Appellant by way of the present application is wholly untenable and the present application is liable to be dismissed at the threshold.

3.2 It is the case of the Applicant/Appellant that State Commission has failed to consider that under Section 9 of the Electricity Act, 2003, the Applicant/Appellant do not need a license to supply power to third parties. It is contended by the Applicant/Appellant that the State Commission has erred by not considering the judgement of High Court in the matter of Bhoruka Power Corporation Limited V KPTCL reported in ILR 1994 KAR 2015. It is further submitted by the Applicant/Appellant that action of the Respondent not allowing the Applicant/Appellant to sell power to third parties has put the Applicant/Appellant under severe financial strain.

3.3 In response to the contentions urged by the Applicant/Appellant, it is submitted that the Applicant/Appellant has not made out any case for staying the order of the State Commission dated 24.10.2019. It is submitted that Government of Karnataka vide orders dated 30.05.1985 and 16.12.1985 had granted permission to the Applicant/Appellant to establish a captive mini Hydel plant. It was made clear that power generated at such plant was to be utilized captively, i.e. by the Applicant/Appellant and the companies which may be formed within the group established by the Applicant/Appellant subject to provisions of the Indian Electricity Act. Therefore, the entire purport of the Government order was to permit the Applicant/Appellant to establish a mini Hydel power plant which would generate power which could be

used by the Applicant/Appellant itself or its group companies. However, contrary to the same, the Applicant/Appellant has been selling the power so generated to third parties who are not captive consumers of the Applicant/Appellant. It is humbly submitted that the said supply of power is not only opposed to the terms of the Government order by which the Applicant/Appellant was permitted to establish the plant but is also opposed to the provisions of the Electricity Act 2003 which clearly defines the term captive generating plant. Such being the case, there is absolutely no infirmity in the impugned order passed by the State Commission the Right which was sought to be enforced before the Regulatory Commission was the right which the Applicant/Appellant claims under the Government Order and the Wheeling and Banking Agreement and not under the provisions of Electricity Act 2003. As and when Applicant/Appellant seeks to invoke any statutory right, the same shall be with in accordance with law.

3.4 It is settled law that a judgement of court is a precedent for what it decides. It is also to be noted that a judgement cannot be applied as a precedent in all circumstances. In the reported judgement of the High Court of Karnataka in the matter of Bhoruka Power Corporation Limited v KPTCL reported in ILR 1994 KAR 2015, the question in issue was with regard to the levy of demand charges. The question as to whether the Applicant/Appellant is captive or not and the issue pertaining to whether by law the Applicant/Appellant meets the requirement pertaining to captive consumption was never the issue. This is further fortified by the fact that it was never the contention of the Applicant/Appellant that it was entitled to the right of selling to third parties based on the judgement mentioned supra. Therefore, it is submitted that no reliance can be placed on judgement of High Court

of Karnataka in Bhoruka Power Corporation Limited v KPTCL reported in ILR 1994 KAR 2015 to contend that Hon'ble High Court in said judgement has arrived at a finding that the Applicant/Appellant is permitted to sell power to third parties under the Government Orders dated 30.05.1985 and 16.12.1985.

3.5 Further, the Applicant/Appellant has placed reliance on the provisions of Section 9, and 10 of the Electricity Act 2003 to contend that separate licensee is not required to sell power to third parties. It is to be noted that agreement between the parties was entered into in the year 1992, much prior to the introduction of the Electricity Act 2003 and the Rules made thereunder. It is submitted that Section 185(a) of the Electricity Act, 2003 specifically saves the contract executed as per the repealed law. Therefore, Wheeling and Banking Agreement dated 25.11.1992 is a valid contract and permits Applicant/Appellant to supply power only to captive units. The reliance placed on these provisions are totally misplaced and untenable.

3.6 The process and the agreement to be executed into if the Applicant/Appellant is seeking to avail wheeling arrangement under the provisions of Electricity Act, 2003 is completely different. Further, no application for wheeling and banking has been made by the Applicant/Appellant under the provision of Electricity Act, 2003 till date. Further, the said contentions render the provisions of the contract which oblige the Applicant/Appellant to sell surplus power to the Government of Karnataka otiose and therefore, such a contention is impermissible.

3.7 The contentions that third party sale was permitted earlier is of no relevance in the present case as there has been no amendment to the Government or the Wheeling and Banking Agreement till date

permitting such third party sale. Therefore, the Respondent is justified in their action. The Applicant/Appellant has no enforceable legal right to sell to third parties as on date.

3.8 Averment that the Applicant/Appellant is a independent power producer is untenable and denied. It is submitted that the Applicant/Appellant is captive generating plant. It is submitted that Government of Karnataka vide orders dated 30.05.1985 and 16.12.1985 had permitted the Applicant/Appellant to set up 18 MW mini Hydel plant at Shivpura and supply power to its captive units. The Applicant/Appellant has availed various concession and benefits under the same including occupation of Government Land.

3.9 Averment that it is nowhere stated in the Wheeling and Banking Agreement dated 25.11.1992 that it is a captive generating company and it is not allowed to supply power to third party consumers is untenable and denied. It is submitted that Wheeling and Banking Agreement is executed in pursuance to the Government Orders dated 30.05.1985 and 16.12.1985. It is submitted that Government Order clearly states that the Appellant is permitted to supply power to Bhoruka Steel Ltd. Karnataka Aluminium Ltd., Karnataka Oxygen Ltd., Bhoruka Engineering Ltd. and such other companies formed within the group. Further, any surplus power is to be sold to Government of Karnataka at the rate determined. Therefore, the intention behind permission granted to the Applicant/Appellant is unambiguous and clearly pronounced.

3.10 Averment that action of the Respondent not permitting the Applicant/Appellant to sell power to third parties is illegal, arbitrary and against the provision of the Electricity Act, 2003 is untenable and

denied. Averment with regard to the Applicant/Appelant's plant being shut down is untenable and denied.

3.11 Averment that in the impugned order State Commission has not considered terms of agreement, section 10(2) of Electricity Act 2003 and judgement of Hon'ble High Court is untenable and denied. Averment that the State commission has wrongly placed reliance on the judgement of Supreme Court in AP Gas is untenable and denied. Averment that the State Commission failed to consider that Applicant/Appellant is not required to obtain license under Section 9 of the Electricity Act, 2003 is untenable and denied. The said provisions have no application to the facts falling for consideration in the present case.

3.12 The contention that the State Commission failed to consider that Applicant is not required to obtain license under Section 9 of the Electricity Act, 2003 is untenable and denied. It is submitted that no reliance can be placed on judgement of this Tribunal in Appeal No. 27 of 2006 as same is not application to the facts and circumstances of the present case.

3.13 Averment that Applicant/Appellant is entitled to payment at Rs. 4.30 per unit is untenable and baseless and also, that the Applicant/Appellant will suffer huge loss as the Applicant/Appellant is required to pay difference amount of HT tariff and selling amount is irrational and denied. Further that the Appellant will suffer loss of Rs. 2.45 Crore is totally incorrect. The statements are wholly unsubstantiated and these contentions are being raised for the first time in the present proceedings. The contentions that third party sale was permitted earlier is of no relevance in the present case as there

has been no amendment to the Government or the Wheeling and Banking Agreement till date permitting such third party sale.

3.14 Averment that great prejudice and loss will be caused to the Applicant/Appellant if the stay order is not granted is untenable and denied. Further, the contention that balance of convenience lies in favour of Applicant/Appellant is untenable and denied. Averment that no loss will be caused to the Respondent, if the Applicant/Appellant is allowed to sell power to third parties. From the averments in the application and appeal, it is clear that hardship being pleaded is only pertaining to the plausible monetary claims which may arise against the Applicant/Appellant in future. The same cannot be the basis for granting interim reliefs. Therefore, there is neither irreparable injury nor balance of convenience in favour of Applicant/Appellant. Wherefore, it is prayed that this Hon'ble Tribunal may be pleased to dismiss the present appeal in the interest of justice.

OUR CONSIDERATION AND FINDINGS

4. The Applicant/Appellant has sought the following interim relief:

(a) Pass an ex-parte ad-interim order staying the operation of the impugned order passed by the Hon'ble Karnataka Electricity Regulatory Commission in OP No. 44 of 2019;

b) Allow the appellant company to wheel energy to its third party consumers in accordance with WBA Agreement dated 25.11.1992 by directing the Respondent No. 1 to issue Official Memorandum to the Appellant/Appellant, permitting sale of electricity generated by the Appellant to third parties connected to the grid of the Respondent No. 1;

c) Pass such other further orders as the Tribunal deems fit to pass under the facts and circumstances of the case.

4.1 The Applicant/Appellant has a Mini Hydel Electric Power Station of 18 MW capacity (2 x 9 MW) in the State of Karnataka. The power plant was established at a time when there was acute shortage of power in the State and the Government of Karnataka was engaging participation of power generation by private sector. Initially the permission of State Government was admittedly for captive power generation for supply of power to its captive group of its sister concerns which later on during 1992 was permitted by the Government to sell the electricity generated not only to within the Applicant/Appellant group but also to others who may be nominated by the applicant. Accordingly, an agreement dated 25.11.1992 came to be executed between the Applicant/Appellant and KEB whereby the wheeling of electricity was allowed to enable the Appellant to supply electricity through KEB system to both namely (i) industries of Bhoruka Group and also to the (ii) nominees described as Users nominated by the Applicant/Appellant. The said agreement was for a period thirty years commencing from 25.11.1992. It is not in dispute that the COD of Hydro Power Plant was achieved on 27th November 1992 and the power generated from the plant was supplied to captive users as well as the other entities nominated by the Applicant/Appellant.

4.2 It is the contention of the Applicant/Appellant that the Agreement dated 25.11.1992 was executed primarily in the context of the Appellant being considered as a generating company (consequent to the amendment in the Electricity (Supply) Act, 1948 recognizing the private sector generating companies). Consequent to the agreement from the year 1992 till 2019 i.e. for more than 27 years there has been supply of

electricity by the Appellant to third parties without any objection by the KEB or its successor entities, the Respondent Distribution Companies. After coming into force of the Electricity Act, 2003 and the introduction of payment of Cross Subsidy Surcharge, the Appellant has paid the Cross Subsidy Surcharge on sale to third parties and the same has been duly accepted and appropriated by the distribution companies. Admittedly this was on the basis that the Applicant/Appellant is entitled to sell its power to third parties.

It is noted that a petition came to be filed by the Applicant/Appellant before the Hon'ble High Court of Karnataka in the context of the liability for the payment of demand charges under Section 49 of the Electricity (Supply) Act, 1948, and after considering of the documents, agreements and material placed on record, the Hon'ble High Court specifically decided that the Applicant/Appellant was also permitted to supply electricity to third parties apart from its system concerns.

4.3 In addition to the above by Order dated 27.05.2002, the State Commission had also recognized the Applicant/Appellant being granted permission for supply of electricity to third parties. It is relevant to note that the Government of Karnataka was also a party in the proceedings before the Hon'ble High Court in Writ Petition No. 28054 and 28055 of 1993 which was decided on 20th October 1993 and the contentions of the Respondent in the said Writ Petition that third parties sale was allowed has been duly recorded and the decision of the Hon'ble High Court was based thereon. It is the further contention of the Applicant/Appellant that in the light of the above facts, the principles of promissory estoppel by conduct would be clearly applicable in the present case as decided by the Hon'ble Supreme Court, inter alia, in LML Limited v State of Uttar Pradesh (2008) 3 SCC

128; Dewan Singh and Others -v- Rajendra PD Ardevi (2007) 10 SCC 528 and Life Insurance Corporation -v- Lalita Devi AIR 2016 Pat 6.

4.4 Learned Counsel for the Applicant/Appellant has also placed reliance on the national tariff policy dated 06.01.2006 (revised on 28.01.2016) which allows captive power generators to supply energy through grid to even non captive users/ third parties which relates to Clause 6.3 of the Policy states as under :

> *"Captive generation is an important means to making competitive power available. The Appropriate Commission should create an enabling environment that encourages captive power plants to be connected to the grid.*
>
> *Such captive plants may supply surplus power through grid subject to the same regulation as applicable to generating companies. Firm supplies may be bought from captive plants by distribution licensees using the guidelines issued by the Central Government under section 63 of the Act taking into account second proviso of para 5.2 of this Policy.*
>
> *The prices should be differentiated for peak and off-peak supply and the tariff should include variable cost of generation at actual levels and reasonable compensation for capacity charges.*
>
> *Wheeling charges and other terms and conditions for implementation should be determined in advance by the respective State Commission, duly ensuring that the charges are reasonable and fair.*
>
> *Grid connected captive plants may also supply power to non-captive users connected to the grid through available transmission facilities based on negotiated tariffs. Such sale of electricity will be subject to relevant regulations for open access including compliance of relevant provisions of rule 3 of the Electricity Rules, 2005."*

4.5 Learned Counsel for the Applicant/Appellant while summing up his arguments reiterated that in view of the above submissions and

notwithstanding any previous dispensation, effective 10th June 2003, the supply of electricity by the Appellant/Appellant to third parties is fully within the scope of the present act and accordingly, the restriction imposed in the impugned Order on the supply of electricity to third parties is patently erroneous, contrary to the provisions of Electricity Act 2003 and hence should be treated as non-est.

4.6 **Per Contra** Learned Counsel for the first Respondent/Bescom submitted that Government of Karnataka vide its order dated 30.05.1985 and 16.12.1985 had granted permission to the Applicant/Appellant to establish a captive mini Hydel plant and it was understood that power generated from the plant would be utilized captively, i.e. by the Applicant/Appellant and the companies which may be formed within the group established by the Applicant/Appellant subject to provisions of the Indian Electricity Act.

However, contrary to the same, the Applicant/Appellant has been selling the power so generated to third parties being not captive consumers. Such being the case, there is absolutely no infirmity in the impugned order passed by the State Commission. Learned Counsel further submitted that it is settled law that a judgement of court is a precedent for what it decides and a judgement cannot be applied as a precedent in all circumstances. In the reported judgement of the High Court of Karnataka in the matter of Bhoruka Power Corporation Limited v KPTCL reported in ILR 1994 KAR 2015, the question in issue was in this regard to the levy of demand charges and the question as to whether the Applicant/Appellant is captive or not and the issue pertaining to whether by law the Applicant/Appellant meets the requirement pertaining to captive consumption was never the issue. Learned counsel was quick to point out that accordingly no reliance

can be placed on judgement of High Court of Karnataka as stated supra.

4.7 Learned counsel for the first respondent vehemently submitted that the Applicant/Appellant has placed reliance on the provision of Section 9 and 10 of the Electricity Act 2003 to contend that separate licensee is not required to sell power to third parties. It is, however, to be noted that agreement between the parties was entered into in the year 1992, that is much prior to the enactment of the Electricity Act 2003 and the Rules made thereunder. As per the Act, 2003, specifically Section 185(a) of the Electricity Act, 2003 the contract executed as per the repealed law has been saved and therefore WBA dated 25.11.1992 is a valid contract which permits Applicant/Appellant to supply power only to captive units. Further, no application for wheeling and banking has been made by the Applicant/Appellant under the provisions of Electricity Act, 2003 till date and hence Applicant/Appellant has to sell surplus power to the Government of Karnataka only.

4.8 Learned Counsel for the Respondent further contended that third party sale was permitted earlier is of no relevance in the present case as there has been no amendment to the Government order or the Wheeling and Banking Agreement till date permitting such third parties sale. Learned counsel was quick to submit that the averment that the Applicant/Appellant is a IPP is untenable as Government of Karnataka vide order dated 30.05.1985 and 16.12.1985 had permitted the Applicant/Appellant to setup 18 MW mini Hydel Plant for supplying power to its captive units. Further, the WBA was executed in pursuance to the Government Orders referred to above which permitted to supply power to sister concerns of the Bhoruka Power Ltd. and other companies formed within the group. It implied that the

surplus over and above captive use was to be sold to Government of Karnataka on the determined rate. Therefore the intention behind the permission granted to the Applicant/Appellant is unambiguous and fairly pronounced.

4.9 Learned counsel for the first respondent emphasised that it is wrong on the part of the Applicant/Appellant to contend that the State Commission has not considered terms of agreement, section 10(2) of Electricity Act 2003 and judgement of Hon'ble High Court and that the State commission has wrongly placed reliance on the judgement of Supreme Court in AP Gas is without any footing and hence denied. Further, the Applicant/Appellant cannot rely on the judgement of this Tribunal in Appeal No. 27 of 2006 as the same is not applicable to the facts and circumstances of the present case. The respondent counsel also contended that averment of the Applicant/Appellant that if stay is not granted, it will suffer huge loss as it is required to pay difference amount of HT tariff and selling amount is irrational. In fact, the statements are wholly unsubstantiated besides being raised for the first time in the present proceedings.

4.10 Learned counsel for the first Respondent reiterated that the contentions of the Applicant/Appellant that third party sell was permitted earlier is of no relevance in the present case as there has been no amendment to the Government' Order or Wheeling and Banking Agreement permitting any such third party sale. Further, it is beyond logic to aver that no loss will be caused to the Respondent, if the Applicant/Appellant is allowed to sell power to third parties. In view of these facts, it is clear that hardship being pleaded by the Applicant/Appellant is only pertaining to the plausible monetary claims which may arise against the Applicant/Appellant in future and the same

cannot be the basis for granting interim reliefs. Therefore, there is neither irreparable injury nor balance of convenience in favour of Applicant/Appellant and hence, the Tribunal may be pleased to dismiss the present application in the interest of justice.

Our Consideration

5. We have carefully considered the rival submissions of the parties and also taken note of provisions under various enactments such as Electricity (Supply) Act 1948, Electricity Act, 2003, National Tariff Policy, etc. The main dispute in the matter is regarding supply of electricity from the mini Hydro Project to third parties in addition to supply of power to the sister concerns of the generating company. We note that initially the permission of State Government was admittedly for captive power generation and later on during 1992, the Applicant/Appellant was permitted by the Government of Karnataka to sell the electricity generated not only to within the group of the Applicant/Appellant but also to others who may be nominated by the Applicant/Appellant. Accordingly an agreement dated 25.11.1992 came to be executed between Applicant/Appellant KEB whereby the wheeling of electricity was allowed to enable the Applicant/Appellant to supply electricity through KEB system to both namely (i) industries of Bhoruka Group and (ii) to the nominees described as Users nominated by the Applicant/Appellant.

5.1 The said agreement was for a period of 30 years and the Applicant/Appellant being a generating company consequent to the amendment in the Electricity (Supply) Act. 1948 has supplied electricity to the third parties without any objection by the KEB or its successor entities for over 27 years. After enactment of Electricity Act, 2003 and

the introduction of payment of CSS, the Applicant/Appellant has been paying the CSS on sale to third parties and the same has been duly accepted and appropriated by the distribution companies.

5.2 Admittedly, this was on the basis that the Applicant/Appellant is entitled to sell its power to third parties ad this aspect has also been considered by the Hon'ble High Court of Karnataka in its Order dated 20th October, 1993. It is also relevant to note that in addition to above the State Commission by its Order dated 27.05.2002 has also recognized the Applicant/Appellant being granted permission for supply of electricity to third parties.

5.3 Learned Counsel for the Applicant/Appellant has also placed reliance on the National Tariff Policy dated 06.01.2006 (revised on 28.01.2016) which inter alia allows captive power generators to supply energy through the grid to even non captive users (Clause 6.3). The arguments of Learned Counsel for the Respondent/Bescom is mainly focused on the fact that as per approval/permission of Government of Karnataka the Applicant/Appellant was granted permission to establish a captive mini Hydel Plant and the power generated from the plant was to be utilized captively by the Applicant/Appellant and its sister captive concerns.

5.4 It is the contention of the Respondent' Counsel that the Agreement between the parties was executed in the year 1992 i.e. much prior to the enactment of the Electricity Act 2003 and the Rules made thereunder. As per the Electricity Act 2003 specifically Section 185(a) the contract executed under the repealed law has been saved and therefore WBA dated 25.11.1992 is a valid contract which permits the Applicant/Appellant to supply power only to captive units. Further, no

application for wheeling and banking has been made by the Applicant/Appellant under the provisions of Electricity Act, 2003 till date and hence the surplus power has to be sold to the Government of Karnataka/Discom only.

5.5 Learned Counsel for the Respondent Discom also submitted that the order of the Hon'ble High Court of Karnataka as relied upon by the Applicant/Appellant is not applicable to the present case as the question in issue was levy of demand charges only and not any other issue such as the Applicant/Appellant is captive or not. It is also the contention of the Respondent Discom that neither the earlier permission of the State Government has been revised nor the Applicant/Appellant has taken any fresh approval under the Electricity Act, 2003 for supply of power to third parties and hence the decision of the State Commission cannot be stated to be erroneous.

5.6 Having regard to the submissions of the both parties as above, we are of the opinion that the Applicant/Appellant has supplied power to its captive units as well as to third parties based on earlier permissions of the State Government as well as WBA dated 25.11.1992. It is also noticed that on 19th October 1991 Government of Karnataka has extended the period of the approval upto 40 years and the Applicant/Appellant subsequently on 23.06.1992 applied for permission to sale electricity generated not within the captive group but also to others who may be nominated by the Applicant/Appellant and accordingly, the agreement was entered into between the Applicant/Appellant and KEB on 25.11.1992 which is valid for 30 years. It is not in dispute that KEB and its successor entities has allowed the third party sale of electricity from the Applicant's plant and also collected CSS for such supply of power in accordance with the

provisions of the new Act of 2003. Having allowed third party sale of power for over 27 years based on requisite permission/approval/agreement it is not justified now to question the legality of such legitimate arrangement.

5.7 In the light of above, we are of the considered opinion that the Applicant/Appellant is entitled to sell its surplus power to third parties nominated by it which is fully permitted by the erstwhile Electricity (Supply) Act, 1948 and also new Electricity Act, 2003. Further, National Tariff Policy of Government of India clearly provides for sale of surplus power from captive generators to third parties after payment of requisite CSS.

Accordingly, the IA is allowed and the operation of Impugned Order dated 24.10.2019 passed by the Karnataka Electricity Regulatory Commission in OP No. 44 of 2019 is hereby stayed to the extent that Applicant/Appellant be allowed to wheel its surplus power to third party consumers in accordance with law/agreements.

Pronounced in the open Court on this 19th Day of December, 2019.

List the Appeal for hearing on 06.02.2020.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

mkj