

INDSIL HYDRO POWER & MANGANESE LTD.

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v.

STATE OF KERALA & ORS ETC.

(Civil Appeal Nos. 5943-5945 of 2019)

JULY 30, 2019

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**[DR. DHANANJAYA Y CHANDRACHUD AND
INDIRA BANERJEE, JJ.]**

Electricity : Pursuant to the policy decision of State Government to allow the private agencies to set up hydel schemes, the appellant was allowed to set up a Hydro Electric Project – MoU was executed between the appellant and the KSEB – In terms of the MoU, the appellant would operate the unit for 30 years from the date of commissioning i.e. the date from which the power generated by the appellant is fed into the KSEB grid – The MoU contemplated that the transmission line required for transferring power from the power house to the nearest grid sub-station upto a length of 4 Kms. would be built by KSEB at the cost of the appellant and rest of the transmission line was to be constructed by the KSEB at its own cost – Delay in construction of transmission line led to institution of writ petition by appellant before High Court wherein appellant claimed power free of cost in terms of clause 9 and 10 of the agreement and sought direction for expeditious construction of transmission line – Pursuant to interim order, the Chief Electrical Inspector filed a report to the effect that the installation of transformers was completed by the appellant on 21 August 2000 but the sanction for energization of 110 KV was not issued since the transmission lines were not ready – High Court directed the State Government to deal with the representations submitted by the appellant – Pursuant to order of High Court, State Government passed order on 7 February 2001 opining inter alia that appellant was not entitled to the benefit of the pre 1992 tariff concession till the completion of the transmission line by KSEB; that the delay in the construction of the transmission lines was not deliberate and was due to factors beyond control; that the tariff concessions were provided to new industries which is a distinct issue from captive power generation and hence the plea

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- A *for a tariff concession could not be acceded to; and having regard to the grievance of the appellant that it had been unable to evacuate the power which it was positioned to generate for its captive unit, KSEB ought to adhere to the time schedule which it had undertaken to fulfill and complete the construction of the transmission lines by 28 February 2001 without fail – High Court dismissed the writ*
- B *petition eventually holding that there was no intentional delay in construction of the transmission lines on the part of KSEB; that the tariff concession was made available only to new industries; and that the agreement between the parties did not disclose any specified time limit for the provision of transmission lines – On appeal, held:*
- C *The agreement stipulated that the date of commissioning would be construed as the date from which the power generated by the units set up by the appellant was fed into KSEB grid – Though the contract did not specify the exact length of the transmission line, clause 9 made it clear that for a length of 4 kms, construction would be at the cost and expense of the appellant while the balance would be*
- D *constructed by KSEB at its own cost – Clause 3 postulated that commercial operations would begin within a period of 30 months – Thus, the only reasonable construction of the contract would be that the obligations which were to be performed by KSEB, namely, the construction of the transmission line must necessarily be*
- E *completed within the same period – Otherwise imposing an obligation upon the appellant to commence commercial operations within 30 months would have no meaning – Therefore, High Court was not correct in holding that the contract did not stipulate any timelines for the completion of the work of constructing the transmission line – Clause 12 of the agreement contemplated a*
- F *situation where the KSEB grid is not in a position to absorb the energy generated from the project for any reason including the breakdown of transmission lines or any other reason beyond the control of KSEB – In that event, clause 12 provided the generation from the project to be restricted to the extent of generation for captive*
- G *consumption as directed by KSEB – These provisions indicated that the contract was not entirely silent in regard to a situation involving the inability of KSEB's grid to absorb the energy generated from the project for any reason – The report of the Chief Electrical inspector made it clear that it was as a result of the delay which took place in the construction of the transmission line that the actual*
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injection of power into the grid could not take place – This clearly showed that the appellant had duly fulfilled its obligation of setting up Phase I and Phase II of its units and the only reason why it was unable to inject power into the grid was because the setting up of the transmission lines by KSEB could not take place – Thus, the basis on which State Government took a decision on 7 February 2001 and High Court affirmed it by its impugned judgment would need to be re-visited – Appellant was not entitled to the grant of deemed generation status as a matter of right – Similarly, the concessional power tariff applicable for a period of five years from 1994 to 1999 was extended until 20 August 2000 – This is undoubtedly a matter of policy and the High Court was justified in coming to the conclusion that it was not open to the Court to foist a particular measure of policy on the State – State Government to reassess the matter in proper perspective within the available framework of law and its own policy.

Administrative Law: Contractual matters – Judicial review – Scope of interference – Held: It is now a settled principle of law that the exercise of writ jurisdiction under Art.226 is not excluded in matters pertaining to contract – The States and its agencies are duty bound to act in a manner which is fair and transparent – They cannot act arbitrarily in dealings with private parties – This must particularly be the governing principle where the State as a measure of encouraging industrialisation invites the participation of private industries to respond to the policy initiative of the State – Electricity.

Deeds and documents: Interpretation of commercial documents – In construing a commercial document, the contract must be read and understood in its entirety so as to attribute to it a business meaning which was within the understanding of the contracting parties – Electricity.

Disposing of the appeals, the Court

HELD: 1. In announcing the policy initiative on 7 December 1990, the State Government intended to encourage the setting up of hydel power projects by private agencies and hence, a slew of concessions came to be provided. The agreement that was entered into between the appellant and the KSEB is undoubtedly a matter in the contractual arena. It is now a settled principle of law that the exercise of writ jurisdiction under Article 226 is not

A excluded in matters pertaining to contract. The States and its
agencies are duty bound to act in a manner which is fair and
transparent. [Para 33] [664-E-F]

2. In the instant case, under its agreement with KSEB, the
appellant assumed the obligation to set up Phases I and II of a
B hydel project with a capacity of 21 MW and to operate the project
for a period of 30 years. After the expiry of 30 years, the project
would be handed over to the State free of cost. The agreement
stipulated that the date of commissioning would be construed as
the date from which the power generated by the units set up by
C the appellant was fed into KSEB grid. Under clause 3 of the
agreement, the appellant was to furnish within three months a
programme for construction and installation towards the
completion of the project. Commercial operation was to be
achieved within a period of 30 months from that date. Under
D clause 9 of the contract, KSEB assumed the obligation to set up
the transmission line. Though the contract did not specify the
exact length of the transmission line, clause 9 made it clear that
for a length of 4 kms, construction would be at the cost and
expense of the appellant while the balance would be constructed
by KSEB at its own cost. While a superficial reading of clause 9
E alone is liable to lead to the interpretation that no time was fixed
for the completion of the transmission lines, this would not be a
correct reading of the contract. In construing a commercial
document, the contract must be read and understood in its
entirety so as to attribute to it a business meaning which was
within the understanding of the contracting parties. [Paras 34-
F 35] [664-G; 665-A-D]

3. Clause 3 postulated that commercial operations would
begin within a period of 30 months. The only reasonable
construction of the contract would be that the obligations which
were to be performed by KSEB, namely, the construction of the
G transmission line must necessarily be completed within the same
period. Otherwise imposing an obligation upon the appellant to
commence commercial operations within 30 months would have
no meaning. This would result in a specific term of the contract
being rendered redundant which the Court must as a principle of

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interpretation seek to avoid. Hence, the High Court was not correct in coming to the conclusion that the contract did not stipulate any timelines for the completion of the work of constructing the transmission line. Such a requirement was implicit in clause 3 of the agreement and clause 9 must necessarily be read in that context. [Para 36] [665-E-H]

4. The submission which has been urged on behalf of KSEB principally relies on the concessions which have been provided to the appellant in regard to the tariff which is applicable to its industrial unit. These concessions were available to all new industries to whom a concessional tariff was provided over a period of five years from 1994 to 1999. These concessions were independent of and would not therefore disentitle the appellant to the benefit of the agreement that was entered into with KSEB on 30 December 1994. The grant of a concessional tariff is a matter of policy to encourage new industries to set up operations in the State. Clause 10 of the agreement stipulated that the energy drawn from the hydel units – Phase I and Phase II – would be delivered free of cost to the appellant less an amount of 12% towards wheeling charges and transmission losses. Alternatively, it would be banked by KSEB, if the appellant so desired. KSEB would collect 1% of the energy so banked as its commission. [Paras 37-39] [666-A-D]

5. Clause 12 of the agreement contemplates a situation where the KSEB grid is not in a position to absorb the energy generated from the project for any reason including the breakdown of transmission lines or any other reason beyond the control of KSEB. In that event, clause 12 provides that the generation from the project will have to be restricted to the extent of generation for captive consumption as directed by KSEB. These provisions indicate that the contract is not entirely silent in regard to a situation involving the inability of KSEB's grid to absorb the energy generated from the project for any reason including a reason which is beyond the control of KSEB. [Para 40] [666-E-G]

6. The report of the Chief Electrical inspector makes it clear that it was as a result of the delay which took place in the construction of the transmission line that the actual injection of

- A power into the grid could not take place. The order of the State Government dated 7 February 2001 shows that there was no deliberate act or default on the part of KSEB. Indeed, it has not been seriously disputed that at the material time, there were agitations on the part of the farmers and certain other circumstances which caused delay in the construction of the transmission lines. However as significant as these reasons are, it should not lead to a situation where a private investor who has acted upon the policy of the State Government being left in the lurch as a result of supervening circumstances which have resulted in the power not being evacuated into the grid due to the non-commissioning of the transmission lines at the material time by KSEB. It is imperative that contractual obligations entered into by the State have legal sanctity. A legal regime where the sanctity of contracts is respected and commercial contracts are enforced is essential to the maintenance of the rule of law. Trade and commerce can be freely conducted in a stable legal order which provides remedies for enforcement. [Paras 42, 43] [667-B-F]

7. Though in the order of the State Government dated 7 February 2001, it was envisaged that the transmission lines would be constructed and completed by 28 February 2001, there was a further delay of approximately three months even thereafter as a result of which the evacuation of power could commence only with effect from 1 June 2001. On the basis of the factual data which has emerged from the record, on which there is no dispute, the basis on which the State Government took a decision on 7 February 2001 and the High Court affirmed it by its impugned judgment would need to be re-visited. The appellant was not entitled to the grant of deemed generation status as a matter of right. Similarly, the concessional power tariff which is applicable for a period of five years from 1994 to 1999 was extended until 20 August 2000. This is undoubtedly a matter of policy and the High Court was justified in coming to the conclusion that it is not open to the Court to foist a particular measure of policy on the State. In what manner the State should remedy the grievance of the private investor is something which should be duly considered by the State Government within the available framework of law and its own policy. [Paras 44, 45] [667-G-H; 668-A-C]

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Shrilekha Vidyarthi (Kumari) v. State of U.P. (1991) 1 SCC 212 ; [1990] 1 Suppl. SCR 625 ; ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd. (2004) 3 SCC 553 ; Noble Resources Ltd. v. State of Orissa (2006) 10 SCC 236 : [2006] 6 Suppl. SCR 53 – referred to. A
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Case Law Reference

[1990] 1 Suppl. SCR 625 referred to Para 33
(2004) 3 SCC 553 referred to Para 33
[2006] 6 Suppl. SCR 53 referred to Para 33 C

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5943-5945 of 2019.

From the Judgment and Order dated 21.08.2015 of the High Court of Kerala at Ernakulam in O.P. Nos. 6030 of 2001, 25360 of 2000 and W.P.(C) No. 20393 of 2003. D

V. Giri, Joseph Kodianthara, Sr Advs., Amit, R. Gopalakrishnan, Advs. for the Appellant.

C. K. Sasi, Nayantara Roy, Abdulla Naseeh V. J., P. V. Dinesh, Ms Sindhu T. P., Mukund P. Unny, R. S. Lakshman, Bineesh K., Ashwini Kumar Singh, Ms. Bina Madhavan, Ms. Anthony Elizabeth, Ms. Akanksha Mehra (for M/s. Lawyer S. Knit & Co.), Advs. for the Respondents. E

The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J. F

1. Leave granted.

2. These appeals arise from the judgment of a Division Bench of the High Court of Kerala dated 21 August 2015. The High Court has dismissed the writ proceedings instituted by the appellant under Article 226 of the Constitution of India. G

3. On 7 December 1990, the State of Kerala issued G.O (Ms) No. 23/90/PD by which private entities were permitted to construct and operate Hydel Power Projects for the generation of power, subject to certain conditions. These conditions, broadly speaking were:

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- The Private Agencies would be allowed to set up sanctioned hydel schemes at their own cost.

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- Where the power scheme is located in an area owned by the Respondents, the land would be leased for a period of 30 years from the date of commissioning of the same, after which the land with all structures would vest in the Government free from all encumbrances.

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- The transmission line required for transferring power from the captive plant of the agency to the nearest grid sub-station would be built at the cost of the agency by the KSEB and after construction it would be transferred to the KSEB without any compensation.

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- The captive plant energy fed into the KSEB grid – 12% wheeling charges loss would be delivered free of cost to the agency at their H.T. Terminals.
- The percentage of 12% for Transmission & Distribution losses, wheeling charges, etc. will be liable for review by Board during revisions of tariff rates periodically.

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- Before implementation of the Scheme, an agreement setting forth all the above aspects and such other conditions as found necessary would be entered into between the agency and the KSEB.”

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4. On 12 March 1992, the State government issued G.O (Ms) No. 5/92/PD by which the earlier Government Order was supplemented in terms of the following conditions:

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- The power generated by the agencies could be utilized by them in their own factories/business premises anywhere in the State or could be sold to the KSEB.
- For each project, the rate of purchase of electricity generated will be notional ensuring a minimum rate of return as prescribed by the Government.”

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5. The appellant is an EHT consumer with a contract demand of 14000 KVA. It has a power intensive unit for the manufacture of Ferro Alloys which was energized on 12 August 1994. The appellant commenced commercial production on 1 October 1994. A

6. On 6 February 1992, the Government of Kerala provided incentives to new industrial units by providing an exemption for five years from the payment of enhanced tariff of electricity from 1 January 1992. This was made available to manufacturing units which commenced commercial production on or before 31 December 1996. The pre-1992 tariff concession was allowed to the appellant for the period from 1 October 1994 to 30 September 1999. Pursuant to a policy decision of the State Government, the appellant was also granted an extension of the pre-1992 tariff for a further period commencing from 1 October 1999 until 20 August 2000. From 21 August 2000, the appellant is being billed under the prevailing tariff. The pre-1992 tariff was at the rate of Rs 0.42 per unit as against the cost of thermal power purchased by the Kerala State Electricity Board which at the material time was Rs 3.30 per unit. B C D

7. In pursuance of the policy decision of the State Government to allow private agencies to set up hydel schemes, the appellant was allowed to set up a Hydro Electric Project (Kuthungal Phase I & II) at Kuthungal, Idukki District with a capacity of 21 MW as a captive power project in terms of the Government Order dated 7 December 1990. The allotment of the hydel project was confirmed in favour of the appellant in June and July 1992. An MoU was executed between the appellant and KSEB in pursuance of which the appellant was to set up a hydel project at Kuthungal in Idukki District. E

Some of the relevant terms of the agreement contemplated that: F

“‘Commercial Operation’ i.e. the date on which power generated by the Petitioner is fed into the KSEB Grid, was to be achieved within 30 months from date of execution of the agreement. A penalty would be levied if the Company was not able to adhere to the above timeline. G

If the Petitioner was not able to adhere to the agreed schedule, for reasons beyond its control, the KSEB may consider the request of the company for a revised schedule.

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A If the Petitioner is unable to complete the project or after completion is unable to operate the project as per the schedule, the KSEB shall have the right to take over.

B The KSEB would build 4 kms of the transmission line required for transferring power from the power house to the nearest grid/substation at the cost of the Petitioner. The balance would be constructed by the KSEB at its own cost as a promotional measure.

C The power generated - 12.0% (Wheeling & Transmission Losses) would be available/delivered to the Petitioner at the EHT Terminals at the point of supply in its installations.

D If the KSEB grid was not in a position to absorb the energy generated from the project for any reason beyond the control of the KSEB, the generation from the project would be restricted to the extent of generation for captive consumption as directed by the KSEB.

In case of any dispute/difference between the parties, the matter would be referred to the State Govt. and their decision would be final and binding between the parties.”

E 8. The agreement contemplated that the appellant as the project agency would operate the unit for a period of 30 years from the date of commissioning. The date of commissioning was defined to mean the date from which the power generated by the appellant is fed into the KSEB grid.

F 9. Clause 3 of the agreement stipulated that the appellant would, upon the execution of the agreement, submit a programme of construction and installation so that commercial operation is achieved within a period of 30 months. The agreement contemplated that the transmission line required for transferring power from the power house to the nearest grid sub-station or location as suggested by KSEB, upto a length of 4 kms, would be built by KSEB at the cost of the appellant. The rest of the
G transmission line was to be constructed by KSEB at its own cost.

10. Clauses 3 and 9 insofar they are material, are extracted below:

“3. The KSEB is entitled to check up, whenever it deems necessary to see whether the conditions stipulated - “in respect

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of installation, operation and maintenance are being adhered to by the company. The company will furnish, within three months of signing the Agreement, a programme of construction and installation to the effect of completing the project in such a manner that the commercial operation (the term, “commercial operation” in this context indicates the date on which the power generated by the company is fed into the KSEB grid) of the project is achieved within 30 (thirty) months from that date...”

9. The transmission line required for transferring power from the power house to the nearest grid, substation and/or other locations as suggested by the KSEB upto a length of 4 (four) km shall, be built by the KSEB at the company, as a deposit work and the balance constructed by the KSEB at its cost as a promotional measure for encouraging the private entrepreneurs for the company by KSEB it shall be transferred to the KSEB without any compensation. Land required for construction of such transmission line will be considered as part of land required for the project as per conditions as elaborated under clause (6) above and the metering equipment as per the specifications of KSEB shall be provided by the company at their cost at a point in the generating station as approved by the KSEB and handed over to the KSEB along with transmission line, without any compensation.”

11. Clause 10 of the agreement contemplated that the energy from the hydel units set up by the appellant and fed into the KSEB grid less 12% towards wheeling charges and transmission losses would be delivered free of cost to the appellant.

12. Clause 12 makes the following provision for a situation where the grid of KSEB was not in a position to absorb the energy generated from the project:

“12. If the KSEB grid is not in a position to absorb the energy generated from the project for any reason such as high level of storage in reservoirs, breakdown of transmission lines and/or other reasons beyond the control of KSEB, the generation from the project will have to be restricted to the extent of generation for captive consumption as directed by KSEB. The schedule of power generation from the project shall be as directed by the KSEB.”

A 13. Clause 25 of the agreement envisaged that any dispute or difference between the parties would be referred to the Government of Kerala whose decision would be final and binding.

B 14. On 25 July 1998, the Chief Engineer of KSEB called upon the appellant to deposit 2.13 crores for the construction of 4 km of the transmission line in pursuance of clause 9 of the agreement. The amount was deposited by the appellant on 5 October 1998. A further demand of Rs 20,55,075 /- made on 5 May 1999 was also fulfilled.

C 15. The case of the appellant is that civil construction work was completed and one of the three generators was commissioned and synchronised with the grid on 15 May 2000. There was a delay in the setting up of the transmission lines without which it was not possible for the hydel unit to inject power into the KSEB grid. On 20 May 2000 and 30 June 2000, the appellant addressed representations in regard to the delay. According to the appellant, on 21 August 2000, the remaining two generators of the project were also commissioned and a certificate was issued by the Chief Electrical Inspector of the Government of Kerala.

D 16. The delay in the construction of the transmission line led to the institution by the appellant of a writ petition under Article 226 of the Constitution of India before the Kerala High Court. The reliefs which the appellant sought were in the following terms:

E “a. Declare that the petitioner is entitled to consume power free of cost at its plant at Palakkad namely Sun Metal and Alloy Limited at Kanjikode in Palakkad and Indsil Electrosmelts Ltd. at Pallatheri in accordance with clause 9 of Exhibit P2 order and clause 10 of Exhibit P6 agreement calculated on the basis of the possible consumption as mentioned by the Electricity Board in Exhibit P38 Budget proposal until such time as the Board lays the transmission line and is ready to evacuate the power actually generated from the Kuthungal Hydro Electric project in Kuthungal Idukki District.

F b. Issue a writ in the nature of mandamus commanding second respondent to take expeditious steps to see that the transmission line required for transmission of power from Kuthungal to Neriaoiangalam is completed as early as possible.

G c. Issue a writ in the nature of mandamus commanding respondents 2 and 3 to refrain from collecting any amount from

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the petitioner by way of electricity charges or related charges for the power consumed by the petitioner and its associate in accordance with clause 10 of Exhibit P6 agreement on the basis of the possible power generation as mentioned in P38 Budget until evacuation of power generated in the project at 21 MW. A

d. Issue a writ in the nature of mandamus commanding the first respondent to take appropriate decision on Exhibit P.26, 35 and 36 representations by taking appropriate directions to the Board to make available to the petitioner power in accordance with clause 9 of Exhibit P2 and Clause 10 of Exhibit P6 agreement.” B

17. In pursuance of an interim order passed by the High Court on 31 August 2000, the Chief Electrical Inspector of the Government of Kerala filed a report on 14 September 2000. The Report, insofar as it is material to these proceedings, states that the installation of transformers was completed by the appellant on 21 August 2000 but the sanction for energization of 110 KV was not issued since the transmission lines were not ready. The Chief Electrical Inspector stated in his conclusions that except for a pre-commissioning test and other minor work, installation had been completed. What remained to be completed is the construction of transmission lines by KSEB. C D

18. The conclusion in the report reads thus:

“Except for the pre-commissioning tests to be done prior to energisation of the 110 KV lines, and minor works connected at the time of pre-commissioning, the installation of the 3 bios of the 7 generators, 11 kv – switch gears 4 Nos. of the 11KV/110KV step-up transformers, 500 KVA uxiliary transformer and the 110kv yard is completed. E F

The 11 KV switch gears, transformers and the 110 KV yard are completed and ready for evacuation of power generated simultaneously by the 3 Nos. of 7MW generators installed at Kuthungal only the 110 KV transmission lines are to be connected which is now incomplete. The name plate details of the generators, step-up transformers and equipment with 110 KV yard are enclosed for reference.” G

19. The High Court of Kerala, by an order dated 1 November 2000, directed the State Government to deal with the representations H

A submitted by the appellant in terms of the dispute resolution procedure contained in clause 25 of the agreement. The State Government was to decide whether there was any delay in the construction of the transmission lines by KSEB and to determine the claim of the appellant for the grant of concessions including a deemed generation status or an extension of the pre 1992 concessional tariff.

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20. Pursuant to the order of the High Court, an order was passed by the State Government on 7 February 2001. The State opined that:

(i) There was no penal provision in the agreement providing a consequence for a delay in the completion of the construction of the transmission lines by KSEB;

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(ii) The appellant was not entitled to deemed generation status since this was neither a concession provided in the agreement nor was the concession available to an entity such as the appellant which generated power for its own consumption;

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(iii) The appellant was not entitled to the benefit of the pre 1992 tariff concession till the completion of the transmission line by KSEB;

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(iv) KSEB had not deliberately delayed the construction and the delay in the construction of the transmission lines was due to factors beyond its control including public agitation and the inaccessibility of the terrain;

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(v) Tariff concessions are provided to new industries which is a distinct issue from captive power generation and hence the plea for a tariff concession could not be acceded to; and

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(vi) Having regard to the grievance of the appellant that it had been unable to evacuate the power which it was positioned to generate for its captive unit, KSEB ought to adhere to the time schedule which it had undertaken to fulfill and complete the construction of the transmission lines by 28 February 2001 without fail.

Accordingly, the State Government directed that:

(i) The appellant shall continue to remit the pre-1992 tariff from August 2000 to February 2001;

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- (ii) The difference between the billed and the concessional tariff shall be remitted to KSEB in 48 equal monthly instalments; and A
- (iii) The penalties shall be waived. B

21. The Writ Petition filed before the High Court was eventually adjudicated upon in the impugned order of the Division Bench dated 21 August 2015. The Division Bench held that though the appellant was permitted to put up a captive power plant in terms of the agreement dated 30 December 1994, the agreement did not contemplate a situation where the transmission lines will not be ready for evacuation of power. The High Court held that there was no intentional delay in the construction of the transmission lines on the part of KSEB. On whether or not the concession should be granted to the appellant, the State Government had already passed an order on 7 February 2001 opining that the tariff concession was made available only to new industries. This procedure, according to the State Government, was not available to captive power generation units. The High Court held that this view was not contrary to the policy of the State Government. The High Court held that the agreement between the parties did not disclose any specified time limit for the provision of transmission lines. The High Court accordingly dismissed the Writ Petition. C D

22. Assailing the judgment of the High Court, it has been urged on behalf of the appellant by Mr V Giri, learned Senior Counsel that acting in pursuance of the agreement dated 30 December 1994, the appellant completed the entire construction of the two units of the hydel project. Mr Giri urged that the High Court was not correct in proceeding on the assumption that the agreement did not contain a time limit for the construction of the transmission lines. In this context, it was submitted that clause 3 of the agreement obligated the appellant to furnish a programme of construction within three months of the execution of the agreement in such a manner that commercial operation was achieved within 30 months from that date. It was urged that the expression “commercial operation” has been defined as the date on which power generated by the appellant is fed into the KSEB grid. Mr Giri submitted that these provisions contained in clause 3 of the agreement have to be read in the context of clause 9 under which KSEB assumed the obligation to set up four kilometers of the transmission line at the cost of the appellant E F G

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A and the balance on its own cost. On this basis, it was submitted that it was the obligation of KSEB to achieve the completion of the installation of transmission lines within the period stipulated by the agreement for the commencement of commercial operation since in the absence of the transmission lines, commercial operation would not become possible.

B 23. Mr Giri submitted that clause 9 of the agreement casts an obligation on KSEB to carry out construction of the transmission lines. Hence, though clause 9 does not expressly provide for a period of completion, it must be read in the context of clause 3 under which commercial operations, with reference to the injection of power into the power grid, were to commence within a period of 30 months.
C Consequently, it is urged that the duty to complete the transmission lines must necessarily be fulfilled within the period of 30 months stipulated for commencement of commercial operation.

D 24. Mr Giri urged that the failure to complete the construction of transmission lines had a direct bearing on the appellant. If the transmission lines were constructed, the appellant would have been in a position to utilise the power generated by the hydel unit for captive consumption. Instead, the appellant had to purchase electrical power from KSEB and to pay for the purchase.

E 25. In this backdrop, it was submitted that the High Court was not justified in coming to the conclusion that no period was stipulated for the completion of transmission lines. Moreover, it was submitted that the finding that the appellant would not be entitled to an extension of the concessional tariff or deemed generation status would not solve the issue. The appellant has to be compensated for the situation which has been
F caused by the default of KSEB.

G 26. Mr Giri submitted that even after the State Government passed an order on 7 February 2001, it is a matter of record that the transmission lines were not completed by the date envisaged i.e. 28 February 2001. As a result, evacuation of power could commence only with effect from 1 June 2001.

H 27. It has been urged that as a result of the demand for interest on the differential tariff, the appellant will face a serious financial problem. Mr Giri urged that though the appellant had not taken recourse to the remedy of a civil suit for the recovery of damages, this was in view of the ongoing relationship with the State Government and KSEB and it

would be appropriate if this Court were to direct that the State Government should reconsider the matter afresh having regard to the grievances of the appellant. A

28. Mr Giri has also urged that clause 12 of the agreement specifically contemplates a situation in which the KSEB grid is not in a position to absorb the energy generated by the project for any reason, in the event of which, it has been provided that the generation from the project will be restricted to the extent of generation for captive consumption as directed by KSEB. B

29. On the other hand, it has been urged on behalf of the KSEB by Mr P V Dinesh, learned counsel, that in the present case, the contract was a commercial bargain between the appellant and KSEB. Learned counsel submitted that in terms of the policy decision of the State of Kerala, substantial tariff concessions have already been granted to the appellant initially for a period of five years between 1 October 1994 and 30 September 1999 and thereafter by a further extension until 20 August 2000. Learned counsel submitted that whereas the pre 1992 tariff to industries was at the rate of Rs 0.42 per unit, the cost of thermal power purchased by KSEB is Rs 3.30 per unit. Hence, the appellant has paid approximately 19.84 crores on account of the concessional tariff as against an amount of Rs 51.32 crores towards energy charges alone which would not have been possible had the normal rate of tariff been applicable. C D E

30. Moreover, it has been submitted that under the terms of the agreement, KSEB undertook the obligation to fund a portion of the transmission line over and above the distance of 4 kms which was constructed at the cost of the appellant. For drawing the entire line of 16.77 kms, KSEB acquired a substantial tract of land which involved the payment of compensation. F

31. Mr Dinesh urged that as a result of the acquisition, there were protests from the farmers due to which construction of the towers was delayed. It was urged that in the order of the State Government dated 7 February 2001, a finding of fact was recorded to the effect that the delay in the construction of the transmission lines was not occasioned by any deliberate act on the part of KSEB. In this background, it has been submitted that the appellant which had pressed its claim for grant of deemed generation status and for a concessional tariff beyond 20 August G H

A 2000 is clearly not entitled to it in law. It was urged that the deemed generation status cannot be allowed to the appellant which is a captive power unit and, similarly, a concessional tariff is made available to new industries which had already been availed of by the appellant. In this view of the matter, it was urged that particularly in the background of the fact that there was no deliberate act on the part of KSEB, the High Court was not in error in dismissing the Writ Petition. It was urged that the contract between the parties does not envisage any consequence for a delay on the part of KSEB in erecting the transmission lines and there is no specific provision in regard to the period within which the transmission lines have to be set up.

C 32. Mr C K Sasi, learned counsel appearing on behalf of the State of Kerala has placed reliance on the decision of the State Government dated 7 February 2001 in support of the submission that relevant facts have been taken into account.

D 33. While assessing the merits of the rival contentions, this Court must be cognizant of the fact that the invocation of the power of judicial review under Article 226 of the Constitution of India was in the context of a contract which was entered into between the appellant and KSEB in pursuance of a policy initiative of the Government of Kerala. Evidently, in announcing the policy initiative on 7 December 1990, the State Government intended to encourage the setting up of hydel power projects by private agencies and hence, a slew of concessions came to be provided. The agreement that was entered into between the appellant and the KSEB is undoubtedly a matter in the contractual arena. It is now a settled principle of law that the exercise of writ jurisdiction under Article 226 is not excluded in matters pertaining to contract. The States and its agencies are duty bound to act in a manner which is fair and transparent. The State and its instrumentalities cannot act arbitrarily in dealings with private parties.¹ This must particularly be the governing principle where the State as a measure of encouraging industrialisation invites the participation of private industries to respond to the policy initiative of the State.

G 34. In the present case, under its agreement with KSEB the appellant assumed the obligation to set up Phases I and II of a hydel

¹ Shrilekha Vidyarthi (Kumari) v. State of U.P., (1991) 1 SCC 212 ; ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC 553 ; Noble Resources Ltd. v. State of Orissa, (2006) 10 SCC 236

project with a capacity of 21 MW and to operate the project for a period of 30 years. After the expiry of 30 years, the project would be handed over to the State free of cost. A

35. It was in this background that the agreement stipulated that the date of commissioning would be construed as the date from which the power generated by the units set up by the appellant was fed into KSEB grid. Under clause 3 of the agreement, the appellant was to furnish within three months a programme for construction and installation towards the completion of the project. Commercial operation was to be achieved within a period of 30 months from that date. Under clause 9 of the contract, KSEB assumed the obligation to set up the transmission line. Though the contract does not specify the exact length of the transmission line, clause 9 makes it clear that for a length of 4 kms, construction would be at the cost and expense of the appellant while the balance would be constructed by KSEB at its own cost. While a superficial reading of clause 9 alone is liable to lead to the interpretation that no time was fixed for the completion of the transmission lines, this in our opinion, would not be a correct reading of the contract. In construing a commercial document, the contract must be read and understood in its entirety so as to attribute to it a business meaning which was within the understanding of the contracting parties. B C D

36. Clause 3 postulates that commercial operations would begin within a period of 30 months. The only reasonable construction of the contract would be that the obligations which were to be performed by KSEB, namely, the construction of the transmission line must necessarily be completed within the same period. Otherwise imposing an obligation upon the appellant to commence commercial operations within 30 months would have no meaning. This would result in a specific term of the contract being rendered redundant which the Court must as a principle of interpretation seek to avoid. Thus, the reasonable construction of the contract would be that the commencement of commercial operations within 30 months postulated that both the appellant and KSEB must perform their respective obligations under the contract within that period so as to adhere to the date of commencing commercial operations. Hence, the High Court was not correct in coming to the conclusion that the contract did not stipulate any timelines for the completion of the work of constructing the transmission line. Such a requirement was implicit in clause 3 of the agreement and clause 9 must necessarily be read in that context. E F G H

A 37. The submission which has been urged on behalf of KSEB principally relies on the concessions which have been provided to the appellant in regard to the tariff which is applicable to its industrial unit. These concessions, it must be noted, were available to all new industries to whom a concessional tariff was provided over a period of five years from 1994 to 1999. These concessions were independent of and would not therefore disentitle the appellant to the benefit of the agreement that was entered into with KSEB on 30 December 1994. The grant of a concessional tariff is a matter of policy to encourage new industries to set up operations in the State.

C 38. The claim of the appellant, however, in the present proceedings is based upon the contract for setting up a captive power generation unit relying on the hydel policy of the State dated 7 December 1990 in terms of which the agreement between the parties was executed.

D 39. Clause 10 of the agreement stipulated that the energy drawn from the hydel units – Phase I and Phase II – would be delivered free of cost to the appellant less an amount of 12% towards wheeling charges and transmission losses. Alternatively, it would be banked by KSEB, if the appellant so desired. KSEB would collect 1% of the energy so banked as its commission.

E 40. The case of the appellant is that as a result of the inability of KSEB to set up the transmission lines it was unable to receive the power which it was in a position to evacuate into the grid for its captive use. The grievance of the appellant is that as a result of this, it was compelled to purchase power from KSEB at the rates as applicable. Clause 12 of the agreement contemplates a situation where the KSEB grid is not in a position to absorb the energy generated from the project for any reason including the breakdown of transmission lines or any other reason beyond the control of KSEB. In that event, clause 12 provides that the generation from the project will have to be restricted to the extent of generation for captive consumption as directed by KSEB. These provisions indicate that the contract is not entirely silent in regard to a situation involving the inability of KSEB's grid to absorb the energy generated from the project for any reason including a reason which is beyond the control of KSEB.

41. In the present case, the essential facts are not in dispute.

H 42. Pursuant to the interim order that was passed by the High Court, the Chief Electrical Inspector upon inspecting the work of

installation submitted a report on 14 September 2000. The report has not been questioned. The report categorically states that the installation of transformers was completed on 21 August 2000. The work which remained was in the nature of pre-commissioning tests for which the work which had to be completed was essentially the laying down of the 110 KV line on the part of KSEB. The report of the Chief Electrical inspector makes it clear that it was as a result of the delay which took place in the construction of the transmission line that the actual injection of power into the grid could not take place. There is, in other words, clear and cogent material to lead to the conclusion that the appellant had duly fulfilled its obligation of setting up Phase I and Phase II of its units and the only reason why it was unable to inject power into the grid was because the setting up of the transmission lines by KSEB could not take place.

43. The order of the State Government dated 7 February 2001 shows that there was no deliberate act or default on the part of KSEB. Indeed, it has not been seriously disputed that at the material time, there were agitations on the part of the farmers and certain other circumstances which caused delay in the construction of the transmission lines. However as significant as these reasons are, it should not lead to a situation where a private investor who has acted upon the policy of the State Government being left in the lurch as a result of supervening circumstances which have resulted in the power not being evacuated into the grid due to the non-commissioning of the transmission lines at the material time by KSEB. It is imperative that contractual obligations entered into by the State have legal sanctity. A legal regime where the sanctity of contracts is respected and commercial contracts are enforced is essential to the maintenance of the rule of law. Trade and commerce can be freely conducted in a stable legal order which provides remedies for enforcement.

44. At this stage, it is also necessary to note that though in the order of the State Government dated 7 February 2001, it was envisaged that the transmission lines would be constructed and completed by 28 February 2001, there was a further delay of approximately three months even thereafter as a result of which the evacuation of power could commence only with effect from 1 June 2001. On the basis of the factual data which has emerged from the record, on which there is no dispute, we are hence, of the view that the basis on which the State

- A Government took a decision on 7 February 2001 and the High Court affirmed it by its impugned judgment would need to be re-visited in the light of what we have observed above.

45. We are in agreement with the view of the State Government, as accepted by the High Court, that the appellant was not entitled to the grant of deemed generation status as a matter of right. Similarly, the concessional power tariff which is applicable for a period of five years from 1994 to 1999 was extended until 20 August 2000. This is undoubtedly a matter of policy and the High Court was justified in coming to the conclusion that it is not open to the Court to foist a particular measure of policy on the State. In what manner the State should remedy the grievance of the private investor is something which should be duly considered by the State Government within the available framework of law and its own policy.

46. To facilitate this exercise, we are of the view that it would be appropriate if both the State Government and KSEB together re-visit the entire matter afresh and take an appropriate decision in accordance with law preferably within a period of four months from the receipt of a certified copy of this order. The appellant would be at liberty to supplement its earlier representations with whatever, in addition, it may wish to submit before the State Government within a period of one month of the receipt of a certified copy of this order.

47. We would expect that the State Government would now reassess the matter in a fair and proper perspective so that the dispute can attain finality with the ultimate decision.

48. To facilitate this exercise, we allow the appeals and set aside the impugned judgment and order of the High Court dated 21 August 2015.

49. The appeals shall accordingly stand disposed of in terms of the above directions. There shall be no order as to costs.