*   IN THE HIGH COURT OF DELHI AT NEW DELHI

\+   FAO(OS) No.146/2010

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Date of Decision: 13.08.2010

PTC India Ltd. ... Appellant

Through Mr.Vikas Singh Sr. Advocate with Mr. Aashish Bernard, Mr. Varun Pathak, Advocates for Appellant.

Versus

JAYPEE KARCHAM HYDRO CORPORATION LTD. .... Respondent

Through Mr.Shanti Bhushan, Sr.Advocate with Mr.Vishal Gupta, Advocate for respondent.

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR
HON'BLE MR. JUSTICE MOOL CHAND GARG

1.	Whether reporters of Local papers may be allowed to see the judgment?	YES
2.	To be referred to the reporter or not?	NO
3.	Whether the judgment should be reported in the Digest?	NO

ANIL KUMAR, J.

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1. The appellant PTC India Limited/Trading Licensee of electricity, has challenged the order dated 19th February, 2010, passed by the Single Judge in OMP No. 25/2010 titled as PTC India Limited Vs. Jaypee Karcham Hydro Corporation Limited (hereinafter referred to as JKHCL) dismissing its petition under Section 9 (ii) (d) and (e) of Arbitration and Conciliation Act, 1996 seeking an interim stay against the termination of PPA agreement dated 21st March, 2006 executed

between the appellant and the respondent by letter dated 17th December, 2009 by JKHCL/respondent and a direction to respondent/JKHCL not to enter into any agreement for sale of power with any other party to the extent of power contracted by JKHCL with the appellant.

2. The learned Single Judge while dismissing the petition has held that in view of Section 14(i) (a), (b), (c) and (d) and 41 (i) (e) of Specific Relief Act, 1963 contemplating that if money is an adequate compensation and the contract is in its nature determinable, then, the appellant shall not be entitled for any injunction and placed reliance on Indian Oil Corporation Limited Vs. Amritsar Electric Service (1991) 1 SCC 533; State Bank of Saurashtra Vs. PNB, (2001) 5 SCC 751; Dave Ramshankar Jivatram Vs. Bailailal Gauri, AIR 1974 Guj. 69 and Union Construction Company (Pvt.) Ltd. Vs. Chief Engineer, Eastern Command, Lucknow and Anr., AIR 1960 All. 72. The learned Single Judge further held that Clause 13.3 of the Power Purchase Agreement dated 21st March, 2006 is not a negative covenant and since the appellant could be compensated in terms of money, as Clause 14.6.1 of PPA is not for the purpose of securing performance of contract but is for payment of compensation in lieu of specific performance, therefore, the appellant is not entitled for injunction and/or stay or any other interim order sought by the appellant.

3. Brief facts to comprehend the disputes are that the appellant is a trading company of electricity which entered into a Power Purchase Agreement (hereinafter referred to as PPA) dated 21st March, 2006 for purchase of 704 MW of power to be generated from 1000 MW from Karcham Wangtoo Hydro Project in the district of Kinnor in the state of Himachal Pradesh to be developed by the respondent. The respondent is a generating company as defined in the Electricity Act, 2003.

4. The appellant company has been granted license to trade in electricity by Central Electricity Regulatory Commission (hereinafter referred to as "CERC") under Section 14 of Electricity Act, 2003. In terms of Clause 3.1.3(iv) of PPA, the appellant/trading company entered into back to back Power Sale Agreements (referred to as the "PSA") with several purchasers viz. UP, Punjab, Haryana and three distcoms of Rajasthan.

5. According to the appellant, the PPA entered with the respondent has detailed provisions with regard to tariff, which is to be calculated in accordance with Article 9 and Schedule E of the PPA. The appellant has to pay tariff on the capital cost and the means of finances as approved by CERC and determination of tariff was subject to approval of the appropriate commission under the Electricity Act, 2003.

6. According to the appellant, the Central Electricity Authority (CEA) by its office memorandum dated 31st March, 2003, had granted economic clearance to Karcham Hydro Electric Project by M/s. JKHCL which was subject to stipulations that tariff had to be determined by Central Electricity Regulatory Commission.

7. Relying on Section 8 of the Electricity Act, 2003, it was also contended by the appellant that a generating company establishing a hydro generating station is required to submit to the Central Electricity Authority for approval of its scheme of capital expenditure.

8. The appellant further asserted that respondent had contended that on account of delays in issue of mandatory clearance from the Ministry of Environment and Forests, Govt. of India, the starting date of the work got delayed from 1st January, 2004 to 18th November, 2005 which resulted in delay in commencement of work by about 23 months which changed the parameters including the amount as there had been a steep increase in price of various raw materials and consequently, additional overhead cost of Rs. 1965.40 million was contemplated. The respondent company, therefore, sought revision of scope of work and also the project cost.

9. According to the appellant, the respondent company had informed the appellant for revision of scope of work and project cost by its office memorandum dated 18th February, 2009 and 16th March, 2009. It was asserted that though statutory power to decide the costing of any project is vested with Central Electricity Authority under Section 73(i) of the Electricity Act, 2003. however, the respondent got estimated modification of project cost by an independent technical consultant.

10. The appellant further contended that respondent for its own interest and for the purpose of making claim upon the financial institutions for financial increase in the project cost, approached CERC with Petition No. 153/2009 praying for revision of estimated project cost from Rs. 5,909.59 crores to Rs. 7,080.38 crores. The respondent also sought final capital cost and/or tariff for the project in view of Section 79 (i) (b) r/w Section 185 of the Act.

11 The prayers made by the respondent in the said petition are as under:-

> "a. Grant approval for the revised capital cost of Rs.7080.38 crores incurred or to be incurred for the completion of the project.
>
> b. Declare and confirm that this Hon'ble Commission shall based on an appropriate filing, consider the final capital cost and/or tariff for the Project in view of:

i. Section 79(1)(b) read with Section 185 of the Act.
ii. TEC dated 31.03.2003
iii. Tariff Clauses under the PPA and the respective PSA's read with the principles derived from the judgments of the Hon'ble Supreme Court in DLF vs. Central Coalfields & Anr (2007) 10 SCC 588.
iv. The maxim "Ubi jus ibi remedium"
v. Orders dated 18/21.06.2007 and 12.05.2009 issued by the Haryana Electricity Regulatory Commission and the Uttar Pradesh Electricity Regulatory Commission respectively."

12. According to the appellant the CERC by its order dated 26th October, 2009, only adjudicated on the issue of revision of projected capital cost, however, the second prayer of the respondent company was not considered. Regarding financing the capital cost and/or tariff for the project, there was no discussion or even any analysis made in the order dated 26th October, 2009 while dismissing the petition as not maintainable.

13. It was held by CERC that there is no corresponding provision for Hydro Power Generating stations as while framing the 2009 Regulations, the Commission had done away the provisions for "in principal" approval of the project capital cost applicable to thermal power generating stations through a conscious decision. In the circumstances, it was held that granting approval to the estimated completion cost for the generating station by relaxing the provision of the tariff regulations through invoking Regulation 44 thereof may

amount to restore the repealed provision through back door and therefore, the prayer (i) of the respondent was also not granted and it was held that the petition is not maintainable.

14. The application being IA 52/2009, was also filed by the appellant in the petition No. 153/2009 before CERC for impleading distribution companies as parties as the appellant had entered into back to back power supply agreement with them, but since the main petition was held to be not maintainable, the application by the appellant to implead the distribution companies was also dismissed.

15. The disputes arose according to the appellant, when in view of the order dated 26th October, 2009 of CERC, the respondent company sent a letter dated 17th December, 2009 terminating the PPA dated 21st March, 2006. The letter dated 17th December, 2009 terminating the PPA is as under:-

JKHCL/MD/PTC/09 17th December, 2009

Shri T.N.Thakur ji
Chairman & Managing Director
PTC India Limited
2nd Floor, NBCC Tower
15, Bhikaji Cama Place
New Delhi-110066
(Fax No.011-41659502)

Dear Sir,

Kindly refer to your letter dated 25.11.2009, addressed to the Executive Chairman Jaiprakash Associates Limited, referring to the order of the Central Electricity Regulatory Commission (CERC) dated 26.10.2009 holding our petition before the CERC related to estimated capital cost and tariff as not maintainable.

In view of the facts and circumstances, we had to obtain legal advice from a senior counsel and he has, after going into all the facts and the law on the subject, advised us that the Power Purchase Agreement (PPA) dated 21.03.2005 between this Company (JKHCL) and the PTC India Limited was void as the procedure contemplated in the PPA for determination of the tariff on the basis of which alone the price for supply of electricity by the company to PTC India Limited was payable could not be enforced. Since the PPA is now found to be void, no agreement, according to the legal opinion, survives between us.

Thanking you,

Yours faithfully,

For Jaipee Karcham Hydro Corporation Limited
(D.P.Goyal)
Managing Director.

C.C to: Group Head-DCS

PTC India Limited, 2nd Floor, NBCC Tower, 15, Bhikaji Cama Place, New Delhi-110066 (Fax No.011-41659502) by FAX and also by registered mail."

According to the appellant, the termination by letter dated 17th December, 2009 was illegal and even contrary to Article 13.2.2 and 13.2.3 of PPA.

16. In these circumstances, the petitioner filed the OMP No. 25/2010 under section 9 of the Arbitration and Conciliation Act, 1996, which has been dismissed by the learned Single Judge. The submission of the appellant in brief is that there was no occasion for the respondent to approach CERC with petition No. 153/2009 as in terms of Regulation 5(i) of Tariff Regulation 2009, the capital cost of the project could not be approved by CERC unless the commercial operation date is six months from the date of filing of application for approval of the capital cost which admittedly, according to the appellant, is on 17th November, 2011.

17. The appellant also relied on an order dated 11th January, 2010 passed in Petition No. 109/2009, in which the tariff was determined by CERC for sale/supply of electricity from Torrent Power Limiter, another generating company to PTC India Ltd, appellant, the trading licensee. It was further disclosed that Torrent Power Limited is another generating company in the state of Gujarat, like a generating company/respondent, which is however, supplying about 800 MW of power to distribution licensees and CERC had determined the tariff under Section 79 (i) (b) of the Electricity Act, 2003. In the circumstances, it is contended that the plea of the respondent that CERC shall not determine the tariff in respect of PPA entered with the appellant or has declined to determine the tariff by its order dated 26th

October, 2009 is not correct and consequently, by letter dated 17th December, 2009, the respondent could not declare the PPA dated 21st March, 2006 as void. It is asserted that in any case, the agreement could not be declared void without resorting to the procedure prescribed in Article 13.2.1 of PPA and therefore, the letter dated 17th December, 2009 declaring the PPA as void could not be acted upon.

18. Though the appellant contended that the CERC could determine the tariff, however, as the Appellate Tribunal for Electricity in its judgment dated 21st October, 2008, passed in Appeal No. 71/2008, has specifically noted that CERC does not have the power to determine tariff between generator companies and trading licensees, therefore, under the Electricity Act, CERC does not have the power to adjudicate upon disputes between the generator company and licensee, i.e., respondent and the appellant. Relying on Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd., (2008) 4 SCC 755, it has been contended that since there is an Arbitration Agreement with the respondent under Article 13.3 of the PPA, the appellant was competent to invoke the jurisdiction under Section 9 of the Arbitration and Conciliation Act, 1996 as the Supreme Court had held in Gujarat Urja Vihar Ltd. (supra) that all other disputes, other than which are covered under the Electricity Act, 2003, would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996.

19. The appellant has also contended that though the Single Judge has declined the prayer for injunction in view of Section 14(i) (a), (b), (c) and (d) of the Specific Relief Act, however, in view of provision of Section 3, Section 10(b) and Section 10(b)(ii) (a), Section 23, Section-34 and Section-42 of the Specific Relief Act, injunction ought to have been granted to the appellant.

20. Relying on Section 9 (ii) (e) of the Arbitration and Conciliation Act, 1996, it was contended that though an interim injunction was declined under Section 9(ii) (d) of the Arbitration and Conciliation Act, 1996, however, an appropriate order directing the respondent/generating company from creating any third party rights could be granted under sub-section (e) of the Arbitration and Conciliation Act, 1996.

21. Buttressing the point that the compensation for breach of contract is not an adequate relief, the learned Sr. counsel for the appellant Mr. Vikas Singh contended that under Article 14.6 of the PPA, the total compensation contemplated is only Rs. 250 crores payable by the respondent out of which the appellant shall only be entitled to retain Rs. 12.50 crores as rest of the compensation has to be passed on by the appellant to the purchasers with whom the appellant had entered into PSA in accordance with Article 3.1.3 of PPA whereas the

appellant would have earned otherwise a revenue of Rs. 900 crores during the term of PPA dated 21st March, 2006.

22. The order was also impugned on the ground that though electricity is movable property yet it is not an ordinary article of commerce and it is also not easily obtainable in the market and has special value and interest to the appellant and consequently, in terms of Section 10(b) (a) of the Specific Relief Act, the appellant should have been granted an appropriate injunction.

23. Relying on Hungerford Investment Trust Limited Vs. Haridas Mundhra, (1972) 3 SCC 684, it was contended that Specific Relief Act, 1963 is not exhaustive enactment and it does not lay down law relating to specific relief in all its ramifications and in the circumstances, the appellant could not be denied reliefs in view of Section 14 (i)(a) (b) (c) and (d) of the Specific Relief Act, 1963 and therefore, refusal of relief was erroneous. Reliance was also placed by the appellant on Ashok Kumar Srivastava Vs. National Insurance Company Limited and Ors. (1998) 4 SCC 361 where it was held that though Specific Relief Act widens the spheres of the civil Court but it is not exhaustive of all kinds of specific reliefs. It was further held that the Act is not restricted to specific performance of contracts as the statutes govern powers of the

Court in granting specific reliefs in a variety of fields even then it does not cover all specific reliefs conceivable.

24. On behalf of the appellant, it has also been contended that Article 13.3 contains implied negative covenant as the right and obligation of the parties has to remain effective during the Arbitration proceedings and one of the principal obligation of the respondent is to sell contracted power and contracted energy to the appellant and so during the resolution of the disputes on account of implied negative covenant, the respondent ought to be restrained from selling or entering into any sale agreement with any other person or company, more so as the appellant has failed to perform its part of contract as contemplated by proviso to Section 42 of the Specific Relief Act though the appellant has fulfilled the condition precedent in Article 3.1.3 (iv) of the PPA by entering into Power Sale Agreements with safe purchasers, namely, UP, Punjab, Haryana and three distcoms of Rajasthan. The learned counsel for the appellant also relied on M/s. Gujarat Bottling Company Limited and Ors. Vs. Coca Cola Company and Ors. (1995) 5 SCC 545 to claim a restrain and an injunction order against the respondent.

25. The petitioner also pleaded that in view of the Arbitration Agreement between the appellant and the respondent as per Article 13,before the Arbitrator adjudicate upon the dispute about the specific

performance of the agreement, the Court is competent under Section 9 to grant appropriate relief and reliance was placed on Olympus Super Structures Pvt. Ltd. Vs. Meena Vijay Khetan & Ors. (1999) 5 SCC 651 holding that the issue of specific performance of a contract can be decided by the Arbitrator. Reliance was also placed on Rodemadan India Ltd. Vs. International Trade Expo Centre Limited (2006) 11 SCC 651.

26. The appeal is contested by the respondent contending, inter-alia, that the Single Judge has declined injunction and restrain order against the respondent to sell or entering into sale agreements with the Distribution Companies. Considering the facts and circumstances, and exercising its discretion, the Appellate Court is not to interfere with the exercise of such discretion by a Single Judge as the order of the Single Judge is neither arbitrary, nor capricious or perverse, nor has been passed ignoring settled principals of law regulating grant or refusal of interlocutory injunction.

27. Mr.Shanti Bhushan, learned Senior Counsel for the respondent has contended that the Appellate Court is not to reassess the whole material and seek to reach a conclusion different from one reached by the Single Judge, as the decision by the Single Judge is reasonably possible on the basis of the material which was before him and in

circumstances, the Appellate Court will not be justified to interfere with the exercise of discretion by the Single Judge. Reliance was also placed on (1990) (Supp.) SCC 727 'Wander Ltd. v. Antox India Pvt. Ltd.' asserting that at the time of entering into Power Purchase Agreement dated 21st March, 2003, the parties were not aware that under the Electricity Act, 2003 Regulating Commission was not competent to determine tariff for supply of electricity by a generating company to a trading licensee. Since the question of determination of price at which the electricity is to be supplied by the respondent to the appellant was to be determined by the CERC (Central Electricity Regulatory Commission), which will not be determined by CERC, therefore, the agreement has become void in terms of Section 10 of the Sale of Goods Act, 1930 and Section 2 (g) of the Indian Contract Act, 1872. For the plea that CERC will not determine the tariff between the generating company and trading licensee, reliance was placed on the judgment dated 22nd December, 2006 of Appellate Tribunal for electricity in Petition No.1 of 2005, titled as 'Gajendra Haldea v. CERC and others' holding that the Central Electricity Regulatory Commission under Section 62 (1) (a) read with Section 79 (1) (a) & (b) of the Act is empowered to determine the tariff only for sale of electricity by a generating company to a distribution licensee. Reliance was also placed on the decision of Appellate Tribunal for electricity in appeal No.71 of 2008, 'Lanco Amarkantak Power Pvt. Ltd. v. Madhya Pradesh Electricity Regulatory Commission and others' dated 21st October, 2008, holding

that though the parties themselves had stipulated that tariff would be fixed by the Commission, however, this will not give jurisdiction to the Commission to fix tariff under the power purchase agreement as the Commission derives jurisdiction only from the Electricity Act, 2003, and parties before the Commission cannot confer jurisdiction by their agreement, if the commission does not have the same under the Act. The respondent generating company also relied on the decision of the CERC (Central Electricity Regulatory Commission) dated 26th October, 2009 whereby the petition of the respondent being Petition No.153 of 2009 relating to revised capital cost approval of 1000 megawatt from Karcham Wangtoo Hydro Electricity Project in Himachal Pradesh and also seeking a prayer for determination of tariff was declined, and consequently, it is contended that the agreement has become void as the procedure contemplated by the agreement for determining the tariff on the basis of which the price of electricity to be supplied by the respondent to appellant could not be enforced, and in the circumstances, the agreement cannot be enforced, nor the appellant can seek specific performance to supply power to the appellant and contend that the agreement is not void.

28. Regarding specific performance of the agreement, it was contended that the respondent cannot be restrained from entering into the agreement as the electricity once generated cannot be stored and

granting any injunction restraining the respondent from selling electricity to anyone else will result into waste of energy seriously effecting the rights of the respondent as well as a very large segment of consumer. The respondent relied on the principle enunciating by the Apex Court in 'Gujarat Bottling Company Ltd. v. Coca Cola Company', 1995 (5) SCC 545 and contended that granting injunction against the respondent in the facts and circumstances will be contrary to the principle enunciated by the Apex Court.

29. The respondent further contended that the power purchase agreement is for purchase of electricity which is a movable property as contemplated under Section 10 of the Specific Relief Act, and under the Act, breach of such a contract of a movable property can be compensated in terms of money, and therefore, the agreement cannot be specifically enforced. Reliance was also placed on Section 14 of the Specific Relief Act which stipulates which contract cannot be specifically enforced. The other plea of the respondent is that since the agreement by its nature is determinable, therefore, on this ground also the appellant is not entitled for any interim order against the respondent and reliance was placed on 'Indian Oil Corporation Ltd. v. Amritsar Gas Services' 1991 (1) SCC 533. Relying on 'State Bank of Saurashtra v. Punjab National Bank', 2001 (5) SCC 751, 'Dave Ramashanker Jivatram v. Bai Kailash Gauri' AIR 1975 (Gujarat) and

'Union Construction Company Pvt. Limited v. Chief Engineer, Eastern Company Limited', AIR 1972 Allahabad 72 it was contended that the compensation of money is an adequate relief in the facts and circumstances and therefore, the appellant is not entitled for any interim relief.

30. Mr.Shanti Bhushan, learned Senior Counsel very emphatically contended that even according to the appellant the compensation contemplated under the agreement is Rs.250/ crores out of which appellant is only entitled for Rs.12.50/ crores though the appellant would earn about Rs. 900/- crores, if the agreement is enforced as alleged by the appellant, however, this cannot be construed to mean that the compensation in money cannot be a relief. It is asserted that it is apparent that the compensation is an adequate relief and because the compensation computed in the agreement is different and at variance with the alleged compensation claimed by the appellant and this will not mean compensation in money cannot be granted.

31. The respondent has also opposed grant of injunction of any type against it on the ground that there is no negative covenant in the agreement and contract between the parties. It is contended that the agreement runs into such minute and numerous details which the Court cannot enforce while specifically enforcing its material terms. The

reliance was also placed on a paragraph of the affidavit filed by the appellant showing that under the agreement, the material and equipment which are to be used by the respondent are to be new and of International/Indian Utility Grade quality and which are also in accordance with prudent utility and can be used in the project in such a manner so as to ensure that the useful life of the project with proper maintenance and operation would be at least equal to the term of the agreement.

32. According to Mr.Shanti Bhushan, learned Senior Counsel, though there is no negative covenant between the parties as Clause 13.3 could not be construed in any manner as negative covenant, however, in respect of a negative covenant, the injunction could also be declined in certain circumstances, depending on the facts and circumstances of the case as was held by the Apex Court in the case of 'Gujarat Bottling Company Ltd. v. Coca Cola Company', 1995 (5) SCC 545.

33. Dismissal of the appeal is also sought on the ground that the appellant has no serious intention of going for arbitration under the Arbitration and Conciliation Act, 1996 and is merely interested in getting injunction from the Court as the dispute regarding the validity of the agreement had arisen on 17th December, 2009 and despite elapse of considerable time, no step has been taken by the appellant to appoint

its own arbitrator or invoke appointment of arbitrator by the respondent in terms of the Arbitration Clause.

34. Reliance has been placed on 'Firm Ashok Traders v. Gurumukh Das Saluja' 2004 (3) SCC 155 holding that the party invoking relief under the Clause 9 should invoke arbitration within reasonable time. It was held that commencement of arbitral proceeding is not dependent on interim relief being allowed or denied. After invoking Section 9 of the Arbitration and Conciliation Act, a party must post haste seek appointment of arbitrator under Section 11 of the said Act otherwise interim relief can be denied to such a party.

35. The respondent also made a grievance regarding an application of impleadment filed by Haryana Power Purchase Center for impleadment before the Single Judge although there is no arbitration agreement with the said distribution company and the respondent generating company which application was withdrawn by the said distribution company. However, an appeal has been filed by the said distribution company at the instance of the appellant. According to the respondent, Haryana Power Purchase Center/Distribution Company has no locus standi to be impleaded or to file an appeal against the order of the Single Judge dismissing the application of the appellant/Trading Licensee seeking restrain against the respondent/Generating Company.

36. Learned counsels for the parties were heard in detail. The genesis of the application under Section 9 (ii) (d) & (e) by the appellant is the letter dated 17th December, 2009 sent by the respondent/JKHCL to the appellant relying on order dated 26th October, 2009 of CERC in their Petition No.153 of 2009 holding that the petition before the CERC related to estimated capital cost and tariff is not maintainable. In the circumstances, it was alleged that the Power Purchase Agreement (PPA) dated 21st March, 2006 between the appellant and JKHCL has become void as the procedure contemplated in the PPA for determination of tariff could not be enforced and therefore, there is no agreement between the parties.

37. The plea of the appellant is that there was no occasion for the respondent/ JKHCL to approach the CERC as in terms of Regulation 5(1) of Tariff Regulation, 2009, capital cost of the project could not be considered unless commercial operation date i.e. six months from the date of filing of the application for approval of capital cost which was admittedly on 7th November, 2001 would have arrived. It was contended that in any case the prayer of the respondent for determination of the tariff had not been considered and finally decided and therefore, the respondent could not contend that the tariff is not to be determined by the CERC and the PPA between the parties has become void.

38. These pleas of the appellant are contrary to the order passed by the CERC regarding determination of tariff for supply of electricity by a generating company. It is observed by the CERC that under Clause (b) of Sub Section (1) of Section 79 of the Act, the Commission is empowered to regulate tariff of the generating companies, other than those owned and controlled by the Central Government, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. Regarding Clause (a) of Sub Section (1) of Section 62 of the Act, it was held that it does not provide for approval of capital cost but empowers appropriate Commission to approve tariff for supply of electricity by a generating company to a distribution licensee.

39. Relevant paragraphs 14 to 18 of order dated 26th October, 2009 of CERC are as under:-

> **"**14. The question of maintainability of the petition is to be decided first. According to Section 61 of the Act, the Commission is to specify the terms and conditions for determination of tariff. Clause (a) of sub-section (1) of Section 62 of the Act empowers the Appropriate Commission to determine tariff for supply of electricity by a generating company to a distribution licensee. Under clause (b) of sub-section (1) of Section 79 of the Act, the Commission is further empowered to regulate tariff of the generating companies, other than those owned or controlled by the Central Government, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. **Clause (a) of sub-section (1) of Section 62 of the Act does not provide for approval of capital cost but empowers the Appropriate Commission to approve tariff for supply of**

electricity by a generating company to a distribution licensee. The present petition is said to have been filed under clause (b) of sub-section (1) of Section 79 of the Act. **It is to be noted that this statutory provision is silent on approval of capital cost as such.**

15. The terms and conditions for determination of tariff for the period 1.4.2009 to 31.3.2014 have already been notified by the Commission by virtue of power under Section 61 of the Act. These regulations (the 2009 regulations) also do not provide for determination of in principle capital cost.

16. We may also have a look at the historical aspect of approval of capital cost. The Supply Act provided for preparation of a scheme, relating to establishment of the generating stations. The scheme was to be submitted to CEA for its concurrence. CEA while according its concurrence was to take into account the capital cost, apart from considering other relevant factors. The Parliament has omitted the provisions for techno-economic concurrence. Thus, the Parliament did not consider it appropriate to retain the provisions for techno-economic clearance, including approval of the project capital cost by CEA. The Commission in the tariff regulations applicable during the tariff period 2004-09 had made provisions for 'in principle' approval of the project capital cost for thermal power generating stations. **There was no corresponding provision for hydro power generating stations.** While framing the 2009 regulations, the Commission has done away the provisions for 'in principle' approval of the project capital cost applicable to thermal power generating stations, through a conscious decision. Under the circumstances, granting approval to the estimated completion cost for the generating station by relaxing the provisions of the tariff regulations through invoking Regulation 44 thereof may amount to restoring the repealed provision, through back door.

17. Case law relied on behalf of the petitioner is not relevant to the issue presently under consideration. Those judgments were rendered in completely different set of circumstances.

18. In view of the above, the prayers made by the petitioner cannot be granted and, therefore, the petition is not maintainable. It is accordingly dismissed at admission stage."

40. Though the learned counsel for the appellant has argued that the petition for determination of tariff shall be maintainable before the CERC, however, this Court while exercising its jurisdiction under section 37 (1) (a) of the Arbitration and Conciliation Act, 1996 against an order passed on an application under section 9 of the said Act, does not exercise appellate jurisdiction against the order dated 26th October, 2009. If according to appellant the decision dated 26th October, 2009 is not correct, the applicant ought to have impugned it before the appropriate appellate authority as contemplated under the Electricity Act, 2003.

41. In Appeal No. 71/2008 and IA 102/2008 titled as 'Lanco Amarkantak Power Pvt. Ltd. v. Madhya Pradesh Electricity Regulatory Commission the Appellate Authority by its order dated 21st October, 2008, has repelled similar pleas as raised by the appellant holding that tariff is not to be determined by CERC in respect of an agreement between the generating company and the trading licensee despite the specific clause in the agreement between a generating company and trading licensee stipulating that tariff shall be fixed by CERC. It was held that by virtue of the agreement between the generating company and the trading licensee, jurisdiction cannot be conferred on CERC as the Commission derives its jurisdiction only from the Electricity Act, 2003. The Appellate Tribunal had held that the basic provision for

determination of tariff is given In Section 62. So far as the question of tariff is concerned, Section 62 has to be read as the principal provision and the other provisions have to be read as supportive provisions. Section 62, 79 & 86 have to be read harmoniously. Just as clauses (a) & (b) of sections 79 & 86 could not empower the Commissions to determine tariff for sale by a Generator to a trader, clause (f) of sections 79 & 86 cannot empower the Commission in this regard.

42. The plea of the petitioner that in view of the order dated 11th January, 2010 passed by CERC in Petition No. 109/2009 where the CERC has determined tariff for sale, supply of electricity by Torrent Power Limited (which is a generating company) to PTC India Ltd. (which is a trading licensee) despite the order dated 21st October, 2008 in Lanco Amarkantak Power Pvt. Ltd and therefore, CERC will have jurisdiction to determine the tariff pursuant to PPA dated 21st March, 2006 cannot be adjudicated under section 9 or other provision of Arbitration and Conciliation Act, 1996. Though the appellant has approached the High Court under section 9 of the Arbitration and Conciliation Act, 1996 for interim order or interim injunction but he cannot get it determined that the CERC has jurisdiction to decide the tariff between the generating company and a trading company as this is to be determined under the provisions of Electricity Act, 2003. In Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd., (2008) 4 SCC 755,

in paragraph 59 it was held that all other disputes (unless there is some other provision in the Electricity Act, 2003) are to be decided in accordance with Section-11 of the Arbitration and Conciliation Act, 1996. Para 59 of the said decision is as under:

> 59. In the present case we have already noted that there is an implied conflict between Section 86(1) (*f*) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation Act, 1996 since under Section 86(1) (*f*) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under Section 11 of the Arbitration and Conciliation Act, 1996, the court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or the Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(*f*) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail).

In the said case certain disputes had arisen between the parties mainly in connection with the allocation of power and the Essar Group had allegedly did not maintain allocation of electrical energy. On an application filed before the Gujarat High Court, an arbitrator was appointed which order was challenged before the Supreme Court on the ground that the Electricity Act, 2003 stipulating that the disputes between the licensees and the generating companies can only be

adjudicated by State Commissions, either by itself or by an arbitrator to whom the Commission refers the dispute and the High Court could not refer disputes between the licensee and generating company to an arbitrator. The Supreme Court had held as under at page 772 in paragraphs 60 & 61:

> 60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30-5-1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10-6-2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. **After 10-6-2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it.** We further clarify that *all* disputes, and not merely those pertaining to matters referred to in Clauses (*a*) to (*e*) and (*g*) to (*k*) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1) (*f*) about the nature of the dispute.
>
> 61. We make it clear that it is only with regard to the authority which can adjudicate or arbitrate disputes that the Electricity Act, 2003 will prevail over Section 11 of the Arbitration and Conciliation Act, 1996. However, as regards the procedure to be followed by the State Commission (or the arbitrator nominated by it) and other matters related to arbitration (other than appointment of the arbitrator) the Arbitration and Conciliation Act, 1996 will apply (except if there is a conflicting provision in the Act of 2003). In other words, Section 86(1) (*f*) is only restricted to the authority which is to adjudicate or arbitrate between licensees and generating companies. Procedural and other matters relating to such proceedings will of course be governed by the Arbitration and Conciliation Act, 1996, unless there is a conflicting provision in the Act of 2003.

The Gujarat Urja Vikas Nigam Ltd. (supra) also held that except section 11 of the Arbitration and Conciliation Act, 1996 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to Arbitration under Electricity Act, 2003 unless there is a conflicting provision in the Electricity Act, 2003 in which case such provision shall under the Electricity Act, 2003 will prevail.

43. The plea of the learned counsel for the appellant that decision of Lanco Amarkantak Power Pvt. is not in rem and in any case it is not final as a special leave petition is pending against the said order dated 21st October, 2008 in Lanco Amarkantak Power Ltd,; in other matters relied on by the appellant, despite the decision dated 21st October, 2008 in Lanco Amarkantak Power Pvt. Ltd , the CERC has determined tariff between the generating company and the trading licensee and that by order dated 26th October, 2009 the CERC has not declined to determine the tariff but has only declined to grant approval of the project capital cost and in the circumstances CERC has jurisdiction to determine the tariff between the appellant and respondent, cannot be adjudicated in the proceedings under Arbitration and Conciliation Act,1996. This Court does not have to determine whether the CERC has jurisdiction to determine the tariff between generating company and trading licensee under the appropriate provision of Electricity Act, 2003 in an appeal filed under section 37 of the Arbitration and Conciliation Act, 1996

against the dismissal of the application of the appellant under section 9 of the said Act.

44. The plea of the appellant that CERC has jurisdiction to determine the tariff between the generating company and the trading licensee and still an application under section 9 of the arbitration and conciliation act, 1996 shall be maintainable, shall be contrary to the ratio of decision of the Supreme Court in Gujarat Urja Vikas Nigam Ltd. (supra). If the plea of the appellant is that an application under section 9 of the Arbitration and Conciliation Act, 1996 is maintainable, in that case the plea of the respondent that the agreement has become void as the tariff is not to be determined by CERC between the generating company and the trading licensee becomes relevant. An application under section 9 of the arbitration and conciliation act, 1996 shall be entertainable only if CERC does not have jurisdiction. If the plea of the appellant is that CERC has jurisdiction and in case CERC has jurisdiction to determine the tariff between the generating company and the trading licensee, even for an interim relief, the appellant is required to approach CERC for any interim relief as provided under section 94 (2) of the Electricity Act, 2003. The appellant cannot be allowed to contend that though CERC has jurisdiction to determine the tariff between the generating company and trading licensee and yet approach the Court under section 9 of the Arbitration and Conciliation Act, 1996

and agitate the issue that the CERC has jurisdiction to decide the tariff between a Generating Company and a trading licensee. The pleas of the appellant in the circumstances appear to be contradictory and on such pleas the communication dated 17th December, 2009 of the respondent cannot not be faulted.

45. If the tariff is not to be determined by CERC, then no other mode is provided for determination of tariff under the PPA agreement and the said agreement will become void under section 10 of Sale of Goods Act, 1930 read with section 2 (g) of the India Contract Act, 1872. Relying on the principals enunciated by the Supreme Court in Gujarat Bottling Company Ltd. Vs Coca Cola Company, (1995) 5 SCC 545 relied on by the respondent, the appellant will not have a prima facie case in the facts and circumstances so as to be entitled for any interim relief under section 9 of the Arbitration and Conciliation Act. If the PPA agreement is void then it cannot be held that it is specifically enforceable.

46. For the sake of argument, if it is assumed that the PPA is not void, as the question whether the tariff between the generating company and a trading licensee has not become final and is pending adjudication in the Supreme Court in another matter, in that eventuality what is to be considered is whether such an agreement is specifically enforceable. The appellant has contended that in view of section 3, section 10 (b),

section 10 (b) (ii) (a), section 23, section 34 and section 42 of the Specific Relief Act, 1963, the PPA agreement can be specifically enforced. Per contra according to Learned counsel for the respondent in view of section 14 (1) (a), (b), (c) and (d) of the Specific Relief Act,1963 the PPA cannot be specifically enforced.

47. The learned Single Judge after considering the pleas and contentions of the parties and relying on Indian Oil Corpn. Ltd. v. Amritsar Gas Service (1991) 1 SCC 533; State Bank of Saurashtra Vs. P.N.B.(2001) 5 SCC 751; Dave Ramshankar Jivatram vs. BaiKailasgauri, AIR 1974 Gujarat 69 and Union Construction Co. (Private Ltd.), vs. Chief Engineer, Eastern Command, Lucknow and Anr. AIR 1960 Allahabad 72 in detail has rather held that the PPA agreement cannot be specifically enforced. Reliance has been placed by the Single Judge on Clause 14.6.1 of PPA which makes it abundantly clear that both the parties at the time of execution of contract contemplated that in the event of termination of the contract, money would be an adequate compensation and stipulation of an amount under Clause 14.6.1. Of PPA is not for the purpose of securing performance of the contract but is for payment of compensation in lieu of specific performance. Plea of the appellant that some interim relief should have been granted under Section 9 (ii) (e) of the Arbitration and Conciliation Act, 1996 has also been declined holding that if the relief under Section 9(ii)(d) of Act, 1996

of the Act of 1996 was untenable, the same could not be granted under Section 9(ii)(e) of Act because if some essential ingredients or tests have to be satisfied for an order under Section 9(ii)(a) to (d) of Act, 1996, the same cannot be circumvented by saying that the said relief would be deemed to be sustainable under Section 9(ii)(e) and not 9(ii)(a) to (d) of Act, 1996.

48. The learned Single Judge has also repelled any relief on the ground that the PPA contains a negative covenant. The observation and findings of the Single Jude are as under:

> 12. Undoubtedly, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative covenant, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative covenant. Section 42 is thus an exception to Section 41 of Act, 1963. This is because if there is a negative covenant, the Court has no discretion to exercise. In restraining by injunction the breach of a negative covenant, the interference of the Court is in effect an order for specific performance. The rationale for this is that if parties for valuable consideration, with their eyes open, have contracted that a particular thing shall not be done, all that a Court has to do is to order by way of injunction that the said thing shall not be done. In such a case, the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties.
>
> 13. Express negative covenant is normally found in employment contracts where it is stipulated that in the event an employee leaves or abandons or resigns from his job before a particular period, then for the remainder term of the agreement the said employee would not be employed

> with a rival company. For a covenant to qualify as an implied negative covenant there should be a restriction, which can readily be implied to operate either during the period of the contract or after its termination.
>
> 14. Keeping in view the aforesaid, I am of the opinion that Clause 13.3 of PPA does not constitute a restriction either express or implied and is, therefore, not a negative covenant. In fact, the said Clause only stipulates that legal rights of both the parties during the arbitral proceedings would remain unaltered.
>
> 15. Moreover, as petitioner is a mere trader of electricity and not an actual consumer of electricity, I am of the view that petitioner can be compensated in term of money. In fact, Clause 14.6.1 of PPA makes it abundantly clear that both the parties at the time of execution of contract contemplated that in the event of termination of the contract, money would be an adequate compensation. In my opinion, stipulation of an amount under Clause 14.6.1. of PPA is not for the purpose of securing performance of the contract but is for payment of compensation in lieu of specific performance. Consequently, petitioner is not entitled to any injunction and/or stay.

Article 13.3 only stipulates that the rights and obligations of the parties have to remain effective during the arbitration proceedings. Under the agreement tariff between the appellant and the respondent has to be determined by CERC. Non determination of tariff would create a sort of right in favour of respondent. In the circumstances it would not be appropriate to hold that the respondent would still have obligation to sell contracted power and contracted energy to the appellant. In the circumstances the said clause in the PPA agreement would not constitute a negative covenant and cannot be enforced as has been contended by the appellant. In the circumstances the observation

of the Single Judge that Article 13.3 will not constitute a negative covenant cannot be faulted.

49. This court is not inclined to interfere with decline of interim relief while exercising its discretion by the Single Judge. On the basis of arguments advanced and pleas raised on behalf of the counsel for the Appellant, it cannot be held that the order of the Single Judge is perverse, arbitrary or capricious or that the Single Judge has ignored settled principal of laws. The plea that the compensation contemplated under the agreement is inadequate as under Article 14.6 of the PPA, the total compensation contemplated is only Rs. 250 crores payable by the respondent out of which the appellant shall only be entitled to retain Rs. 12.50 crores as rest of the compensation has to be passed on by the appellant to the purchasers with whom the appellant had entered into PSA in accordance with Article 3.1.3 of PPA whereas the appellant would have earned otherwise a revenue of Rs. 900 crores during the term of PPA dated 21st March, 2006, is also to be repelled. After agreeing for compensation and incorporating it in the agreement, it cannot be allowed to be urged on behalf of the appellant that he cannot be compensated in terms of money. Rather appellant plea is that since during the PPA agreement it would have earned Rs.900 crores, therefore, the compensation should have been Rs.900 crores. If that be so then it cannot be inferred that appellant cannot be compensated in terms of money. How much money he would be entitled or not is to be

determined in Arbitration in accordance with the Arbitration Agreement between the parties.

50. The arguments on behalf of the appellant had been elaborate regarding enforceability of the PPA agreement. But that is one of the view and not the only view. We, however, concur with the reasoning of the Single Judge. It is no more res integra that in an appeal against an order exercising discretion by the Single Judge granting or refusing interim order, Appellate Court will not reassess the entire material and seek to reach a conclusion different from the one reached by Court below, if the one reached by the Court below is reasonably possible on material. The Appellate Court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner, the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. If that be so, the appellant has failed to point out any perversity or arbitrariness and ignoring settled principals of law by The Single Judge.

51. The plea of the applicant that the electricity is not an ordinary article of commerce and is of special value and interest to the appellant

and is also not easily obtainable in the market cannot be construed in favor of the appellant only. It also has to be considered from the point of view of the respondent that electricity being not an ordinary article cannot be stored. The appellant has failed to answer satisfactorily that if till the time the production of electricity starts, the arbitration proceedings are not concluded and disputes between the parties are not decided, then how the electricity would be preserved. In that case the electricity which will be produced would be vested and it will be a loss not only to the respondent but to the consumers of electricity also in the region where there is shortage of electricity. In this scenario taking into consideration all the relevant facts, the inevitable inferences is that such interim order as sought by the appellant shall cause more inconvenience to the respondent then to the appellant. In the circumstances it has to be inferred that the balance of convenience is in favor of respondent rather in favor of appellant and consequently the interim order as sought by the appellant cannot be allowed in his favor. The Appellant has relied on a number of precedents on different proposition to contend that the agreement (PPA) can be specifically enforced. However precedent relied on by the Appellant are distinguishable and it may not be necessary to deal with each one of them individually. It cannot be disputed that the ratio of any decision must be understood in the background of the facts of that case. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in

it. It is to be remembered that a decision is only an authority for what it actually decides. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. The ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and circumstances in two cases. The Supreme Court in Bharat Petroleum Corporation Ltd and Anr. v. N.R.Vairamani and Anr. (AIR 2004 SC 778) had held that a decision cannot be relied on without considering the factual situation. In the judgment the Supreme Court had observed:-

> “Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

In P.S.Rao Vs State, JT 2002 (3) SC 1, the Supreme Court had held as under:

> ". There is always a peril in treating the words of judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusion in two cases.

In the circumstances on the basis of the precedents relied on by the appellant it cannot be held that the PPA is specifically enforceable and if that be so then the appellant shall not be entitled for any interim order that the respondent be restrained from entering into any agreement with any other company or person in the facts and circumstances of the present case.

52. When an application under Section 9 of the Arbitration and Conciliation Act, 1996 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings within reasonable time as the commencement of arbitral proceeding is not dependent on interim relief being allowed or denied. After invoking section 9 of the Act, a party must post haste seek for appointment of arbitrator under section 11 of the said Act otherwise interim relief can be denied to such a party. The application dated 15th January, 2010 under section 9 (ii) (d) and (e) was filed by the appellant which was dismissed by order dated 19th February, 2010. There is nothing on record to show any steps taken by the appellant for initiation of Arbitration Proceedings. The learned counsel for the appellant during hearing, however, contended that a notice for appointment of Arbitrator(s) was given, but the copy of the same has not been filed. In the circumstances it cannot be held that the appellant has taken steps expeditiously and this would

also disentitle the appellant for any order under Section 9 of the Arbitration and Conciliation Act, 1996. Reliance for this can be placed on (1999) 2 SCC 479, Sundaram Finance Ltd. Vs NEPC India Ltd. and Firm Ashoka Traders Vs Gurumukh Das Saluja, (2004) 3 SCC 155.

53. For the foregoing reasons the appellant has failed to make out any case for setting aside the order dated 19th February, 2010 of the Single Judge impugned before this Court and for grant of any interim order or interim injunction as prayed by him. The appeal is without any merit and the appellant is not entitled to any relief. The appeal is therefore, dismissed. Parties are however, left to bear their own costs.

August 13,2010 **ANIL KUMAR, J.**
'VK'

Mool Chand Garg, J.
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1. In accordance with the judgment delivered by the Hon'ble Supreme Court in the case of *Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd., (2008) 4 SCC 755,* there is a implied conflict between Section 86 of the Electricity Act, 2003 (hereinafter referred to as "the Electricity Act") and Section 11 of the Arbitration and Conciliation Act, 1996.

2. According to Section 86(1) (f) of the Electricity Act, the dispute between the licensee and the generating company is to be decided by the State Regulatory Commission or the arbitrator nominated by it. Similar provisions exist in Section 79(1) (f) of the Electricity Act which gives jurisdiction to the Central Electricity Regulatory Commission (hereinafter referred to as "the CERC") when the dispute arises between the generating company and the trading licencee. However, under Section 11 of the Arbitration and Conciliation Act, 1996, the court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act and the Arbitration and Conciliation Act, 1996, the Apex Court opined that whenever there is a dispute between a licensee (which as per the definition of 'licensee' in the Electricity Act would also include a trading licensee) and the generating companies, only the State Commission or the Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity Act. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(f) of the Electricity Act (unless there is a conflicting provision in the Electricity Act, in which case such provision will prevail).

3. In the present case, the dispute which has arisen between the parties is with regard to fixation of tariff by the Central Electricity Regulatory Commission for supply of electricity by the generating company to the trading licensee (appellant). Fixation of tariff is governed by Section 62 of the Electricity Act. Section 79 (1) (b) of the Electricity Act is also relevant in this regard, which reads as under:-

> **"Section 79. (Functions of Central Commission): ---** (1) The Central Commission shall discharge the following functions, namely:-
> (a) xxx xxx xxx
> (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;"

4. In a judgment delivered by the Appellate Authority in an appeal bearing No.71 of 2008 titled as *"Lanco Amarkantak Power Pvt. Ltd. v. Madhya Pradesh Electricity Regulatory Commission and Others"* under the Electricity Act; the Appellate Authority held that tariff in the case of a trading licensee is not to be determined by the CERC in respect of agreement between the generating company and the trading licensee despite the specific clause in the agreement between the generating company and a trading licensee stipulating that tariff is to be fixed by the CERC in view of Section 62 of the Electricity Act.

5. It is true that neither the present appellant nor the respondent were parties to the aforesaid decision. It appears that taking note of the

aforesaid decision, the respondent has taken a view based upon the advice given by his senior counsel that in view of the aforesaid legal position they now cannot sell the electricity to the appellant under the Power Purchase Agreement dated 21.03.2006 as the said agreement has become void. In this regard, they sent a communication dated 17.12.2009.

6. Another important development which took place in this case and which also seems to be the basis of writing the said letter is an adjudication by the CERC of a petition which was filed by the respondent before the CERC for a review of filing capital loss and/or tariff for the project undertaken by them for generating the electricity in view of Section 79(1)(b) r/w Section 185 of the Electricity Act, wherein they made the following prayers:-

> "a. Grant approval for the revised capital cost of Rs.7080.38 crores incurred or to be incurred for the completion of the project.
>
> b. Declare and confirm that this Hon'ble Commission shall based on an appropriate filing, consider the final capital cost and/or tariff for the Project in view of:
>
> vi. Section 79(1)(b) read with Section 185 of the Act.
>
> vii. TEC dated 31.03.2003
>
> viii. Tariff Clauses under the PPA and the respective PSA's read with the principles derived from the

judgments of the Hon'ble Supreme Court in DLF vs. Central Coalfields & Anr (2007) 10 SCC 588.

ix. The maxim "Ubi jus ibi remedium"

x. Orders dated 18/21.06.2007 and 12.05.2009 issued by the Haryana Electricity Regulatory Commission and the Uttar Pradesh Electricity Regulatory Commission respectively."

7. CERC vide its order dated 26.10.2009 passed the following order:-

> **"**14. The question of maintainability of the petition is to be decided first. According to Section 61 of the Act, the Commission is to specify the terms and conditions for determination of tariff. Clause (a) of sub-section (1) of Section 62 of the Act empowers the Appropriate Commission to determine tariff for supply of electricity by a generating company to a distribution licensee. Under clause (b) of sub-section (1) of Section 79 of the Act, the Commission is further empowered to regulate tariff of the generating companies, other than those owned or controlled by the Central Government, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. **Clause (a) of sub-section (1) of Section 62 of the Act does not provide for approval of capital cost but empowers the Appropriate Commission to approve tariff for supply of electricity by a generating company to a distribution licensee.** The present petition is said to have been filed under clause (b) of sub-section (1) of Section 79 of the Act. **It is to be noted that this statutory provision is silent on approval of capital cost as such.**
>
> 15. The terms and conditions for determination of tariff for the period 1.4.2009 to 31.3.2014 have already been notified by the Commission by virtue of power under Section 61 of the Act. These regulations (the 2009 regulations) also do not provide for determination of in principle capital cost.

16. We may also have a look at the historical aspect of approval of capital cost. The Supply Act provided for preparation of a scheme, relating to establishment of the generating stations. The scheme was to be submitted to CEA for its concurrence. CEA while according its concurrence was to take into account the capital cost, apart from considering other relevant factors. The Parliament has omitted the provisions for techno-economic concurrence. Thus, the Parliament did not consider it appropriate to retain the provisions for techno-economic clearance, including approval of the project capital cost by CEA. The Commission in the tariff regulations applicable during the tariff period 2004-09 had made provisions for 'in principle' approval of the project capital cost for thermal power generating stations. **There was no corresponding provision for hydro power generating stations.** While framing the 2009 regulations, the Commission has done away the provisions for 'in principle' approval of the project capital cost applicable to thermal power generating stations, through a conscious decision. Under the circumstances, granting approval to the estimated completion cost for the generating station by relaxing the provisions of the tariff regulations through invoking Regulation 44 thereof may amount to restoring the repealed provision, through back door.

17. Case law relied on behalf of the petitioner is not relevant to the issue presently under consideration. Those judgments were rendered in completely different set of circumstances.

18. In view of the above, the prayers made by the petitioner cannot be granted and, therefore, the petition is not maintainable. It is accordingly dismissed at admission stage."

8. It would also be relevant to take note of the observations made in paragraph 10 and 11 of the order, which reads as under –

"10. According to learned counsel for the petitioner in view of Section 185 of the Act read with Section 6 of the General Clauses Act 1897, the right of getting the capital cost approved which accrued in favour of the petitioner under the Supply Act before its repeal cannot be taken away after the Act came into force. Learned counsel

> submitted that the petition was filed under clause (b) of sub-section (1) of Section 79 of the Act, and the Commission had the power to determine the tariff of the generating station as the electricity generating threat is to be sold to more than one State and also to approve the capital cost.
>
> 11. According to learned counsel, clause (1) of Regulation 4 of the 2009 regulation provides for filing of tariff petition of the units of the generating stations completed or projected to be completed within six months from the date of application. He submitted that the projected commercial operation date of the generating station was 17.11.2011 and therefore, the petitioner could approach the Commission for determination of tariff any time after 17.5.2011 in accordance with the 2009 regulations. According to him, the capital cost was to be determined as and when the petition for approval of tariff was filed by the petitioner in terms of clause (1) of Regulation 5 of the 2009 regulations. However, in this case the petitioner had approached the Commission for approval of the estimated completion cost in advance which may be approved by relaxing the provisions of Regulation 5 in exercise of power under Regulation 44 the 2009 regulations........"

These observations made by the Commission are based upon the stand of the respondent and clearly reflects that the application for fixation of tariff was probably considered as premature moved prior to six months of the generating company starting its commercial operation, which date was shown as 17.11.2011.

9. The issue before us is as to whether the appellant was justified in filing the petition under Section 9 of the Arbitration and Conciliation Act, 1996 instead of filing an appeal against the order of the Commission in refusing to fix tariff may be because the application was premature, and/or, also taking benefit of the judgment of the Appellate

Authority in *Lanco's case (supra)* declaring that the power purchase agreement between the parties itself became void, which could have been adjudicated by the CERC or the arbitrator appointed by the Commission in the light of the interpretation given by the Apex Court in the case of *Gujarat Urja Vikas Nigam's case (supra)*.

10. To answer this question the primary issue to be answered would be, "whether the purchase agreement which is the basis of invoking arbitration clause has become void or whether the validity of the agreement is required to be gone into by the arbitrator appointed by the Commission". Even if it has to be decided by an arbitrator appointed under Section 11 of the Arbitration and Conciliation Act, 1996, the existence of a valid arbitration agreement would be a primary requirement for such exercise.

11. At this stage, I may also observe here that the powers available to grant any interim relief under Section 9 of the Arbitration and Conciliation Act, 1996, as prayed for by the appellant in OMP No. 125/2010, are also available with the Commission under Section 94 of the Electricity Act.

12. Before proceeding further it would be appropriate to take note of the provisions of Section 86 of the Electricity Act, which, of course, deals with the functions of the State Government. It reads as under:-

"Section 86. (Functions of State Commission): ---

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

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

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

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and

(k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any of the following matters, namely :-.

(i) promotion of competition, efficiency and economy in activities of the electricity industry;

(ii) promotion of investment in electricity industry;

(iii) reorganization and restructuring of electricity industry in the State;

(iv) matters concerning generation, transmission , distribution and trading of electricity or any other matter referred to the State Commission by that Government.

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

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

13. Similar provisions are in existence with respect to the functions of the Central Commission in Section 79 of the Electricity Act. Of course, there seems to be some confusion/overlapping in the provisions contained under Section 79(1)(b) and Section 62 of the Electricity Act.

14. To resolve such a conflict as to whether the Commission would be in a position to clarify the issues or not, the answer appears to be

available in Section 79(1)(b) of the Electricity Act which deals with regulating supply of electricity by a transmission licensee in more than one State and goes to show that it is one of the functions of the Central Commission in terms of sub-clause (b) to take a decision with regard to regulation of tariff of generating company other than those owned or controlled by the Central Government specified in sub-clause (a) if such generating companies enters into or otherwise have a composite scheme for sale of electricity in more than one State would be upon Central Commission despite the provisions contained under Section 62 of the Electricity Act. This also appears to be a mandate of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009. At this stage, I may also observe that the Commission despite order passed by the Appellate Authority in an appeal bearing No. 71/2008 has fixed the electricity tariff in the case of a generating company supplying electricity to a trading company vide order dated 11.01.2010 in petition No. 177/2009.

15. In view sub-section (f) of Section 79(1) which is akin to sub-clause (f) of sub-section (1) of Section 86 of the Electricity Act, it would be upon the Commission to adjudicate upon the disputes involving generating company and transmission licensee in regard to matters connected with clause (a) to (d) above and to refer disputes in arbitration to an arbitrator nominated by them. Thus, the dispute which has arisen even on account of the judgment of the Appellate

Authority to hold as to whether the power purchase agreement entered into between the appellant and the respondent has become void or not would also be dispute which will be covered under Section 79 and which will have to be determined by the Commission. This would also be so in view of the judgment delivered by the Apex Court in *Gujarat Urja Vikas Nigam's case (supra).* Para 59 of the said decision is as under:-

> "59. In the present case we have already noted that there is an implied conflict between Section 86(1)(*f*) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation Act, 1996 since under Section 86(1)(*f*) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under Section 11 of the Arbitration and Conciliation Act, 1996, the court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or the Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(*f*) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail)."

16. Some other observations made by the Apex Court in the aforesaid judgment at page 772 in paragraphs 60& 61 reads as under:-

> "60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30-5-1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10-6-2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. **After 10-6-2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it.** We further clarify that *all* disputes, and not merely those pertaining to matters referred to in Clauses (*a*) to (*e*) and (*g*) to (*k*) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1) (*f*) about the nature of the dispute.
>
> 61. We make it clear that it is only with regard to the authority which can adjudicate or arbitrate disputes that the Electricity Act, 2003 will prevail over Section 11 of the Arbitration and Conciliation Act, 1996. However, as regards the procedure to be followed by the State Commission (or the arbitrator nominated by it) and other matters related to arbitration (other than appointment of the arbitrator) the Arbitration and Conciliation Act, 1996 will apply (except if there is a conflicting provision in the Act of 2003). In other words, Section 86(1) (*f*) is only restricted to the authority which is to adjudicate or arbitrate between licensees and generating companies. Procedural and other matters relating to such proceedings will of course be governed by the Arbitration and Conciliation Act, 1996, unless there is a conflicting provision in the Act of 2003."

17. It will also be relevant to take note of sub-Section 13.3 of the agreement entered into between the parties known as power purchase agreement, which reads as under:-

"13.3. Arbitration

Where any Dispute arising out of or in connection with this Agreement,

a) is not resolved as provided for in Article 13.2.

b) not used

c) falls within the scope and purview of statutory arbitration under the provision of the law; then such Disputes shall be submitted to arbitration in accordance with the Arbitration and Conciliation Act, 1996 ("Arbitration Act") at the request of either Party in writing to the other Party. The following provisions shall then apply:

I. The rights and obligations of the Party shall remain effective during the arbitration proceedings;

II. The place of arbitration shall be New Delhi, India;

III. The language of the arbitration shall be English;

IV. Any Dispute submitted to arbitration shall be considered by three arbitrators, two of whom shall be nominated, one by PTC and one by the Company, if within 130 days of the receipt of a party's notification of the appointment of an arbitrator, the other party has not notified the fist party of the arbitrator it has appointed, the first party may apply for the appointment of the second arbitrator in accordance with the Arbitration Act. The third arbitrator will be nominated by the two existing arbitrators or, failing such nomination within 30 days of the appointment of the second arbitrator, shall be appointed in accordance with the Arbitration Act."

18. A perusal of the aforesaid agreement r/w Section 185 of the Electricity Act goes to show that if a dispute arises between the parties with regard to the interpretation of that agreement or implementation thereof even after termination of that agreement would have to be determined by arbitrator in view of sub-section 13.3 of the Power Purchase Agreement.

19. Thus, I conclude that the question as to whether the tariff could have been fixed with respect to sale of electricity to the trading licensee or if the Power Purchase Agreement relied upon by the appellant has become void in view of *Lanco's case (supra)* despite judgment of the Hon'ble Supreme Court in *Gujarat Urja Vikas Nigam's case (supra)* which is later in time is a dispute which is arbitrable and the only forum where such adjudication could take place is CERC. However, I may also observe that in this case, at least till the filing of OMP No.125/2010 and the appeal before this Court, the appellant had not taken any steps in this regard.

20. I may observe here that nothing stated by me in this order shall reflect upon the merits of the judgment of the Appellate Authority in *Lanco's case (supra)*, which is sub judice before the Hon'ble Supreme Court as informed by one of the parties. It may however be observed that the SLP was filed by the appellant before the Hon'ble Supreme

Court after filing of the appeal before us and there are no interim orders on the said appeal passed by the Hon'ble Supreme Court.

21. In view of what has been observed above by me and for other reasons given by Justice Anil Kumar in his separate judgment, I find myself in agreement with Justice Anil Kumar that the appeal filed by the appellant has to be dismissed in the facts of this case. I have only given a clarificatory note which I feel was necessary to clarify the mess which appears to be a creation of parties themselves regarding applicability of arbitration as invoked for settlement of the disputes between the parties.

MOOL CHAND GARG, J.

August 13, 2010
'dc'