Supreme Court of India
Karnataka Power Transmission ... vs Jsw Energy Limited on 22 November, 2022
Author: K.M. Joseph
Bench: K.M. Joseph, Ajay Rastogi, Aniruddha Bose, Hrishikesh Roy, C.T. Ravikumar

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                                                    REPORTABLE


                    IN THE SUPREME COURT OF INDIA
                     CIVIL APPELLATE JURISDICTION

                      CIVIL APPEAL NO.8714 OF 2022
              (Arising Out of SLP (CIVIL) NO.18607 OF 2004)

 KARNATAKA POWER TRANSMISSION
 CORPORATION LIMITED                              ...APPELLANT(S)
                                  VERSUS
 JSW ENERGY LIMITED
 (EARLIER KNOWN AS JINDAL
 THERMAL POWER COMPANY
 LIMITED & JINDAL TRACTABEL
 POWER COMPANY LIMITED) & ORS.                   ...RESPONDENT(S)

                                   With
                      CIVIL APPEAL NO.8715 OF 2022
              (Arising Out of SLP (CIVIL) NO.23793 OF 2004)


 KARNATAKA ELECTRICITY REGULATORY
 COMMISSION                                      ...APPELLANT(S)
                                  VERSUS
 JINDAL THERMAL POWER COMPANY
 LIMITED & OTHERS                                ...RESPONDENT(S)


                                JUDGMENT
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K.M. JOSEPH, J.

1. Signature Not Verified Digitally signed by Leave granted. Being connected, the appeals are Jagdish Kumar Date: 2022.11.22 16:16:07 IST being disposed of by a common judgment. Reason:

2. The appellant, in appeal arising out of SLP (C) No. 18607/04, is the Karnataka Power Transmission Corporation Limited and hereinafter referred to as 'the appellant'.

3. By the impugned judgment, the High Court has allowed Miscellaneous First Appeal No. 4795 of 2002 filed by the first respondent herein, viz., JSW Energy Ltd., earlier known as Jindal Thermal Power Company Limited (hereinafter referred to as the first respondent). The appeal was filed by first respondent under Section 41 of the Karnataka Electricity Reforms Act, 1999 (hereinafter referred to as the 'Act' for brevity).

4. By the impugned order, the High Court has set aside the order dated 22.05.2002 and the order dated 08.07.2002 which are orders passed by the Karnataka Electricity Regulatory Commission (hereinafter referred to as 'Commission' for brevity). The Commission is the appellant in the other appeal. The High Court has after setting aside the impugned orders directed the appellant, to comply with the tariff rate specified in the order of the Government of Karnataka (hereinafter referred to as 'GoK' for brevity) dated 12.05.1999. The further direction given is as follows:

> "(ii) as per the interim order passed by this Court on 19th November, 2002, it is stated by Dr. Singhvi that the appellant has paid 40% of Rs. 62.5 crores computed by the KPTCL as difference between the PPA rates and the rates fixed by the Commission and, therefore, we direct the KPTCL to repay the amounts recovered from the appellant in pursuance of the interim order dated 19th November, 2002 and also pay the adjustment arising out of payments made by the appellant to KPTCL (i.e., the date between the respondent No. 2/PPA rate and respondent No. 31 entered rate of this Hon'ble Court; as the case may be) from 1st August, 2000 up to November 2002 within a period of one month from today;" FACTS IN BRIEF

5. The first respondent was permitted by GoK during March 1994 to set up a 2X130 MW cortex gas/ coal based thermal power plant at Bellary. It was apparently intended that Jindal Vijayanagar Steel Limited (JVSL) would consume the power produced from the thermal plant to be set up by the first respondent. The Central Electricity Authority granted the required technical economic clearance in March 1996. Originally, GoK gave approval to set up the power plant by JTPCL for 300 MW. It was initially reduced from 300 to 240 MW in March 1995 and finally, it was modified by order dated 13.02.1996 and reduced to 260 MW (130X2). There were to be two units, that is Unit No.1 and Unit No.2. Karnataka State Electricity Board (KEB for short) entered into a heads of terms with JTPCL on 30.09.1995.

6. Clause 4 of the heads of terms reads as follows:

> "4. SALE OF EXCESS ENERGY & CAPACITY TO KEB If, at any stage, JTPC has excess firm capacity and/or energy for sale to KEB, then KEB may purchase the same from JTPC subject to agreement on price and other terms to be negotiated at the time of such sale."

7. Heads of terms was essentially a memorandum prior to the agreement, entered into in regard to wheeling and banking in regard to sale to dedicated consumers by the first respondent. It was followed up by a wheeling and banking agreement between the KEB and JTPCL dated 23.01.1996.

8. In the said agreement also, the parties have reiterated the Clause (Clause 2.4) relating to the sale by first respondent to KEB in similar terms as in the Heads of terms. Somewhere in 1998, the first respondent invoked the clause in its bid to sell power to KEB.

9. On 20.10.1998, the first respondent wrote to KEB as follows:

> "This has reference to your above referred letter on the above subject. In this connection kindly refer to our earlier letter dated 28th September 1998, wherein we have confirmed that our tariff is in accordance with GOI notification dated 30th March 1992. Further we have confirmed that we would offer substantial rebate on the two-part tariff calculated on the basis of GOI norms. A statement giving details of Tariff calculations at 85% PLF and 68.5% PLF and 68.5% PLF is enclosed. The statement also gives details of cost under various sub-heads. The tariff is subject to the following assumptions:
>
> 1. Landed costs of imported coal assumed at USD 50 per tone.
>
> 2. Any variation in coal price will be to customer's account.
>
> 3. Exchange Rate assumed at USDI = Rs.42.
>
> 4. Repayment of Foreign Loan, ROE and Depreciation will vary as per the applicable exchange rate.
>
> 5. O&M Charges will vary as per Indian Inflation Rate.
>
> At your convenience, we can explain and furnish any clarifications required on the tariff calculations.

Hope the details furnished along with this letter would enable you to consider our proposal and hence request your to kindly arrange for the approval of your board.

10. On 21.11.1998 again, there is a proposal put forth by the first respondent to the KEB. Therein it has indicated that it has completed 100 per cent construction, erection and testing facility of Unit No.1.

11. After stating that they are scheduled to synchronise Unit No.1, by December, 1998, it was indicated that the commissioning of unit no.2 is scheduled for July 1999. Thereafter, reference is made to clause 2.4 of the Wheeling and Banking Agreement, as already referred to. The respondent offered 50 MW from the commissioning date of Unit No.1. Further offer of 100 MW was made (base load basis) from the commissioning date of Unit No.2. It further offered upto maximum of 200 MW during the time when the steel plant JVSL and JPOCL (another dedicated consumer of first respondent) were under shut down (major breakdown) or during the maintenance period. It further offered to pay penalty if the supply was less than 75 MW from commissioning date of Unit No.2. The rate was shown as 2.90/Kwh. Payment was requested by irrevocable revolving L/C. This offer, however, was exclusive of certain items and it is indicated that the consideration of the same was in line with Government of India and KEB Norms. We may notice the following terms which are set out as the elements to be excluded of the rate:

"1. Electricity Tax: The Organizations such as KPCL, NTPC, NPC and MSEB who are supplying power to KEB is exempted from Electricity Tax. Hence JTPC be exempted from Electricity Tax.

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2. Inflation:      Each year the tariff will be
                   adjusted to inflation as per
                   the    acceptable   published
                   index.
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3. Foreign Exchange: As an IPP, we have 85 MUS$ foreign exchange borrowing from US. Exim Bank and SBI-

New York. For repayment of the loan the exchange variation to be incurred by JTPC to be compensated in annual revision of price.

4 Fuel escalation Charges : We are using imported coal. In case of an increase in the coal price over and above the base price declared to KEB it is to be compensated.

5. Force majeure Conditions : Due to grid failure or transmission line failures if we cannot supply power no penalty should be levied on minimum guaranteed power.

6. Maintenance of Power Plant: During the scheduled maintenance and shutdown period penalty should not be levied.

We propose to supply power on the basis outlined in this letter for an initial period of five years from the date of commissioning of second 130 MW Unit. Since we are eligible for Income Tax Exemption for the first five years, it is not included in the proposed tariff."

12. The promise was to supply for a period of five years from the date of commissioning of the second unit. It is stated that the first respondent is available for any clarification and for further negotiation. Under the head "Utilization of Power During Stabilization Period" it is stated as follows: "II. UTILISATION OF POWER DURING STABILISATION PERIOD.

(from the date of synchronization to commercial operation) We have signed 'Wheeling and Banking' agreement with KEB which allows us to bank Power with KEB during the period from synchronization to commercial operation. During the above period we still be supplying power to our sister company's i.e., JVSL and JPIOCL who are located adjacent to Power Plant and within a common's with yard (owned & controlled by JTPC). During this period since the power may not be available on 'FIRM' basis we would like to draw power from our Banked Power and supply to JVSL and JPOCL.

KEB has sanctioned power to JPOCL, JVSL and JTPC to meet their star-up power requirements. KEB has sanctioned demand for each unit separately. All the three units are availing KEB power for plant commissioning, start-up purposes, trial operation and each unit is paying demand and energy charges to KEB. After synchronization of JTPCL's 1st 130 MW unit (December 98) we seek your kind consent and approval for the following arrangements. a. JTPCL will supply power to JPOCL and JVSL.

b. JTPCL, JVSL, JPOCL will continue the contract with KEB and continue to pay contracted demand charges to KEB.

c. In exceptional cases when JTPC generation is lower than the energy requirement of JVSL and JPOCL, subject to their individual contract demand with KEB, JTPCL draws energy from KEB for a limited period, or during the shutdown of the unit.

d. Bank all excess power (without limitation as per wheeling and banking agreement) with KEB and take energy credit for the Banked power, to utilize as and when required.

e. In case, we draw power from KEB when our bank is zero, we will also pay energy charges to KEB as per the applicable tariff.

Once the reliability tests are over and when JTPC declares the commercial operation of their unit, JVSL, JPOCL and JTPC will request KEB to cancel (withdraw) their contract demand with KEB and JTPC will meet both demand and energy of these two units on regular basis. Present metering system (Annexure -1) INSTALLED by KEB in our complex is on temporary basis and for adopting the above modalities permanent metering system is required to be established by KEB which is detailed at Annexure- 2.

We request you to kindly accord your approval for the above two proposals. Proposal 2 requires implementation of metering system before synchronization of unit scheduled in the last week of December 1998 and hence approval may please be accorded at the earliest.

Thanking you we remain Yours faithfully For JINDAL TRACTEBEL POWER CO. LTD.

Sd/-

S.S. Rao Dy. MD & CEO”

13. The response of the KEB is found in communication dated 1st December, 1998. It is stated as follows: “The Board is in principle willing to purchase surplus power from your plants as already discussed. Your proposal regarding the tariff is under evaluation by the Board”.

14. Next, it is relevant to notice the communication dated 19.01.1999 made by KEB to GoK. It reads as under:

> “KARNATAKA ELECTRICITY BOARD K.P. SINGH, I.A.S. CAUVERY BHAVAN, CHAIRMAN BANGALORE–560001 D.O.No./KEB/B2/B13/6306/93-94 Date: 19/1/1999 My dear Chaubey, Sub: Purchase of power generated by the captive power plant of M/s. Jindal Tractebel Power Company at Hospet.

Government of Karnataka vide GO No. de 221 PPC 93 Bangalore dated 7-3-1994 had permitted M/s. Jindal Tractebel Power Company to set up a 2xl20 MW power plant at Hospet, which was subsequently enhanced to 2xl30 MWs. This plant, which was set up as a captive power plant was given an IPP status later on vide Government letter No. DE 221 DPC 93 (P) dated 1-2-1996 as the shareholders of the power plant and steel plant were different. TEC for the above project was issued by CEA vide their letter dated 22-3-1996. As the company proposed to utilize the power generated for their own use and to sell to other industries in the State, after initial round of discussions with the Company, only a wheeling and banking agreement was proposed. In January 1996, Board entered into a Wheeling and Banking Agreement with the Company. In the Wheeling and Banking Agreement, as per Clause 2.4, the Company could sell excess capacity and/or energy to KEB and KEB had an option to purchase the same at a negotiated rate. The relevant clause is reproduced below:

"'If at any stage, the Company offers excess firm capacity and/or energy for sale to the Board, then the Board may purchase the same from the Company, subject to agreement on price and other terms to be negotiated at the time of such sale."

Jindal Tractebel Power Company is the first IPP to have achieved Financial Closure. Subsequent to achieving Financial Closure, the company took up the work of construction of the plant and the first unit of the plant has also been synchronised with the KEB grid recently.

M/s. JTPC during discussion have stated that due to downward trend in the Steel industry, the requirement of the steel has reduced and consequently progress of the Corex Plant has slowed down. As a consequence of the above, the Company, vide their letter No.4 JTPC/KEB dated 20-10-1998 have offered to sell 50 Mw after the first unit is commissioned and 100 MW after the second unit is commissioned to KEB on basis. Also, in case of shut down of the JVSL Plant or its subsidiaries for maintenance purposes, they have offered to sell nearly 200 MWs to KEB.

Though KEB has signed PPAs with various IPPs, the progress of these plants is not satisfactory. As of today, only the 200 MW Barge Mounted Power Plant being set up by M/s. Tanir Bavi Power Company has neared financial closure. A table indicating the first-year tariffs payable to various IPPs, whose projects have been sanctioned under the bid route is given below. The present rate of Rs.42.50 to a dollar has been taken for the purpose of calculating the tariff.

FIRST YEAR OF BID ROUTE PROJECTS

Name of firm	Tariff heat rate Kcals.Kwh	Calorific value of fuel Kcals/Kg	Price of fuel Rs./Kg.	Fixed Charges	Variable Charges	Total
Attria Power	1897.44	10800	8.40	1.3540	1.4758	2.8298
Bharat Forge	1949.42	10800	8.40	1.2028	1.5162	2.7190

Innox Power	2080.00	9900	6.80	1.6118	1.4287	3.0404
Scintilla Power	1923.00	9900	6.80	1.6030	1.3208	2.9238
Rayalseema	2153.85	9900	6.80	1.0743	1.4794	2.5537
Bhoruka	2087.86	9900	6.80	1.3494	1.4341	2.7834
DLF	2153.85	9900	6.80	1.0743	1.4794	2.5537
Tata	2115.30	9900	6.80	1.3204	1.4529	2.7733

It is also to be stated that of the above mentioned plants, some of the plants may not come up. The doubtful plants are that of M/s. DLF, Scintilla and lnnox Power. In case of M/s. Rayalseema, even though the plant had intimated that they have achieved financial closure nearly 8 months back, they have requested for enhancement of capacity of the plant to double its size to make it economically viable. This issue is under examination.

Because of the shortfall in generation in the State and the steady demand for power, KEB is purchasing power from MSEB in addition to that from Central Generating Stations. The tariff we are paying for power of MSEB is Rs.2.30/unit for power availed during off peak hours and Rs.2.65 for power availed during peak hours. We are at present purchasing nearly 100 MWs during peak hours and upto 200 MWs during off peak hours. MSEB has asked for revision of prices from 1-1-1999 for the power supplied by them. The revised rates are Rs.2.50 + FEC for off peak power and Rs.3.00 + FEC for power supplied during peak hours. Tamil Nadu is also purchasing power from MSEB at Rs.2.65 /unit during peak hours and Rs.2.30/unit during off peak hours. Tamil Nadu Electricity Board is also purchasing power from Eastern Grid at Rs.2.74/unit. KPCL is proposing to synchronize their V and VI unit in the coming months. Though the actual cost is yet to be finalized, as the project cost is yet to be frozen, it is indicated that the tariff for the power generated by these plants vary between Rs.2.75 to Rs.2.80. It has also been reported in the press that for the power proposed to be generated from the Kayamkulam Thermal power plant being set up by M/s. NTPC, KSEB would have to pay nearly Rs.3.90/unit and after the intervention of the Prime Minister, the rate payable would be around Rs.3.52/unit.

The project of M/s. JTPCL was under the Captive route and it was contemplated that the entire power generated would be used by JVSL and its subsidiaries. Though a provision was there in the wheeling and Banking agreement for KEB to purchase any surplus power from this project at a later date, it was clearly mentioned that the price at which this power would be purchased would be at negotiated rates. This was because, KEB did not feel it necessary to go into the details of the capital costs of this project as this project was contemplated as a captive power plant and only surplus power, if any, was to be sold to KEB, at a later date. M/s. JTPCL vide their letter dated 20- 10-1998 had offered to sell power to KEB at Rs.2.90/unit.

During internal meetings it was also decided that as this project was meant as a captive power plant and KEB did not go into the details of the project cost earlier or anticipate in the meetings at CEA before the TEC was issued, it would not be possible to negotiate tariff based on two-part tariff notification of GoI. Also, as we would be paying only a fixed price per unit, it was felt that going into the details such as the actual heat rate, the O&M charges, the working capital, foreign exchange protection to be provided, etc. should not be done and only the cost per unit presently being offered from other sources should be compared. Further, to compensate for the variation in Rupee against the dollar, the increase in Consumer Price Index, interest rate on working capital etc., it was also decided that some annual increase in the fixed price should be allowed to take care of the above-mentioned items as has been done in case of MOU Route projects.

With this background, negotiations were held with M/s. JTPCL. During discussions, it was stated that the cost per unit will have to be split into two parts, viz. Fixed Component and Variable charges. The variable charges would be based on the actual price of coal which JTPCL would buy. After detailed discussions, it was decided that a price of Rs.2.60/unit can be offered, comprising of Rs.l.70 as fixed charges and Rs.0.90 as variable charges. To compensate for depreciation of rupee against dollar, escalation of O&M charges due to increase in cost of price index, working capital requirements, etc. It was also decided that the fixed charges should be escalated by 5% every year beginning from the second year after we purchase power from JTPC.

As regards the variable cost, which depends on the cost of coal, the company will have to invite bids from global markets and satisfy KEB about the correctness of the procedure followed and the price arrived at. These bids can be either of I year duration or a longer period. Depending on the actual cost of coal, the variable price will be paid.

Regarding the term of the agreement, it is to be stated that the major thermal power projects , i.e. that of M/s Mangalore Power Company and M/s. Nagrujuna Power Company may not be available for the next five years. There is a case pending in Supreme Court regarding Mangalore Power Company and only after the judgment is known, Gol will consider extending counter guarantee to this project. After the counter guarantee is given, it may take anything between 4 to 5 years for the project to be issued. Again, it may take 4 to 5 years for the project to be put up, since the company will have to achieve financial closure. Hence it is considered prudent to limit the period of the agreement to purchase power from Ms. JTPCL to 5 years initially.

The cost per unit of power purchased from M/s Jindal Tractebel during the five year period keeping the variable cost constant would be as follows:

Year	Fixed Charge	Variable Charge	Total
1	1.70	0.90	2.60
2	1.79	0.90	2.69
3	1.87	0.90	2.77
4	1.97	0.90	2.87
5	2.07	0.90	2.97

Even with the increase of Fixed Charges by 5% every year, it is to be stated that in the 5th year, the cost of power with the variable charges remaining the same will be Rs.2.07 + Rs.0.90, i.e. Rs.2.97 per unit which is lower than the tariff now being offered by MSEB during peak hours.

The company has offered to sell 100 MWs on a guaranteed basis, it will be necessary to assure a minimum level of offtake failing which Deemed Generation Charges will have to be paid. As per two part tariff notification the minimum assured off-take should be 68.5% PLF. As this project is essentially meant as a captive power plant, it is suggested that the minimum off-take below which deemed generation would be payable should be 50% of the contracted/declared capacity, whichever is lower. It is also suggested that a penalty be levied on M/s. JTPCL if there is any shortfall in power below 75% of the quantity assured by the company.

Keeping all the above in mind, it is suggested that we can purchase power from M/s JTPCL at Rs.2.60/unit (FC Rs.1.70 + VC Rs.0.90) with the fixed charge being escalated by 5% from the second year with the conditions of penalty to be paid by the firm for short supply of power and assured off-take mentioned above.

For all IPPs, Government is giving guarantee for the payments to be made by KEB for the power it receives. Apart from this, irrevocable letter of credit and escrow accounts are also being opened by KEB as additional security for power supplied by these companies. In case of JTPCL, as the question of providing government guarantee does not arise as the plant was essentially set up as a captive power plant and majority of the power generated is being sold to captive industries. However, irrevocable revolving Letter of Credit and backup escrow can be provided to the Company. Approval of the Government is sought for the above proposal. Subsequent to the approval, negotiations will be held with M/s JTPCL for finalizing the PPA."

15. The GoK in its response by communication dated 05.03.1999 wrote as follows to the KEB:

"R.No.DE 18 FEB 99 Dated 05-03-1999 I invite your to your D.O. letter dated 19-1- 99 regarding your proposal to purchase power from M/s Jindal Tractabel Power Company at Rs.2.60/unit with a 5% escalation on fixed charges.

The proposal has been examined in detail. The efforts of the KEB to bridge the gap in power availability by entering into a short -term agreement with Jindal Tractebel Power Company Limited (JTPCL) is well appreciated. Government recognizes the fact that inspite of the best efforts made by the State Government to augment the power supply position there still continues to be a big gap between demand and supply. Government also note that presently KEB is supplying more than 75 Million units per day which is a record. The demand may further go up in the coming months and the situation may not change easily in the next few years on account of the substantial delay in the starting up of the Mega power projects in the State. Under these circumstances there is a need to tie up with IPP/other States/NTPC, for augmenting the power supply within the State urgently. There is no doubt all out efforts have to be made within the short time to tide over the problems of increased demand during the summer. The present proposal of the KEB keeps the tariff open ended and possible revision. The PP A being for a period of 5 years, KEB is advised to negotiate with the Jindal Tractebel for a fixed tariff for the next 5 years.

This may kindly be got examined by KEB and the revised proposal may be sent to the government.

Yours, Sri K.P. Singh, IAS."

16. On 31.03.1999 after referring to the proposal dated 21.11.1998 and a series of discussions and the further meeting with the KEB officials on 26.03.1999, the first respondent indicated that in the meeting, KEB officials informed that it was willing to buy power from the first respondent subject to the following terms and conditions:

> "1. The term of the agreement could be 5 years.
>
> 2. The tariff should be a single part tariff. Escalation at a fixed percentage could be applied on the total price on an annual basis. KEB will not consider any request either for two-part tariff based on CEA guidelines or for payment of fuel cost at actuals.
>
> 3. KEB will open irrevocable revolving letter of credit under which JTPC can get payments. It will also be supported by Escrow mechanism.
>
> 4. There can be penalty clause both for short supplies and short drawals.
>
> 5. The PPA should be a simple document." [Emphasis supplied]

17. Thereafter, it is stated that KEB asked for a formal proposal within aforesaid parameters. Thereafter in the communication, it is stated:

"1. JTPC offers 50 MW (Energy 36 MU per month) of power from the commissioning date of Unit 1 and 100 MW (Energy 72 MU per Month) of power from the commissioning date of Unit 2. The first Unit of 130MW is expected to be commissioned in June 1999 and the second unit of 130 MW is expected to be commissioned in August 1999.

2. JTPC would have an option to supply in excess of 50MW (Energy 36 MU per month) after commissioning of Unit 1 and 100 MW (Energy 72 MU per month) after commissioning of Unit 2, with KEB's approval, as and when JTPC has surplus power available.

3. The tariff will be as follows:

> I year (Upto 31" March 2000)Rs. 2.60 I kwhr. II Year (Financial Year 2000-2001) Rs. 2.73 I kwhr. III Year (Financial Year 2001-2002)Rs. 2.87 I kwhr. IV Year (Financial Year 2002-2003) Rs. 3.01 l kwhr. V Year (Financial Year 2003-2004) Rs. 3.16 I kwhr.

4. There will be no Wheeling charges or Electricity Tax on supplies to KEB.

5. To maintain uniformity in penalty on either side, JTPC proposes as follows as from COD of Unit 2:

(a) JTPC guarantees minimum supply of the Threshold Power Value after commissioning of JTPC Unit 2. If the supply is less than the Threshold Power Value, JTPC will pay penalty at 10% of the tariff, for supplies below the Threshold Power Value.

(b) KEB shall guarantee that it will consume the Threshold Power Value. In case the consumption is less than the Threshold Power Value, KEB shall pay to JTPC the full value of Threshold Power at the applicable tariff as above.

(c) The Threshold Power Value is 75 MW (Energy 54 MU per month).

6. The minimum supply and the minimum consumption as per para 5(a) and 5(b) above are applicable on a monthly basis.

7. If there is escalation in fuel cost beyond 5% at any time, JTPC reserves the right to terminate the contract with 3 months' notice, if KEB does not agree to compensate for such escalation.

8. KEB shall open irrevocable revolving letter of credit corresponding to 100 MW (Energy 72 MU per month) power sales under which JTPC can get payment for its monthly bills. It shall also be supported by Escrow mechanism.

9. The initial term of the agreement should be 5 years till March 31, 2004, with a provision for renewal on terms mutually acceptable. We request you to agree to the above terms and conditions and convey your acceptance at the earliest. We will approach our Board and the lenders on getting your acceptance.

We also request you to let us have drafts of the PP A, Escrow agreement and the Letter of Credit, at the earliest. We propose to have one more meeting with your officials, after studying these drafts.”

18. It is next necessary to notice the communication dated 23.04.1999 sent to the GoK by the Chairman of the KEB.

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            “KARNATAKA ELECTRICITY BOARD
K.P. SINGH, I.A.S.                CAUVERY BHAVAN,
CHAIRMAN                         BANGALORE–560001

Ref.No.83/99-2000            Date: 23 APR 1999

My dear Arvind,
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Sub: Purchase of power generated by the captive power plant of M/s. Jindal Tractebel Power at Hospet.

Ref: 1. This office D.O.letter No.KEB/B28/B13/ 6306/93-94 dated 19-1-1999

2. DO letter NO.DE 18 FEB 99 dated 5-3-1999 of Energy Secretary addressed to the undersigned Accordingly, M/s JTPCL were invited for negotiations and discussions were held with them on 26th March 1999 to arrive at the rate they would sell power from their plant to KEB. During the meeting, the position of the Board/GoK was made known to the representatives of M/s JTPC, i.e. the tariff should be a single part tariff including variable charges and should be fixed for each year with an annual escalation by a fixed percentage. The firm was requested to intimate the tariff at which it would sell power to KEB.

The firm stated that from their calculations, they will be taking a hit on fixed charges itself and this will be mainly due to depreciation of Rupee against the dollar and increase in O&M charges. Also in case of variable charges, they stated that it is linked to the cost of coal, which is imported and that this will also increase due to the increase in cost of coal, the freight charges and again due to the depreciation of Rupee against the dollar in future years. They requested that the earlier negotiated position where the variable charges is a pass through should be retained.

The stand of the Government of Karnataka that only a fixed tariff per unit per year should be negotiated was again made known to the firm. The firm stated considering all aspects within the parameters fixed by the Board, they would be able to sell power at Rs.2.75 per unit with a cost escalation of 5% per year, which was not ... acceptable to the Board. The firm was requested to offer a revised figure. After detailed negotiations, the firm, subject to confirmation of their Board of Directors, offered to sell power at a cost of Rs.2.60 per unit with an annual escalation of 5%. They stated that this is the minimum figure they could agree and any further reduction of the same would affect the project as it would be financially unviable.

Hence there are two options available, i.e. either to retain the original proposal of the fixed charges being escalated by 5% every year with the variable charges being a pass through or the entire rate of Rs.2.60 including variable charges being escalated by 5% every year.

In case of the second option, the tariff payable by KEB for each unit in different years will be as follows:

With this the tariff payable during each year of operation will be as follows:

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Year            Rs./Kwh
1               2.60
2               2.73
3               2.87
4               3.01


 5               3.16
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Considering the fact that rupee has been depreciating heavily against the dollar the second proposal may be advantageous to KEB.

The firm in its letter No.JTPC/KEB dated 31-3-1999 has confirmed that the tariff payable by KEB for power purchased will be Rs.2.60/unit in the first year with an annual escalation of 5% every year. They have stated that they will be offering 50 MWs (equivalent to 36 MU per month) from the date of commissioning of the first unit and 100 MW (equivalent to 72 MU per month) with the commissioning of the second unit. The first unit is expected to be commissioned in June 1999 and the second unit in August 1999. They have also indicated that in case they have any surplus power beyond 50 MWs and 100 MWs after commissioning of unit I and unit 2, with the approval of KEB, they will sell power in excess of 50 MW s and 100 MW s.

The firm has also proposed the following after commissioning of Unit 2:

1. They will supply power with a threshold value of 75 MWs equivalent to 54 MU per month.

2. If supply is less than the threshold power value, then JTPC will pay penalty of 10% of the tariff for supplies below the threshold power value.

3. KEB shall guarantee that it will consume the threshold power value. In case the consumption is less than the threshold value, KEB shall pay to JTPC the full value of threshold at the applicable tariff as above.

4. The minimum supply and minimum consumption as above are on monthly basis.

5. If there is an escalation in fuel cost beyond 5% at any time, JTPC reserves the right to terminate the contract with 3 months notice, if KEB does not agree to compensate for such escalation.

6. KEB shall open irrevocable revolving letter of credit corresponding to 100 MW (energy 72 MU per month) power sales under which JTPC can get payment for its monthly bills. It shall also be supported by Escrow mechanism.

7. The initial term of the Agreement should be 5 years till March 31, 2004 with a provision for renewal on terms mutually acceptable. These are issues to be negotiated with the firm while finalising the PP A and will be taken up later on.

This is for information of the government and it is requested that orders may please be obtained and communicated to us.

With regasrds, Yours sincerely, Sd/-

(K.P. SINGH) Shri Arvind Jadav, Secretary to Government, Department of Energy, Government of Karnataka Bangalore”

19. Finally, on 12.05.1999, we find the following proceedings. It reads interalia as follows: “After detailed examination GOVT. ORDER NO. DE 18 FEB 99, BAN GALORE DATED 12TH MAY 1999

1. KEB is permitted to finalize a Power Purchase Agreement with M/s Jindal Tractebel Power Company Limited (JTPCL) for the purchase of surplus power and submit the same to the Government for approval.

2. The rate per unit being Rs. 2.60 including variable charges with an annual increase of 5% every year.

3. The term of the PPA shall be for a period of five years.

4. To adopt the same principle of negotiated tariff for captive generating power project who intend to sell power to KEB."

20. The Act came into force with effect from 01.06.1999. The significance of this is that under Section 27 of the Act, unless there was a 'concluded contract' as on 01.06.1999, the Commission was to regulate the tariff. Thereafter we may notice the following correspondence as well. On 04.01.2000, the superintending Engineer of the KEB wrote to JPPCL. The correspondence would show as follows:

> "This refers to the tariff of 2.60 per KWhr negotiated for purchase by KPTCL of the electricity generated by the subject power project. You are requested to furnish details of the break-up of the tariff so as to enable us to take further action."

21. On 06.04.2000, the first respondent wrote to the Chairman of the appellant (KPTCL). It reads as follows: "JINDAL TRACTEBEL POWER COMPANY LIMITED Ref: JTPC/KPTCL/1545 April 6, 2000 To, The Chairman Karnataka Power Transmission Corporation Ltd., Bangalore Dear Sir, Sub:Purchase of Power from Jindal Tractebel Power Company Limited (JTPCL) by Karnataka Power Transmission Corporation Limited (KPTCL) Bangalore dated 12th May 1999 Bangalore dated 7th July 1999 We are happy to inform you that both the units (2 x 130 MW) of our Power Plant are operating continuously. As per JVSL's agreement with KPTCL, JVSL was to return 215.810 MU to KPTCL. As on 6'h Apri12000 JVSL has returned 199.802 MU to KPTCL and the balance left over is only 16.008 MU, which will be completed by 12'h April 2000.

As per the Government Order (Ref. l), the Government of Karnataka has permitted KPTCL to purchase power from JTPCL at the rate of Rs. 2.60 per unit including variable charges with an annual escalation of 5% every year. The said order has also permitted KPTCL to finalize the PPA with JTPC. Accordingly, JTPC has finalized PPA with KPTCL and the final draft as accepted between JTPC and KPTCL has been submitted to KPTCL in September / October 1999.

SI. No.8 of the Government Order (Ref. 2) directs KPTCL to operate the PPA with JTPC as Per Government Order NO. DE 18 EEB 99 Bangalore dated 12th May 1999 (Ref. I) only after complying with the obligations under the Government of Karnataka Order issued on 7th July 1999 (Ref. 2). SI. No.9 of the Government of Karnataka Order dated 7th July 1999 (Ref.2) also directed KPTCL to honour the obligations under Wheeling, Banking and Grid Supporting Agreement between KPTCL and JTPCL only after fulfilment of obligations under the Government of Karnataka Order dated 7th

July 1999 (Ref. 2) Since the submission of final draft PPA to KPTCL in September I October 1999, JTPC is continuously pursuing KPTCL and Government of Karnataka for signing of the PPA. During this period, whatever clarifications were sought by KPTCL were submitted by JTPC & KTPCL. Inspite of our best efforts, so far, the PPA has not been signed by KPTCL thought the tariff and other conditions are already covered in the Government Order.

After returning of the power by JVSL to KPTCL which is expected to happen by 11th April 2000, JTPC will be supplying power to KPTCL as per the Government of Karnataka Order dated 18'h May 1999 (Ref. 1). Even though PPA is not yet signed and is pending with KPTCL, the absence of PP A should not come in the way of supplying of power by JTPC to KPTCL from 12'h April 2000 as the formal Government of Karnataka Order dated 12m May 1999 along with the details of tariff (Ref. 1) does exist. Hence, pending finalization and signing of PP A between JTPC and KPTCL, we request you to kindly accept the power dispatched by JTPC to KPTCL from 12m April 2000. JTPC will be submitting the invoices as per the Government of Karnataka Order dated 12m May 1999 (Ref. 1) subject to any changes required to be done subsequently as per the terms and conditions of the PPA to be agreed and signed between JTPC and KPTCL."

22. In response to letter dated 06.04.2000, the appellant corporation wrote to the first respondent on 12.04.2000. It reads as under:

"With reference to the above, I am directed to communicate approval of the Corporation to continue to supply energy to the grid from the 2x130 MW Power Plant of your Company pending finalization of PPA under the following conditions.

1. The Grid support charges envisaged in the Wheeling & Banking and Grid support Agreement i.e., Rs. 1.73 Crores Annum will be provisionally deducted from the tariff invoices when the amount is paid. This will be subject to change and has to be paid as per the terms of PP A to be signed.

2. The 115% energy imported will be deducted from the energy exported, provisionally pending finalization.

3. The energy will be accounted only after signing of PPA.

4. The energy banked prior to signing of PP A will be treated as energy banked with the Corporation and will be accounted as per the Corporations rules.

5. This orders is only for facilitating continued operations of the Power Plant and Corporation makes no commitments with respect to terms of PPA which is being finalized separately.

6. The metering arrangements should be as per the Article No. 4 of the Wheeling, Banking Agreement and Grid Support Agreement already signed copy of the same is enclosed."

23. We may still further notice the communication dated 24.05.2000 addressed by the appellant to its Chief Engineer Electricity which reads as under:

> "With reference to the above, I am directed to convey approval of the Corporation to make payments to M/s. JTPCL for the energy supplied to the grid from 15-4-2000 and onwards at Rs. 2.52 per unit pending signing of PPA. Under following terms.
>
> 1. The procedure for payments should be as per the standard procedure followed in case of IPP Projects.
>
> 2. 115% of imported energy should be deducted form the exported energy and payments will be made for net exported energy so arrived.
>
> 3. The metering should be as per the terms of Wheeling & Banking Grid support Agreement between KEB and JTPCL signed on 23-1-96, till such time PP A is finalized.
>
> 4. The firm has to submit an undertaking that the terms and conditions of PP A between KPTCL and JTPCL will be applicable for the payments made by KPTCL for the energy supplied by JTPCL from the date as approved by government till the PP A is signed.

5. This is only an order to facilitate payment of energy charges to M/s. JTPCL and Corporation makes no commitments in this regard and the terms of PPS will be finalized separately.

6. The energy transaction prior to 15-4-2000 will be finalized separately."

24. Finally, we notice the proceedings of the Government of Karnataka dated 17.07.2000. It reads as under:

> PREAMBLE:
>
> ln Government Order No. DE 18 EEB 99 dated: 12.5.99 KEB was permitted to finalize a power purchase agreement with M/s. JTPCL for purchase of surplus power from generating units at the rate of Rs. 2.60 per unit with an annual increase of 5% every year for a period of 5 years. Further the rate per unit has been reduced from Rs. 2.60 to Rs. 2.52 vide Government Corrigendum dated 8.5.2000. It is in this context the request made by the JTPCUJVSL has been examined and it is found that continuing with the earlier rate of Rs. 2.60 per unit would result in honoring the commitment of the Government. Besides it has the advantage of procuring a better price every year for KTPCL. It would ensure that power is purchased at Rs. 2.60 instead of Rs. 2.63 per unit in the first year, Rs. 2. 73 instead of Rs. 2.77 per unit on the second year, Rs. 2.87 instead of Rs. 2.92 per unit in the third year and Rs. 3.01 instead of Rs. 3.05 in the fourth year.
>
> Honoring the earlier Government Order would also ensure that there is no litigation on this subject in a court of law.

The KPTCL vide it's letter dated 22.5.2000 read at Sl. No. Shad also requested the Government to review the effective date for purchase of power from the said company and communicate the Government decision. The matter has been examined at Government level in consultation with KPTCL and in the interest of the Company. After examining the requested made by the Company, Government are pleased to Order as follows:

GOVERNMENT ORDER NO. DE 18 EEB 99. BANGALORE DIST: 17.7.2000 In the circumstances explained above, Government are pleased to permit Karnataka Power Transmission Corporation Limited to purchase power from M/s. Jindal Tranctebel Power Company Limited at the rate of 2.60 per unit with an annual increase of 5 every year as indicated in the Preamble to this Order. The implementation of this Order will commence from the date of the issue.

The other conditions of the Government Order of even no. 6 dated 12.5.1999 remains unaltered."

25. A draft power purchase agreement came to be made on 07.11.2000 between the appellant and the first respondent. There are elaborate details contained therein. Suffice at this juncture to notice further, that a letter was sent to the Commission on 17.11.2000. This letter was treated as an application by the appellant (KTPCL) for entering into a power purchase agreement under Section 25 (3) of the Act read with Section 17(1) of the Act. Based on a public notice, objections were filed by five objectors. More importantly, the stand taken by the first respondent was that the Commission was bereft of jurisdiction to examine the PPA on the ground that it merely represented a contract which was concluded with it prior to the commencement of the Act, and therefore, the case fell within the four walls of the proviso to sub-section 2 of Section 27 of the Act. The Commission thereafter proceeded to enter the following findings, inter alia:

The entire negotiation, correspondence and acceptance of an offer must be absolute. The offer of the first respondent was subject to further approval, that is, the approval of the Board of the Company and the lenders to the company. The Deputy Managing Director and CEO of the company was not delegated the authority to bind the company. The offer was not one to be converted into a contract. After referring to order of the GoK dated 12.05.1999, it is found that out of the 9 issues containing the proposal of JTPCL, Government has indicated its intention to agree only to two issues, namely the rate of Rs 2.60/- per KW hr. and the period of five years that is the term of the agreement. The GoK, it is noted, directed KEB to negotiate the PPA and to submit the same for approval.

The provision for an escrow facility to guarantee payment to JTPCL and payment for full charges for deemed generation did not find reflection. These conditions were central to any PPA.

As on 12.05.1999, the parties did not intend the agreement to be binding. By the GO dated 12.05.1999, Government reserved its right to vary the tariff. There is no acceptance of the proposal as far as GOK is concerned. Government order dated 12.05.1999 only served to provide broad guidelines to negotiate with the first respondent for a mutually agreed term. (1) The PPA cannot be restricted to the aspect of rates only. The mutual rights and obligations have to be stipulated specifically even after the rate is agreed. There is no concluded contract. (2) Government of India notification dated 30.03.1992 was to be considered only as a ceiling and it is perfectly open to the

Electricity Board and generating companies to negotiate and arrive at a lower tariff. Reference is made to the omission of sub-section (2) of Section 43A of the Electricity (Supply) Act, 1948 in the State of Karnataka with effect from 14.09.2000.

26. After an elaborate study of documents, it was found, that the power proposed to be supplied to the appellant (KPTCL) was surplus power and the grant of IPP status by communication dated 01.02.1996 would not avail the first respondent.

We may next notice the following discussion: “60. Simply because, plant is making use of common infrastructures for coal hand long and water supply it cannot be said that the plant of the appellant is a CPP. It is common knowledge that a number of generating projects are set up to take advantage of the existing infrastructures of other projects and it can never be said that merely because infrastructure is shared, the consumption of power is captive. The infrastructure facilities are shared between the projects only with a view to minimise the project costs. The power plant is designed to fire either corex gas or coal as fuel, which confirms that the appellant's power plant is not a captive plant and that it was intended to supply power to KPTCL even with the steel plant is not working and not producing corex gas. It also needs to be noticed that appellant and JVSL are distinct Corporate entities and the appellant has obtained financial assistance, project approvals from various statutory authorities, Gol and GoK on a stand alone' basis.

61. It was, however, contended on behalf of the respondents that power was supplied to KEB only after JVSL's commitment was fulfilled and since the entire capacity of 240 MW has been underwritten by JVSL, the appellant is a CPP to the JVSL. It is also contended on behalf of the respondents that determination of IPP/CPP is irrelevant as the Commission has allowed KPTCL to pay fixed charges to the appellant.”

27. Thereafter, the Commission arrived at a probable tariff and finally directed the appellant to negotiate with the first respondent based on the calculation made and to come up with a fresh proposal. The first respondent did not negotiate. It is this which led to the Commission passing the second impugned order. In the light of the same, Commission proceeded to approve a draft PPA, submitted on 17.11.2000 with the following modifications:

a) The tariff charges for the first tariff period shall be Rs.2.36 Unit instead of Rs.2.60/unit upto 657 MU (page 17 of the Draft PPA).

b) The tariff for the entire energy in excess of 657 MU in, the first tariff period will be Rs. 1.88/unit instead of Rs.2.20/unit (page 17 of the draft PPA)

c) Grid support charges per month as per the following formula:

GSC = Fl Load in MW x 1000 x DC PF Where:

Fl Load in MW is the fluctuating load in MW (l3.55 mw) DC- Applicable Demand Charges PF- Power Factor

d) the yearly escalation is 2.50% instead of 5% (Page 17 of the Draft PPA)

e) Regarding the penalty for non-generation, it is directed that a penalty of 20% of the tariff shall be levied.

14. The PPA as approved by the Commission will come into effect from 1.8.2000 and shall be valid for a period of five years as per the proposal of KPTCL.

15. In their letter No. JTPCL/AUTCH/2358 dated 20th June 2002. JTPCL has expressed their willingness to enter into long term PPA on two- part basis. The Commission advises KPTCL to negotiate with M/s. JTPCL a long term PPA depending upon the need for power. On approval of such a PPA by the Commission, the present PPA will get terminated."

28. It is these orders which came to be challenged by the first respondent before the High Court under Section 41 of the Karnataka Electricity Reforms Act, 1999. The High Court formulated the following points for decision.

"19. After hearing the learned Counsel for the parties, following points arise for decision: (I) Whether the Karnataka Electricity Regulatory Commission-Respondent No. 3 can be added as a party respondent to the appeal and whether it is entitled to defend the impugned order on merits?

(II) Whether there existed a binding contract between the appellant and the KPTCL on the tariff prior to commencement of Karnataka Electricity Reform Act, 1999 with effect from 01.06.1999, in terms of Explanation to Section 19 and proviso to Section 27(2) of the Act? if the answer is in the positive, whether the Commission has jurisdiction to review the tariff particularly when the proviso to sub- section (2) of Section 27 is restricted to tariff determination and does not require a PPA to establish a concluded contract?

(III) Whether the status of the appellant is that of an IPP or CPP?

(IV) Whether the impugned orders are perverse, arbitrary and passed without application of mind?

(V) Whether the Commission has failed to appreciate the appellant's rights grounded on the principles of promissory estoppel and legitimate expectation?"

29. As regards point No.1 it was found that the Commission was performing as a quasi-judicial body. It was further found that when validity of the order of a quasi-judicial body is assailed in a court of law, it is healthy and fair that such authority (the commission) should not take sides. The High court did not find justification for the Commission to file its own extensive pleadings, engage a senior counsel and show abnormal interest. The contesting parties were capable of taking care. The question was also posed as to the position of the Commission if a case is remanded back to it when it has been impleaded as a party and takes an unambiguous and inelastic view. It was finally found that the Commission was not a proper party having regard to the questions that arose for decision in the appeal. The High court took care that it should not be understood as meaning that the

Commission cannot be a necessary and proper party if an appeal is preferred under Section 41 against its order regardless of the question which arose. Answering point No.2, that is whether there is a concluded contract, the Court went on to find that there was a concluded contract within the meaning of the explanation to Section 19 and proviso to Section 27(2) of the Act. This view was formed on the basis of the conspectus of the correspondence beginning with the Government order dated 07.03.1994 and the communications which we have already indicated and culminating in the GO dated 12.05.1999 of GoK. Thus, it was found that all essential terms and conditions, that is, the tariff rate, escalation, quantity and tenure for purchase and sale of power were agreed between the parties before 01.06.1999 (the date on which the Act came into force). The order dated 12.05.1999 was preceded by several rounds of negotiation. It was no doubt found that there were several rounds even after the Act came into force between the parties, and they discussed and finalised the terms and conditions of the PPA except tariff as the tariff was agreed upon as evident from GO dated 12.05.1999. The PPA dated 10.11.2000 incorporated all the agreed terms. After signing the PPA, the appellant took steps to open letter of credit for securing payment based on the tariff of Rs.2.60 per unit plus 5 per cent escalation per annum without obtaining approval of the Commission. The letters dated 04.01.2000, 12.04.2000 and 24.05.2000 according to the High court reflected the intention of the parties to treat GO dated 12.05.1999 as the binding contract as far as the tariff was concerned. The High Court discussed case law and found inter alia that there was a concluded contract. Interpreting the proviso to Section 27 (2) of the Act, it was found that the proviso was only for the purpose of Section 27(2), that is, factors relating to tariff determination. The proviso could not deal with other fields, the Section itself did not deal with. The correct interpretation, according to the High Court, was as far as 'contract concluded' is concerned the proviso is referable to the tariff which is agreed between the parties before the Commission came into existence. There is no form for the concluded contract in the Act. No penalty is imposed for not entering into the PPA. This shows that PPA is not an essential requirement under the Act. The appellant purchases power from other utilities without PPA. The fact that the learned counsel for the Commission entertained this view, was recorded. It is found that when an offer is made and acceptance does not extend to all the terms, on the terms accepted, a contract is concluded. The order dated 12.05.1999 was for all purposes treated as contract for sale of power. Parties were ad idem. All terms and conditions agreed upon in the GoK order dated 12.05.1999 were incorporated in the PPA without any variation. GoK has given its consent to the first respondent in terms of Section 43A of the Act, prior to the commencement of the Act. Since approval was already given under Section 43A of the Electricity (Supply) Act, 1948, approval under Section 17(1) was not necessary. It is recorded in the judgment that the appellant agreed with the first respondent that Section 27(2) of the Act did not require a contract in writing or any formal document or that it prescribed any particular form. The appellant contended that there was no concluded contract for certain reasons. They are as follows.

(1) It is reflected as the contention of the appellant that the offer of first respondent itself was "subject to" the approval of the Board and its lenders. These approvals constituted conditions precedent for formation of the contract.

(2) There was no acceptance or communication of acceptance by the appellant (KTPCL). (3) Essential clauses such as Escrow, deemed generation, auxiliary consumption etc. required for a PPA were not agreed upon.

(4) The order dated 12.05.1999 was merely an internal approval and not in exercise of any statutory provision.

(5) The tariff of Rs.2.60 was an indicative figure. There was no basis to arrive at the figure of Rs.2.60.

(6) There was no record to show that appellant participated before the CEA (Central Electricity Authority).

30. The High Court proceeded to find that as regards the condition in the proposal that the offer that was made was subject to approval by the Board of Directors and lenders that, neither of the parties insisted on the satisfaction of the conditions before supplying power. The principle of waiver was employed also. The order dated 12.5.1999 did not employ the word "subject to". The terms such as 'deemed generation' were not considered essential by the parties. The fact that the party continued to perform for almost 3 years would show by 'conduct' that they cannot be termed as essential. It is not necessary that KPTCL should communicate acceptance to the respondent. It is further found that a contract which is concluded by acceptance by the 'Gok' is protected by proviso to Section 27(2). GoK found that the single part tariff is more advantageous to the appellant. The tariff rate is arrived at on the basis of two-part tariff rate. The break up of tariff for 20 years was submitted to the appellant after detailed negotiation and examination. The tariff of Rs.2.60 per unit was approved. The court concluded that there was a concluded contract. Answering point No.3, it was found that the status of the power plant was of the IPP and not of a CPP. In regard to point No.4, namely, whether order of the Commission was perverse, arbitrary and passed without application of mind, noticing certain errors, it is found that the Commission having opined that the fixed charges should be paid for 657 MUs, it calculated the fixed charges for 487 MUs while fixing the tariff. Incentive payment charges was found by Commission to be Rs.0.952 in arriving at the tariff rate, but the incentive payment charges are taken as Rs.0.924 per unit. These errors were not disputed. Having agreed to a negotiated single part tariff, it was found the Commission could not have unilaterally ignored well established parameters, and applied norms which were relevant for the calculation of two-part tariff. The tariff proposed was on the basis of single part tariff. The tariff of the first respondent is one of the cheapest as it was based on the least cost tariff basis, whereas other companies pay higher charges either on the basis of a two-part tariff or a fixed negotiated tariff. This was not seriously disputed. The appellant (KPTCL) has fixed heat rate at 2400 Kcal/Kwh disregarding the norms of the Ministry of Power as per which the heat rate should be 2500 Kcal/Kwh or the actual heat rate whichever is lower. The commission took the plant load factor at 77% disregarding norms under the Electricity Supply Act as per which the plant load factor would be 68.5% or at a rate negotiated between the parties. The escalation was reduced from 5% to 2.5% per annum. The two-part tariff provides for escalation for inflation and exchange fluctuation and complete reimbursement of fuel cost. The Commission arrived at 1637 MUs at 77% PLF and disproportionately loaded fixed charges on to the first respondent. The Commission ignored the fact that 1150 MUs are arrived on the basis that the appellant is supplying the energy to the steel plant at 85% PLF and this disproportionate loading was found tantamounting to cross subsidising contrary to the observations in the decision of this Court in West Bengal Electricity Regulatory Commission v. CESC Ltd.1. The Commission was found at fault in reducing the assured supply level to 487 MUs

in its calculation whereas more than 900 MUs have been supplied by the first respondent to the appellant for (2002) 8 SCC 715 the years 2001 and 2002. In view of the wheeling and banking agreement in 1996 under which Grid Support Charges payable were agreed upon, the finding of the commission was found flawed in reviewing the charges without any basis. It was found ultra vires the Act. The objections of the first respondent filed before the first impugned order were rejected by the Commission but reasons have not been given. The court went on to answer point No.5 which was whether the case of the first respondent based on principles of promissory estoppel has not been considered by the commission and therefore impugned order required interference. The court after referring to case law on promissory estoppel and doctrine of legitimate expectation found it unnecessary to dilate on this aspect, but finding merit in the contention of the respondent that the Commission failed to appreciate the rights of the respondent in the light of the, 'said principles'. Thereafter the High Court went on to allow the appeal in the manner which we have already explained. SUBMISSIONS OF THE APPELLANT

31. Shri S.S. Naganand, learned Senior Counsel appeared along with Shri Raghavendra S. Srivastava. Shri Raghavendra S. Srivastava, learned Counsel appearing for the appellant would make the following submissions.

There is no concluded contract within the meaning of the proviso to Section 27 of the Act with the aid of the correspondence and the facts established otherwise. He would complain that the High Court has not appreciated factual and the legal position. It is his case that it is clear that the parties intended that there should be a PPA. This is not a case of mere desire that there should be a written document encompassing the agreement between the parties. On the contrary, he would contend that the parties contemplated that there be a PPA whereupon alone a concluded contract would emerge. He would submit that Government G.O. dated 12.05.1999 relied upon by first respondent as the fountain head for the claim there is a concluded contract cannot for many reasons be treated as such.

32. Attacking the findings of the High Court that the concluded contract under Section 19 and Section 27 of the Act need not be in writing or in any particular form, it is contended as follows:

> While there may not be any statutory requirement that there must be a PPA in writing, the correspondence and the conduct of the parties make it clear that they intended to have a formal document binding them on all material terms. Correspondence shows that KEB was willing to buy power on certain terms and conditions one of which was that there should be a PPA. The first respondent had also called upon the appellant to confirm the terms, for placing them before its own Board and sought draft of the PPA to be executed. The Order dated 12.05.1999 cannot be treated as acceptance of the offer. It was merely the permission granted by the GoK to enter into an agreement on certain terms and conditions. Since, KEB and the first respondent were not ad idem on any other term, no agreement was reached. Relying upon Clause 2.4 of the Wheeling and Banking Agreement, it is contended that agreement was contemplated not merely on price but other terms which were to be negotiated.

> Being a statutory corporation, there was no scope for an implied contract. It is contended that a perusal of letter dated 23.04.1999 would show that even as regards the tariff rate proposed by the first respondent, it was subject to the confirmation by the Board of Directors. Reinforcement, in this regard, is sourced in letter dated 04.01.2000, wherein the first respondent was requested for the quote of the tariff for 'further action'. Further reliance is placed on the contents of letter dated 06.11.2000. Support is sought to be drawn from the Judgement reported in India Thermal Power Ltd. v. State of M.P. and others2.
>
> The High Court erred in assuming that the first respondent waived its rights under the draft PPA.
>
> Reliance is placed on the Judgment of this Court in All India Power Engineer Federation and others v.

Sasan Power Ltd. and others3 to contend that whenever waiver is pleaded, particularly, in contracts having public interest, the party must show an agreement 2 (2000) 3 SCC 379 3 (2017) 1 SCC 487 waiving the right, which has not been done in this case. The proviso to Section 27(2) cannot be read in isolation but it must be harmonised with the other relevant provisions. Bearing in mind the mandate of Section 17, the contract must be in the manner approved by the Commission under Section 17 and it must include all material terms. The first respondent was insisting that a PPA must be executed by the appellant. In its communication dated 20.06.2002, the first respondent admitted that the tariff was not acceptable but it would be willing to negotiate on the basis of two-part tariff if the PPA was made valid for 10 to 15 years. The first respondent again has admitted that tariff and several other aspects were pending discussion and negotiation with the appellant. GoK Order dated 12.05.1999 was amended vide Corrigendum dated 08.05.2000 by revising the tariff to Rs.2.52/unit. Later, vide Order dated 17.07.2000, on request by the first respondent, the tariff was restored to Rs.2.60/unit. This establishes that the GoK Order dated 12.05.1999 was not final. Even the rate was confirmed only after 01.06.1999. There is no approval granted by GoK under Section 43A of the Electricity (Supply) Act, 1948. Therefore, approval of the Commission was mandatory under Section 17 of the Act. The Order dated 12.05.1999 was not an approval under Section 43A but it was in the nature of permission given to KEB to negotiate and enter into the contract. There was no contract with the KEB. There could not have been any contract with the appellant (KPTCL) as the appellant was constituted only under the Act, which came into effect from 01.06.1999. The following findings of the High Court are placed under focus:

> "It is not necessary that only the KPTCL should communicate acceptance to the appellant. A contract which is concluded by acceptance by the GOK is protected by the proviso to Section 27(2) of the Act. In our considered opinion the combined reading and consideration of the following documents and circumstances and the reasons we presently state would lead us to conclude that there existed a "concluded contract" between the appellant, KPTCL and GoK well before 01.06.1999."

33. In other words, the Court has even proceeded as if there was a contract between the GoK and the first respondent. If that were the case, apart from other contentions, Article 299 and requirements thereunder, are pressed into service. Drawing upon the Judgment in K.P. Chowdhary v. State of Madhya Pradesh and others4, it was contended that State Government cannot be bound by an implied contract. It is next contended that the first respondent cannot be treated as an Independent Power Producer (IPP). The operation of the first respondent and the sister steel plant (JVSL) are intertwined and interdependent. They share common infrastructure for coal handling, water supply and the coal for the first respondent is purchased by JVSL, for which, it raises an invoice on the first respondent. The first respondent is to be treated as the CPP, as it was supplying power to the steel plant. The capacity was reduced at the request of the first respondent. The contents of the G.O. dated 12.05.1999, which also indicates that the same principle of negotiated tariff for captive generating power plant that intends to sell power to the KEB was applicable to the first respondent are pressed into service. Reliance is also placed on 4 (1966) 3 SCR 919 the agreement dated 14.10.1999. Though first respondent was granted the status of IPP by the GoK, it was recognised by KEB/the appellant as a captive plant. The Commission found that the energy supplied under the PPA was only the surplus energy, after meeting the requirements of its dedicated consumers. When an IPP is desirous of contracting power supply with the appellant on two-part tariff basis, the KEB/appellant would be involved in every stage of project formation, finalisation of capital costs and technical parameters. KEB/the appellant would be represented before the Central Electricity Authority for according Techno Economic Clearance as well as for coal supply agreements, but none of these formalities were carried out. It is also pointed out that the first respondent availed of concession in the matter of electricity tax by contending that it was the CPP, which was accepted by a Quasi-Judicial Body by Order dated 21.11.2000.

34. It is next contended that the findings arrived at by the High Court in regard to the facts, was unsustainable. In this regard, it is contended that the jurisdiction of the High Court in an Appeal under Section 41 of the Act, is a limited one. The limitation arose from the requirement that the appeal is maintainable only, when there is a question of law. This legislative cribbing of the appellate power of the High Court is to be viewed in the context of the fact that the appeal is directed against the findings of an Expert Body like the Commission. Legislature, therefore, wished to clothe High Court not with the ordinary untrammelled power of an Appellate Court. In the instant case, even though the point raised is, whether there was any perversity in the findings of the Commission, without finding any perversity, as such, the High Court has proceeded to make a foray into factual findings rendered by the Expert Body. The findings of the Expert Body were premised on adequate reasoning and material. It is without carefully appreciating and analysing the findings, that various observations have been made. It is lastly also contended that pursuant to the Interim Order passed by this Court, the appellant had to deposit a sum of Rs.100 crores, which the first respondent was permitted to withdraw on furnishing bank guarantee. The learned Counsel would submit that, if the appellant succeeds, the amount paid by the appellant, must be ordered to be restored by the first respondent.

35. Dr A.M. Singhvi, learned Senior Counsel appeared along with Shri Gopal Jain, learned Senior Counsel, for the first respondent. Dr. Singhvi appearing would contend that prior to the issue of GO dated 12.05.1999, parties were agreed about the essential terms, viz., price/tariff, quantum and

tenure. These terms were incorporated in the PPA without any change or amendment. The conditions, seven in number, enumerated in letter dated 23.04.1999, were incidental matters, which were not necessary or a pre-requisite for the formation of the contract. A PPA was not a pre-condition. From 15.04.2000, the first respondent supplied power to the appellant and the tariff was paid at the rate of Rs.2.60/unit. With reference to GO dated 12.05.1999, it is contended that though it contemplated submission of the PPA to the Government of Karnataka (GOK), the interpretation has to be necessarily that the draft PPA terms, apart from the terms in GO dated 12.05.1999, as and when finalised, had to be submitted to the GoK. The seven conditions mentioned in letter dated 23.04.1999 remaining in the realm of negotiation as on 01.06.1999 did not detract from a concluded contract based on the GO dated 12.05.1999. The Act does not prescribe a format for a concluded contract. No penalty or consequence is contemplated for not entering into a PPA. A signed PPA is not condition precedent. The language in Section 18(6) of the Act, which contemplates a PPA, is contrasted with the term ‘concluded contract’, employed in Section 17 of the Act. The concluded contract on tariff is also evident from the conduct of the parties as power was being supplied at Rs.2.60 per unit without waiting for approval by Commission. The stand of the Commission that a PPA may not be necessary, found recorded in the impugned Judgment is highlighted. It is contended that this is not a case where there is a counter proposal from the appellant. This is a case where the final proposal of Rs.2.60 per unit, made by JTPCL during the meeting held on 26.03.1999, was formalised by it in the letter dated 31.03.1999. The appellant sought approval from the GoK. The approval was granted by GO dated 12.05.1999. It resulted in a concluded contract between the GOK/KEB with JTPCL. The GO dated 17.07.2000, restoring the tariff of Rs.2.60, reversing its corrigendum on 08.05.2000, by which, tariff was sought to be reduced to Rs.2.52 per unit, indicates that Rs.2.60 emerged as a sacrosanct figure, which had to be honoured. This again probabilised the case of the first respondent that there was a concluded contract. The expression ‘concluded contract’ employed in Section 27(2) of the Act, must be given the interpretation apposite to the context provided by Section 27, which deals with factors/guidelines for determination of the tariff by the Commission. In other words, similar words to be found in Sections 14(7), 18(6) and 19, where the words used are ‘concluded contract’ or ‘contract concluded’, may not be suitably used. Reliance is placed on the Judgment of this Court in Ram Narain Sons Ltd. v. Asstt. Commissioner of Sales Tax and others5, 5 AIR 1955 SC 765 Dwarka Prasad v. Dwarka Das Saraf6 and Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa and another7. In other words, the contention appears to be that the proviso to Section 27(2) of the Act, must be interpreted in the context, which is that a Law-Giver wanted to give relief against retrospectivity, by protecting tariffs, which were subject matter of agreements between the parties arrived at prior to the commencement of the Act. It is further contended that it is nobody’s case that the contracts entered into by the KEB were not transferred to the appellant. As per Section 14(7) of the Act, all contracts entered into, with or for the KEB, are deemed to have been transferred to KPTCL (the appellant).

36. Considerable support is drawn from the Judgment of the House of Lords reported in Alexander Brogden and others and the Directors, & c., of the Metropolitan Railway Company8 and Kollipara Sriramulu (Dead) by His Legal Representative v. T. Aswatha Narayana (Dead) by 6 AIR 1975 SC 1758 7(1987) 2 SCC 469 8 [L.R.] 2 App. Cas. 666 / HL(E) 1877 Vol.2 666 His Legal Representatives and others9. Reliance is placed on these decisions to contend that even if the parties did contemplate the signing of an agreement, it would not prevent formation of a contract, even dehors

the formal document.

37. He further contended that the appellant made admissions before the High court about the existence of a concluded contract qua tariff, quantum and tenure. As regards the confirmation of the offer by the first respondent's Board, it is merely a procedural internal requirement, an aspect of the doctrine of indoor management. The recommendation made by the KEB of the rate is relied upon. The contention based on the appellant coming into existence after 1.6.1999 is brushed aside as a matter of no moment as it is the successor of KEB, therefore bound by the contract. Merely because the first respondent was pressing for the execution of the PPA, it would not detract from there being a concluded contract qua tariff, quantum and tenure. Otherwise, the appellant would not have purchased power from 15.04.2000. The appellant is 9 AIR 1968 SC 1028 unjustified in contending that even qua tariff, there is no agreement. The submission of the appellant that there is a model PPA is erroneous. The model PPA was issued only in 2005 by the Government of India after the issue of guidelines for tariff determination by competitive bidding under the provisions of the Electricity Act, 2003. The contention that there was no approval granted under Section 43A of the Electricity (Supply) Act, 1948 and therefore, the approval of the commission is mandatory under Section 17 is deliberately made knowing it to be erroneous. GoK Order dated 02.03.1996 expressly establishes the consent given by the GoK under Section 43A(1)(c) of the Electricity (Supply) Act, 1948. Section 17 does not speak about tariff determination powers of the commission. The tariff determination is exclusively dealt with by Section 27. It is pointed out that the terms and conditions which were left to be negotiated in letter dated 23.4.1999 have been incorporated as terms and conditions in the draft PPA. Instances of perversity in the commission's orders are pressed before the Court. The first respondent also contended that for various reasons it is entitled to be treated as IPP.

38. The first respondent does not lay store by the finding on promissory estoppel & legitimate expectation. However, learned Counsel, indeed, supports the other finding interfering with the Order of the Commission, viz., that the first respondent was to be treated as an independent power producer and that the Orders of the Commission were afflicted with arbitrariness and error apparent.

ANALYSIS THE ACT – THE KARNATAKA ELECTRICITY REFORM ACT, 1999.

39. Section 1(3) provides that the Act shall be deemed to have come into force w.e.f. the First Day of June 1999. Section 13 provided for the incorporation of the appellant/company. The principal object was to engage in the business of purchase, transmission, sale and supply of electrical energy. Section 13(4) contemplates that the appellant was to undertake the functions in Section 13 and other functions, as may be assigned to it under the licence to be granted by the Commission under the Act. Section 13(5) reads as follows:

> "13(5) Upon the grant of license to the KPTC under chapter VII, the KPTC shall discharge such powers, duties and functions of the Board including those under the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or the rules framed thereunder, as may be specified in the license and it shall be the obligation of the

KPTC to undertake and duly discharge the powers, duties and functions so assigned."

40. Section 14 of the Act reads as follows:

> "14. Reorganisation of the Karnataka Electricity Board.- (1) On and with effect from the date on which a transfer scheme prepared by the State Government to give effect to the object and purposes of this Act is published or such further date as may be prescribed (hereinafter referred to as the effective date of the first transfer), any property, interest in property, rights and liabilities which immediately before the effective date of first transfer belong to the Board shall vest in the State Government on such terms as may be agreed between the State Government and the Board.

(2) Any property, interest in property, rights and liabilities vested in the State Government under sub-section (1) or part thereof may be revested by the State Government in the KPTC or any generating company or companies in accordance with the transfer scheme published under subsection (1) along with such other property, rights and liabilities of the State Government as may be specified in such scheme, on such terms and conditions as may be agreed between the State Government and the KPTC or any generating company or companies, as the case may be.

(3) From the effective date of first transfer of properties etc., to the KPTC, the Board shall stand dissolved. The Chairman and Members of the Board shall be deemed to have vacated their office. Such of the functions, duties, rights and powers exercisable by the Board under the Indian Electricity Act, 1910 or Electricity (Supply) Act, 1948 or any rule framed thereunder as the State Government may by notification specify shall be exercisable by the KPTC or any generating company or companies, as the case may be, from the effective date of first transfer.

(4) Notwithstanding anything in this section, where,- (a) the transfer scheme involves the transfer of any property or rights to any person or undertaking not wholly owned by the State Government, the scheme shall give effect to the transfer only for fair value to be paid by the transferee to the State Government; and

(b) a transaction of any description is effected in pursuance of a transfer scheme, it shall be binding on all persons including third parties.

(5) The State Government may, after consulting the KPTC [or a licensee as the case may be], KPTC require the 1 [or a licensee as the case may be]1 to draw up a transfer scheme to vest in a further licensee (the "transferee licensee"), any of the function including a distribution function, any property, interest in property, rights and liabilities which have been vested in the KPTC [or a licensee as the case may be] under this section and publish the same as the scheme of transfer under this Act. The transfer scheme to be notified under this sub section shall have the same effect as the transfer scheme under sub section (2) and shall be effective from the date specified (effective date of second transfer). (6) A transfer scheme under this section may, amongst others,.-

(a) define the property, interest in property, rights and liabilities to be allocated,-

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(i) by specifying or       describing    the
property, rights and       liabilities    in
question;
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(ii) by referring to all the property, interest in property, rights and liabilities comprised in a specified part of the transferor's undertaking; or

(iii) partly in the one way and partly in the other;

(b) provide that any rights or liabilities specified or described in the scheme shall be enforceable by or against the transferor, or the transferee, as the case may be;

(c) impose on KPTC or any licensee, an obligation to enter into such written agreements with, or execute such other instruments in favour of, any person as may be specified in the scheme;

(d) impose on any transferee licensee the obligations to comply with the power procurement and purchase arrangements with KPTC; and

(e) make such supplemental, incidental and consequential provisions as transferor licensee considers appropriate including provision specifying the order in which any transfer or transaction is to be regarded as taking effect.

(7) All debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for the Board, or the KPTC or generating company or companies before a transfer scheme becomes effective shall, to the extent specified in the relevant transfer scheme, be deemed to have been incurred, entered into or done by the Board, with the Board or for the State Government or the KPTC or the transferee, and all suits or other legal proceedings instituted by or against the Board or transferor, as the case may be, may be continued or instituted by or against the State Government or the concerned transferee, as the case may be.

(8) If pursuant to a transfer scheme framed by the State Government, the KPTC 1 [or a licensee as the case may be]1 is required to vest any part of its undertaking in another company or body corporate or person, the Commission shall amend the licence granted to enable the transferee to carry out the functions and activities assigned to the transferee."

41. Section 17 which is the opening section in part VII, inter alia provided as follows: -

> "17. Regulation of generating companies and stations- (1) A licensee or a bulk purchaser or any other person may enter into a contract with a generating company for purchase of electricity in the manner approved by the Commission and such approval granted by the Commission shall have the effect of the consent given by the State Government in terms of section 43A of the Electricity (Supply) Act 1948: Provided that the approval granted by the Commission under this sub-section shall not in any manner affect the requirements to obtain approvals and sanctions of the

State Government or any other authority under any other law, rule or regulations.”

42. Section 18, which falls in Part VII, deals with the requirements of a license. It, inter alia, reads as follows:

> “18. Requirement of licence.- (1) No person, other than those authorised to do so by license or by virtue of exemption under this Act or authorised to or exempted by any other Authority under the Electricity (Supply) Act, 1948, shall engage in the State in the business of,- (a) transmitting electricity; or (b) supplying electricity, including bulk supply.
>
> XXX XXX XXX (6) All licenses issued under the provisions of Indian Electricity Act, 1910, by the State Government or any competent authority shall be deemed to be a provisional licence and shall be subject to the conditions provided under sub-sections (4) and (5). All power purchase agreements, transmission services agreements and other contracts entered into shall continue in full force and effect and will be transferred to the successor entities.” (Emphasis supplied)

43. Section 19 of the Act, deals with grant of licenses by the Commission. Section 19(1) reads as follows: “19. Grant of licenses by the Commission. -

> (1) The Commission may on an application made in such form and on payment of such fee as may be specified by regulations, grant a license authorising any person to, - (a) transmit electricity in a specified area of transmission; and/or (b) supply electricity in a specified area of supply or supply in bulk to the licensees or any person.”

44. Section 19(4)(j) reads, inter alia, as follows:

> “(4) Without prejudice to the generality of sub-section (3), the conditions included in a license by virtue of that sub-section may require the licensee to,-
>
> (a) to (i) xxx xxx xxx
>
> (j) purchase power in an economical manner and under a transparent power purchase procurement process; Explanation. - The contracts concluded by the State Government or the Board with generating companies and transmission companies prior to the date of commencement of the Act shall stand assigned to the KPTC in terms of section 14 and the KPTC may continue the purchase or transmission of power under such contracts for effecting bulk sales, distribution and supply to other licensees;”

45. Section 20 provides for exemption from the requirement of license. It contemplates that the regulation by the Commission to grant exemption from the requirement to have a supply license

subject to conditions to be specified. The other provisions of Part VII deals with amendment of licenses and revoking of licenses apart from the general restrictions on the licensee.

46. Section 27, which contains the proviso which is at the heart of the controversy, inter alia, reads as follows:

> "27. Tariffs.- (1) The holder of each licence granted under this Act shall observe the methodologies and procedures specified by the Commission from time to time, in calculating the expected revenue from charges which it is permitted to recover pursuant to the terms of its licence and in designing tariffs to collect such revenues.
>
> (2) The Commission shall, subject to sub- section (3), have the power to lay down methodology and the terms and conditions for determination of revenue of the licensee under sub section (1) of this section and the determination of tariff, in such other manner as the Commission considers appropriate and for doing so, the Commission shall be guided by the following factors, namely:-
>
> (a) the financial principles and their applications provided in sections 7 and 57-A of the Electricity (Supply) Act, 1948 (54 of 1948) and in the sixth schedule thereto;
>
> (b) in the case of the Board or its successor entities, the principles under section 59 of the Electricity (Supply) Act, 1948;
>
> (c) that the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;

(d) the factors which would encourage efficiency, economical use of the resources, good performance and optimum investments and other matters which the Commission considers appropriate for the purpose of this Act ; and

(e) the interest of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy;

(f) the electricity generation, transmission, distribution and supply are conducted on commercial principles

(g) national and state power plans formulated by the Central or State Government, as the case may be :

Provided that the contracts concluded by the Government of Karnataka and/or the Board with generation and transmission companies prior to commencement of the Act shall be deemed to have been approved by the Commission under the provisions of this Act and shall be given effect by the Commission.

(3) Where the Commission departs from factors specified in the sixth schedule to the Electricity (Supply) Act, 1948 (Central Act 54 of 1948) while determining revenue of the licensee and tariffs, it shall record the reasons therefor in writing.

(4) Any methodology or procedure specified by the Commission under sub-sections (1), (2) (3) above shall be to ensure that the objectives and purposes of the Act are duly achieved. (5) Any tariff implemented under this Act,-

(a) shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor, and total consumption of energy during any specified period or the time at which supply is required, or the geographical position of any area , the nature of the supply and the purpose for which the supply is required; or paying capacity of category of consumers and need for cross subsidisation; and

(b) shall be just and reasonable and be such as to promote economic efficiency in the supply and consumption of electricity; and

(c) shall satisfy all other relevant provisions of the Act, regulations and conditions of the license.

(6) The Commission also shall endeavour to fix tariff in such a manner that, as far as possible, similarly placed consumers in different areas pay similar tariff." (Emphasis supplied)

47. Section 5(1) of the Act declares that Members of the Commission shall be persons of ability, integrity and standing, who have adequate knowledge and experience of and have demonstrated capacity in dealing with law or administration. Section 5 further declares that, at all times, one Member shall be a graduate Electrical Engineer with at least 25 years of experience of either generation, transmission or distribution of electricity and have worked in a senior position in the said field. There must always be two Members, who have qualification in the field of law, finance, economics, commerce or administration, with at least 25 years of working experience. Such person should have worked in a senior position in the said field. There are other aspects, which need not detain us. Under Section 10 of the Act, the Commission is endowed with certain powers of a Civil Court. It can enforce attendance of witnesses. It can call for information. It can consult to the extent, it considers appropriate, such persons or group of persons, who may be affected or likely to be affected by its decisions. Section 11 deals with the functions of the Commission. An array of functions vests with it which includes regulating the purchase, distribution and supply and utilisation of electricity, the quality of service, the tariff and charges payable, keeping in view the interest of the consumer as well as the consideration that the charges are adequately levied and duly collected. There are various other functions. It is to function as an independent Statutory Body Corporate. The Commission has the power to act as an Arbitrator or to nominate Arbitrators to decide disputes between the licensees. The Commission is tasked with the power to grant licences under Section 19 of the Act. More pertinently, the Commission is empowered under Section 27(2), to lay down the methodology and the terms and conditions for determination of the tariff, inter alia. Section 27(2)(a) to (g) provide for the factors, which are to guide the Commission.

48. On a conspectus of the provisions of the Act, it is self-evident that in keeping with the very name of the Act, viz., Karnataka Electricity Reforms Act, 1999, the Legislature intended to depart from the earlier regime, under which, the State Electricity Boards, in conjunction with the Government, enjoyed a free run in the matter of fixation of tariff. The Act put in place a mechanism, by which, an independent Body, a Commission, consisting of the Experts, as we saw, were to proceed in the matter, in an independent manner, to determine, inter alia, the tariff. The determination of the tariff was to be done, bearing in mind, the interest of the consumer. At the same time, the Commission was not to be oblivious to the need to arrive at charges for the service of purchase, distribution and supply of electricity, in such a manner that the tariff is adequate in that the charges for the electricity supply, was duly collected, being adequate, for maintaining the supply and distribution of electricity.

49. Section 14(7) provides, inter alia, that all contracts, entered into with or for the Board or the appellant or the generating company or companies, before a transfer scheme becomes effective, is to be deemed to have been entered into or done by the Board, with the Board or for the State Government or the appellant or the transferee. Section 17 provides that a licensee or the bulk purchaser or any other person, may enter into a contract, with a generating company, for purchase of electricity, in the manner approved by the Commission. Such approval, is accorded the status of a consent given by the State Government under Section 43A of the Electricity (Supply) Act, 1948. Section 18, dealing with the requirement of a licence for transmitting electricity and for supplying electricity, including bulk supply, inter alia, provides in Section 18(6) that all power purchase agreements, transmission services agreements and other contracts, entered into, shall continue, in full force and have effect and will be transferred to the successor entities. Section 19 deals with actual power to grant licence. The power is vested with the Commission. Section 19(3) provides that the duration, extent to which and the terms and conditions, under which, transmission or supply of energy is to be made, are to be specified in the licence. The licence is also to contain such other conditions as the Commission may consider appropriate for achieving the purpose of the Act. It is thereafter that Section 19(4) provides that without detracting from the generality of the power with the Commission to impose conditions mentioned in Sub-Section (3), the conditions enumerated expressly in Sub-Section (4), may be imposed. The Explanation relevant to the case, is found sandwiched between Section 19(4)(j) and (k). Section 19(4)(j), the Explanation, which follows thereafter and Section 19(4)(k) read as follows:

> "(j) Purchase power in an economical manner and under a transparent power purchase procurement process;

Explanation: The process concluded by the State Government or the Board with generating companies and transmission companies prior to the date of commencement of the Act shall stand assigned to KPTC in terms of section 14 under such contracts for effecting bulk sales, distribution and supply to other licensees;

(k) the purchase of power from KPTC to the extent necessary to enable the KOPTC to perform its obligations under the contracts concluded by the State Government or the Board referred to in a clause."

50. Moving on to Section 27, the proviso to Section 27(2), brings up the rear to the said sub-Section. Section 27 deals with the duty of the holder of every licence, to observe the methodologies and procedure to be specified by the Commission from time-to-time, in calculating the expected revenue from what it charges. Section 27 uses the expression ‘design’. It only means that the Commission is to fix the tariff, which would be a medium to raise revenue. It is thereafter that Section 27(2) clothes the Commission with the power to actually lay down the methodology and the terms and conditions for determination of the revenue and the determination of the tariff. The factors to guide the Commission in this regard are explicitly set-out in Clauses (a) to (g) under Section 27(2). Since sub-Section (2) limits the power, with reference to sub- Section (3), we may only notice that Section 27(3) obliges the Commission to record reasons, when it departs from the factors specified in the Sixth Schedule to the Electricity (Supply) Act, 1948 in determining the revenue and the tariffs. Section 27(4) declares that the Commission, in formulating the methodology or procedure, is to ensure that the objectives or purpose of the Act, are duly achieved. Section 27(5) further ordains that the tariff is not to reflect any undue preference to any consumer but may discriminate on the basis of the load factor, power factor, inter alia. The paying capacity of the category of the consumers and the need for cross-subsidisation, can form the premise for differentiation. Every licensee is to provide to the Commission, full details of its calculations for the ensuing financial year, of the expected aggregate charges, which it believes to have been permitted to recover, pursuant to the terms of its licence and such further information, as the Commission may reasonably require, to access such calculation [See Section 27(7)]. Section 27(7) further provided that within 90 days of the receipt of all the information by the licensee that the Commission is to notify either its acceptance or its refusal of the licensee’s revenue calculation and tariff proposals. It is obliged to issue a notice, giving reasons, as to why it does not consider the tariff proposals as compliant with the extant methodology or that it is incorrect. It was to propose a modification or an alternative calculation of the expected revenue from charges, which a licensee was to accept. Section 27 defined ‘expected revenue from charges’ in the Explanation (a) under Section 27(12) as meaning, ‘the total revenue which the appellant or the licensees are expected to recover from charges for the level of forecast supply used in the determination under sub-Section (7) in any financial year in respect of goods or services supplied to customers’. Explanation (b) defined ‘tariffs’ as ‘a schedule of standard prices or charges for specified services which are applicable to all such specified services provided to the type of customers specified in the tariff published’.

51. On a conspectus of the Act, the Law-Giver has intended that the holder of every licence granted under the Act, is bound by the regime of regulation of the tariff by the Commission. The appellant was incorporated under Section 13 of the Act. The Act came into force with effect from 01.06.1999. The appellant, in other words, was not in existence prior to 01.06.1999. No doubt it succeeded to KEB. In an answer to a query, it is pointed out that initially, the appellant was the holder of a distribution and supply licence. Subsequently, there has been an unbundling. At present, appellant is engaged in supply of electricity. It is further not in dispute that the appellant is a licensee under the Act. It would, therefore, be clear that being a holder of a licence, the appellant was to follow the procedure under Section 27. It came under the embrace of the jurisdiction and power of the Commission in regard to the regulation of the tariff. The power and jurisdiction of the Commission is to be exercised to ensure that the objectives and the purpose of the Act, are duly achieved. In the Statement of Objects of the Act, it is, inter alia, recited that the law was made to ensure the

development and management of the electricity industry in the State in an efficient, economic and competitive manner to provide reliable quality power and to protect the interest of the consumer, including, vesting in the Commission, the power to regulate the power sector. The sublime legislative object is further reflected in Section 11A, viz., the declaration of the functions of the Commission is, inter alia, to protect the interest of the consumer, apart from promoting efficiency, economy, safety, in the use of electricity. This is, of course, besides ensuring that the charges for electricity are adequately levied and duly collected. As noticed by us, the Act signalled the demise of the old system, whereunder, fixation of tariff was afflicted with caprice, unilateralism and a tendency to unduly subsidise the State Electricity Boards, thereby preventing a natural free play of market forces, which also did not conduce towards the promotion of the production of electricity in the country. Section 27(2)(e) specifically contemplates that the Commission is to be guided by the interests of the consumers, but at the same time, providing for the return, by ensuring that the consumer pays for the use of electricity in a reasonable manner, based on average cost of supply of energy. Section 27 marked a paradigm shift. An independent Body was to exercise fairly drastic power in the matter of regulating revenue and designing tariff by the licensees. The proviso in Section 27(2) was, indeed, intended to protect cases, where contracts were concluded by either the Government of Karnataka and/or the KEB with generation and transmission company prior to the commencement of the Act. The proviso freed parties to such contracts, which were concluded from the regulatory regime. If such contracts were concluded, the Law-Giver has made it clear that they would be deemed to have been approved under the provisions of the Act. Furthermore, the Commission is charged with the duty to give effect to such contracts which are concluded before the commencement of the Act. It is, undoubtedly, true that the proviso to Section 27(2) does not use the words 'power purchase agreement'. It is equally true that Section 18(6), falling under Part VII and dealing with licensing of transmission and supply, employs, inter alia, the words 'power purchase agreement'. Section 18(6), in fact, uses also the words 'transmission service agreements and other contracts'. The attempt of the first respondent is to highlight the fact that the proviso to Section 27(2) does not use the words 'power purchase agreement'. The Law-Giver was aware and has used the expression 'power purchase agreement' in Section 18(6). In a later provision of the same Act, the same Law- Giver has, by omitting the words 'power purchase agreement' in the proviso to Section 27(2), evinced its intention to be that a contract can be concluded for the purpose of the proviso to Section 27(2) even without there being a power purchase agreement.

52. The further argument is, that the proviso to Section 27(2) must be understood with reference to Section 27 and not based on a roving expedition, involving survey of other provisions of the Act, which may use similar words such as, Section 14(7) and Sections 18 and 19. The principle that a proviso must receive meaning with reference to the main provision to which it is a proviso, is pressed into service.

53. The first respondent relied upon the decision of this Court in Dwarka Prasad v. Dwarka Das Saraf10. This Court held, interpreting the proviso in question in the said case as follows:

> "18. We may mention in fairness to Counsel that the following, among other decisions, were cited at the Bar bearing on the uses of provisos in statutes: CIT v. Indo-Mercantile Bank Ltd, [AIR 1959 SC 713 : 1959 Supp (2) SCR 256, 266 : (1959)

36 ITR 1] ; Ram Narain Sons Ltd. v. Asstt. CST [AIR 1955 SC 765 : (1955) 2 SCR 483, 493 : (1955) 6 STC 627] ; Thompson v. Dibdin [(1912) AC 533, 541 : 81 LJKB 918 : 28 TLR 490] ; Rex v. Dibdin [1910 Pro Div 57, 119, 125] and Tahsildar Singh v. State of U.P. [AIR 1959 SC 1012 : 1959 Supp (2) SCR 875, 893 : 1959 Cri LJ 1231] . The law is trite. A proviso must be limited to the subject-matter of the enacting clause.

It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. “Words are dependent on the principal enacting words to which they are tacked as a proviso. They cannot be read as divorced from their context” (Thompson v. Dibdin, 1912 AC 533). If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a 10 (1976) 1 SCC 128 proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.

“The proper course is to apply the broad general Rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest.

The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail. (Maxwell on Interpretation of Statutes, 10th Edn., p.

162)””

54. In other words, since Section 27 is a provision, which appears to deal with the revenue and tariff, which a licensee can garner/charge, it suffices, if there is a contract, which is concluded, which has, for its subject matter, the most indispensable element, viz., the tariff. It is pointed out that in this case, the three essential components of a contract for the purposes of Section 27, have been concluded well before 01.06.1999. Correspondence and negotiation culminating in the issue of the G.O. dated 12.05.1999 by the GoK, by which, the Government of Karnataka, gave its approval for the tariff at Rs.2.60 per unit, for the tenure of five years, and what is more, the quantum to be supplied by the first respondent, was also agreed upon cements the case of the first respondent that there was a concluded contract for the purpose of Section 27(2).

55. Shri Gopal Jain, learned Senior Counsel, would persuade the Court to take a pragmatic and fair view. The Government of Karnataka/KEB was, indeed, faced with the shortage of power. The proposal of the first respondent was most reasonable. If the parties were agreed on the essential terms, which, in terms of the proviso to Section 27(2), consisted, primarily of the tariff, and a PPA is conspicuous by its absence in the proviso, as an indispensable requirement, to constitute a concluded contract, then, nothing more is required to support the impugned Judgment, it is contended. THE LAW RELATING TO CONTRACT

56. Section 2 of the Indian Contract Act, 1872 provides for the interpretation clause. We may set out our understanding of Section 2, so far as it is relevant, to be as follows:

It begins with a proposal made by a promisor. A proposal is an offer to do something or an offer to abstain from doing something. The offer must be made with a view to obtaining the agreement to it from the party to whom it is made. When the person to whom the proposal, as defined, is made, who is treated as the promisee, conveys his unqualified consent, the proposal is treated as having been accepted. The proposal, when it is accepted, becomes a promise. An agreement is every promise and every set of promises forming the consideration for each other. As to what is consideration, we need not be detained. A contract is an agreement enforceable by law. Section 3 of the Contract Act deals with communication, acceptance and revocation of proposals. The acceptance of a proposal, inter alia, takes place by any act or omission of the party accepting. It must be an act or omission by which he either intends to communicate his acceptance or which has the effect of communicating his acceptance. These are matters of fact to be decided on the facts of each case. Section 10 of the Contract Act reads as follows:

“10. What agreements are contracts. —All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed by which any contract is required to be made in writing1 or in the presence of witnesses, or any law relating to the registration of documents.” Thus, from the second part of Section 10 of the Contract Act, it is self-evident that it is not essential to form a contract, that it should be in writing. The second part of Section 10, illustrated by Section 19 of the Copyright Act, 1957 applies where a law stipulates that a contract be in writing in which case a contract must be reduced to writing. THE CORRESPONDENCE AND CONDUCT OF THE PARTIES

57. It is apposite to refer to order dated 7.3.1994 where it all began. It reads as follows:

> “PROCEEDINGS OF THE GOVERNMENT OF KARNATAKA Sub: Proposal of M/s. Jindal Iron & Steel Company Limited to set-up a 300 MW . Power plant in two stages of 150 Mw Each near Bellary-Hospet.

Consequent on the amendments made by the Government of India to the India Electricity Act 1990, and the Electricity (Supply) sector participation in power generation and to sign MOUs with private or foreign companies to set up Thermal Power Plants at Mysore, Hospet, Raichur, Mangalore and Bangalore and a Hyde! Power Station at Shivasemudram.

1. M/s. Jindal Iron & Steel Company Limited are setting up a combined gas cycle plant of 300 MW (2XI50 MW) power plant at Bellary- Hospet within the site allotted for a Steel Plant of 1.25 million ton capacity per annum, for which the Government of Karnataka has already accorded approval.

2. The estimated cost of the power plant is approximately Rs.900 Crores. The debt equity ratio shall be 2.1. The equity of around Rs.225/- crores will be met 50% each by ' .. the participants - M/s. JISCO and M/s. TRACT ABEL. The loans shall be arranged both from Indian financial institutions and foreign banka for which discussions are under progress.

3. The advantage in setting up of the power plant at Bellary-Hospet is that the excess power generated will be fed to the KEB grid which will make the system more stable and can supply power to other industrial units in and around the Bellary-Hospet region. Besides. it would also help to generate additional employment. The fact that the Lingapur 220 KV Sub-station is nearer to the site of the proposed Thermal Power Plant, will help in inter-connection with the Sub- station.

4. The Karnataka Electricity Board has agreed to the proposal of M/s. Jindal Tractebel Power Company for setting up of the generating plant at Bellary - Hospet subject to the toll owing conditions:

> 1. The above firm should send a detailed project report duly indicating the cost of the project with all relevant details like, mode of execution fixation of tariff etc;
>
> 2. For evacuation of power from the above, the present KEB transmission and distribution system may have to be strengthened thus necessitating substantial funds for the above. Board is examining the possibility of obtaining funds from various organizations either from Government or other sources;
>
> 3. The sale of power should be exclusively to KEB and not to any other entrepreneurs. In case power is contemplated to be sold to third parties directly, the sales shall be at the rates to be fixed by Government of Karnataka/KEB and with the prior approval of Government of Karnataka/KEB;
>
> 4. The firm has to enter into power purchase agreement with KEB and the rate at which power is to be purchased by KEB is to be separately worked out;
>
> 5. The firm has to indicate the cost of the generation to take a definite decision for I purchase of power from them.

ORDER NO. DE 221 PPC 93 BANGALORE. DATED 7TH MARCH 1994.

After examining the matter in detail Government are pleased to accord; approval to the proposal of M/s. Jindal Iron & Steel Company Limited a follows:

> [1] Ms. Jindal Tractabel Power Company (JTPCL) is permitted to set up this plant in two phases of 300 MW (each phase consisting of !50 MW each) subject to obtaining the approval of the Government of India in respect of foreign investment by M/s. Tractabel, Belgium in Karnataka and also subject to obtaining other statutory clearances under the relevant Acts;

[2] M/s. JTPCL is permitted to sell power directly to industrial units of the area at the mutually negotiated rates between M/s. JTPCL and the industrial Units, subject to approval by the State Government [3] To permit KEB to evacuate power produced by M/s. JTPCL through its grid system subject to the capacity of the grid system and subject to payment of Wheeling and Banking charges payable to KEB by M/s. JTPCL after evacuating power produced by KPCL;

[4] The company has to sell the balance power to KEB at a tariff to be fixed according to the norms laid down by the Government of India vide Notification dated 31.3 .1992;

[5] KEB will make wheeling and banking arrangements for M/s. JTPCL on payment of wheeling charges;

[6] KEB is permitted to enter into an agreement with M/s. JTPCL regarding power purchase subject to approval by the State Government."

58. A perusal of proceeding dated 07.03.1994 would reveal that though the KEB put forth the condition, inter alia, that the power to be generated by the thermal plant sought to be set up by JISCL, was to be sold exclusively to KEB and not to any other entrepreneur and that the firm has to enter into a power purchase agreement with KEB, and the rate at which power to be purchased by the KEB, is to be separately worked out, in the Order, the GoK permitted the first respondent to sell power directly to industrial units of the area at mutually negotiated rates between the first respondent and the industrial units subject to approval by the State Government. Further, it was decided, inter alia, that the first respondent had to sell the balance power to KEB at a tariff fixed according to the norms laid down by the Government of India vide Notification dated 31.03.1992.

59. Finally, KEB was permitted to enter into an agreement with the first respondent regarding power purchase, subject to approval by the State Government. What is noteworthy is that the KEB took the stand that the first respondent would have to enter into a power purchase agreement with the KEB, and the rate at which power was to be purchased, was to be separately worked out. In keeping with the decision, apparently, that the first respondent was to sell the balance power to the KEB, the Clause relating to sale of excess power to KEB was first indicated in the Heads of Terms and later on in the Wheeling Banking and Grid Support Agreement. It will be noticed that in the clause, what was agreed upon, was that there was to be agreement as regards price and other terms which were to be negotiated at the time of sale. This may be contrasted with the terms of the proceedings dated 07.03.1994, which contemplated sale according to norms dated 31.03.1992. On 20.10.1998, referring to an earlier letter dated 28.09.1998, the first respondent wrote to the KEB that tariff at which they would sell power was in accordance with the Government of India Notification dated 30.03.1992. A statement was forwarded, containing the tariff calculation and also indicating certain assumptions. On 21.11.1998, the first respondent wrote to the KEB and we need notice the following: First respondent claimed that it has completed 100% construction, erection and testing activities of Unit No.1 (130 MW). It was scheduled to synchronise the Unit No.1 by last week of December 1998. For Unit No.2, the first respondent claimed, it had completed 100%

construction, 90% erection of equipment, the boiler light up was scheduled in January 1999 and the commissioning was scheduled in July 1999. Thereafter, first respondent refers to the PPA signed with JVSL and JPOSCL. It was further stated that by proceeding dated 02.03.1996, Government of Karnataka had given approval for the same. The first respondent further makes reference to Clause 2.4 of the Wheeling and Banking Agreement for sale of power to KEB at mutually agreed rates. The communication reveals that thereafter, the first respondent proceeded to make an offer to KEB for sale of power. It offered 50MW from the commissioning date of Unit No.1. Further, it offered 100 MW (base load basis of commissioning date of Unit No.2). A further offer was made of maximum of 200 MW during the period when JVSL, JPOCL, which were the dedicated consumers were under shut down (major break down or during their maintenance period). Penalty was offered if supply was less than 75 MW from the commissioning date of Unit No.2. The price offered was Rs.2.90/KWHR. It is thereafter that it was indicated that the price was to be exclusive of the electricity tax, adjustment towards inflation, compensation towards foreign exchange variations, provision for fuel escalation charges, maintenance of power plant, for force majeure conditions. The proposal was to supply power for an initial period of five years from the date of commissioning of the second 130 MW Unit. There is reference made to utilisation of power during the stabilisation period and we are not referring to the contents of the same except to point out that this represented the second proposal. Finally, the letter ended with a request to the KEB to accord approval for the above two proposals. The KEB, in response, pointed out that the Board was, in principle, willing to purchase power from the first respondents and the proposal of the first respondent, regarding tariff, was stated to be under evaluation by the Board. It can be safely concluded that as on 15.12.1998, quite clearly, apart from the KEB indicating that it was, agreeable in principle, to purchase surplus power from the first respondent, there is no other effect in law produced.

60. Under the proviso to Section 27 of the Act relied upon by the respondent, a contract could be concluded with the Government or with the Electricity Board. In either case undoubtedly the regime under section 27 would cease to apply and the Commission would not have any power.

61. In the notes submitted by first respondent, it was seen contended that the contract was concluded between the first respondent and GoK/KEB. To proceed with clarity, the court specifically asked whether the case of the first respondent was that the contract was concluded between the GoK and the first respondent or with KEB with the first respondent. The submission which was made by the first respondent was that the contract was concluded between the KEB and the first respondent. Therefore, we must proceed on the basis that contention of the first respondent is that the contract was concluded between the first respondent and the KEB. The significance of this finding is that it obviates any adjudication as to whether the contract in question complies with the mandate of Article 299 of the Constitution. The appellant asserts that there can be no implied contract with the Government under Article 299 and enlists support of case laws in this regard. In view of the stand of the first respondent which we have indicated it would be an unnecessary digression to explore the contours of Article 299.

62. The main question which arises for consideration is whether there is contract concluded between the first respondent and the KEB and if so, whether such a contract was concluded before 01.06.1999? 01.06.1999 admittedly marks the commencement of the Act. If as on 01.06.1999, no

contract was concluded between the KEB and the first respondent within the meaning of proviso to Section 27(2), and such a contract was concluded thereafter, it will not advance the case of the first respondent.

63. We must at this juncture deal with an appeal made by the learned Senior Counsel for the first respondent. It is contended that this Court may adopt a pragmatic view. The first respondent had excess power. The KEB stood in dire need of power. Thereafter, negotiations ensued based on Clause 2.4 of the wheeling and Banking and Grid Agreement. Apart from oral negotiation, correspondence evidence the respective positions adopted by the parties. The KEB took up the matter with the GoK and GoK finally gave approval on 12.05.1999. The terms approved by the GoK stand incorporated in the subsequent PPA though the PPA was executed after 01.06.1999 but the significance of all this is that as regards the essential terms, the parties were agreed. A practical view is therefore pressed upon as a just view also, namely, substantially for all practical purposes the parties were ad idem. Repeatedly our attention is alerted to the fact that acting upon the GO dated 12.05.1999 and making it the sheet anchor, first respondent even supplied power. Though there was some prevarication as regards the rate being 2.60 per KWH, the GoK sought to honour the contract as embodied in the G.O. dated 12.05.1999 by issuing G.O. dated 17.07.2000.

64. We are dealing with a statutory dictate. What is required to be established is that the contract stood concluded and furthermore it was so done before 01.06.1999. Dr. Abhishek Manu Singhvi and Shri Gopal Jain, learned Senior Counsels are right in pointing out that the purport of proviso is to provide against retrospectivity of the law. In other words, the lawgiver contemplated that when a contract stands concluded between the Government or the KEB and a party before the Act came into force, the regulatory regime should not be allowed to unsettle a solemn contract.

65. In this regard, we must bear in mind that the Act envisages the setting up of an independent Commission. The Commission stood endowed with various functions. One of the important functions is to fix the tariff. One of the vital objects of the Act is to protect the interest of the consumer. The Electricity Board which was set up under the Electricity (Supply) Act, 1948 was clothed with the power for fixing the rate. The undesirable results it produced and the need for locating the power in an independent body which would fairly and on preordained principles which involves striking a balance between the interest of the consumer and at the same time promoting efficiency in the power sector leading to enhancement in power generation led to the new regime. While a reasonable view must indeed be taken it cannot be half baked or a legally untenable approach. Flying on the wings of pragmatism, the Court cannot gloss over a statutory injunction. We would think that the first respondent must anchor its case on surer foundations.

66. In this case, we proceed on the basis that it all began with the communication dated 20.10.1998 sent by the first respondent. However, for reasons which will be clear, we need not harp upon its contents in greater detail. On 21.11.1998, after referring to the fact that the first respondent was recognised as an independent power producer and it has achieved financial closure and further that it was the only company in Karnataka which could be set up as an independent power producer and still further having completed 100% construction, erection and testing ability in regard to Unit I, it was stated that the synchronising of Unit I will take place by the last week of December 1998.

Regarding Unit II, commissioning was projected in July, 1999. Thereafter, the formal offer was made for sale of power. The rate was Rs.2.90/Kwhr. Even the said rate was to exclude electricity tax, inflation, foreign exchange, fuel escalation charges, maintenance of power plant. The rate was also to be exclusive of force majeure. This meant that if there is grid failure or transmission line failure leading to no supply, there would be no penalty on the minimum guaranteed power. There is also another aspect in the offer under the caption “utilisation of power during stabilizing period” that is from the date of synchronisation till commercial operation. There are certain details thereunder and the letter concluded by the first respondent requesting approval to the two proposals at the earliest. By communication dated 15.12.1998, the Board conveyed that the proposal of the first respondent is under evaluation. The Board (KEB) also expressed its willingness to purchase power as already discussed. On 19.01.1998, the KEB wrote to the GOK. Therein, it is, inter alia, stated that the plant of the first respondent which was set up as a captive power plant was given IPP status later on by GO dated 01.02.1996 as the shareholders of the power plant (the first respondent) and the steel plant (the sister concern of the first respondent) were different. After referring to the wheeling and Banking agreement, it is, inter alia, stated that the first respondent during discussion revealed that there was a decline in the demand for power due to the reduction in the demand of the steel, leading to the proposal by first respondent, KEB further wrote about PPAs entered into with various IPPs and the fact that the progress under the said agreements was not satisfactory. Some other plants may not come up was a concern voiced by the KEB. Other issues relating to them find reflection. Shortfall in generation in the state and the steady demand for power are seen articulated. KEB was purchasing power from Maharashtra State Electricity Board in addition to central generating stations. After dealing with Wheeling and Banking agreement and clause 2.4 which contemplated sale of excess power to the KEB, it was stated that the clause, however, contemplated purchase at a negotiated rate. This, it is further stated was because at that stage details regarding the capital cost were not looked into as the project was contemplated as a captive power plant. It is also for the same reason stated that it would not be possible to negotiate tariff based on two-part tariff notification of the Government of India. After providing certain other details including the variation in the exchange rate qua the US $ and the decrease in consumer price index, interest rate and the need for annual increase in the fixed price, negotiations were undertaken it is mentioned. After detailed discussion, it was decided that a price of Rs.2.60 per unit could be offered. This comprised of Rs.1.70 as fixed charge and Rs.0.90 as variable charge. Variable cost was to depend on the cost of coal. Its cost would determine the variable price. Suffice it to further notice that the KEB suggested that “We” can purchase power from the first respondent at Rs.2.60 per unit (FC Rs.1.70) plus (VC Rs.0.70). The fixed charge was to be escalated from the second year with the conditions of penalty to be paid by the firm for short supply of power and assured off take which has been referred in the letter earlier. We may finally notice the final paragraph of the said communication “Approval of the government is sought to the above proposal. Subsequent to the approval, negotiations will be held with M/s JTPCL for finalizing the PPA.”

67. The GOK wrote to the KEB. It is stated inter alia that the proposal was examined in detail. The efforts of KEB to bridge the gap on power availability by entering into short term agreement with the first respondent was appreciated. The wide gap between demand and supply was noted. The prospect of the demand going up further was echoed. It is finally stated as follows:

> “The present proposal of the KEB keeps the tariff open ended and possible revision. The PPA being for a period of 5 years, KEB is advised to negotiate with the Jindal Tractebel for a fixed tariff for the next 5 years.
>
> This may kindly be got examined by KEB and the revised proposal may be sent to the government”

68. We must not be led astray by the use of the word “the present proposal of the KEB” as meaning that the proposal is one made by the KEB. In law, it would be the first respondent which has made the proposal as contained in its communication dated 21.11.1998 and thereafter following negotiations, the first respondent came up with the price of Rs.2.60. It is this proposal of the first respondent which was suggested by the KEB. The GoK found that the said suggestion about the proposal made by the first respondent kept the tariff open ended with possible revision. The GoK contemplated a PPA being entered into limited to a period of 5 years. Therefore, the GoK wanted KEB to further negotiate a fixed rate for the next 5 years. A revised proposal was to be sent to the Government. It is not the case of the either party that a concluded contract emerged at this stage. Without the parties apparently being aware, the next communication brought them even more perilously close to the date of the commencement of the Act. On 31.03.1999, the first respondent wrote about its first proposal on 21.11.1998. The fact that the discussions followed is further mentioned. Specifically, there is reference to meeting held on 26.03.1999. The readiness of the KEB to purchase power was made subject to the following terms and conditions:

1. The term of the agreement could be 5 years.

2. The tariff should be a single part tariff. Escalation at a fixed percentage could be applied on the total price on an annual basis. KEB will not consider any request either for two-part tariff based on CEA guidelines or for payment of fuel cost at actuals.

3. KEB will open irrevocable revolving letter of credit under which JTPC can get payments. It will also be supported by Escrow mechanism.

4. There can be penalty clause both for short supplies and short drawals.

5. The PPA should be a simple document.”

69. A formal proposal being demanded by the KEB subject to the approval of the Board of Directors and also the approval of its lender, the first respondent made the proposal.

“Accordingly, subject to approval of our Board and also subject to approval of our lenders, we make the following proposal for sale of power to KEB.

1. JTPC offers 50 MW (Energy 36 MU per month) of power from the commissioning date of Unit 1 and 100 MW (Energy 72 MU per Month)of power from the commissioning date of Unit 2. The first Unit of 130MW is expected to be commissioned in June 1999 and the second unit of 130 MW is

expected to be commissioned in August 1999.

2. JTPC would have an option to supply in excess of SOMW (Energy 36 MU per month) after commissioning of Unit 1 and 100 MW (Energy 72 MU per month) after commissioning of Unit 2, with KEB's approval, as and when JTPC has surplus power available.

3. The tariff will be as follows:

I year (Upto 31" March 2000) Rs.2.60/kwhr. II Year (Financial Year 2000-2001) Rs.2.73/kwhr. III Year (Financial Year 2001-2002) Rs.2.87/kwhr. IV Year (Financial Yea; 2002-2003) Rs.3.01/kwhr. V Year (Financial Year 2003-2004) Rs.3.16/kwhr.

4. There will be no Wheeling charges or Electricity Tax on supplies to KEB.

5. To maintain uniformity in penalty on either side, JTPC proposes as follows as from COD of Unit 2:

(a) JTPC guarantees minimum supply of the Threshold Power Value after commissioning of JTPC Unit 2. If the supply is less than the Threshold Power Value, JTPC will pay penalty at l0% of the tariff, for supplies below the Threshold Power Value.

(b) KEB shall guarantee that it will consume the Threshold Power Value. In case the consumption is less than the Threshold Pow~r Value, KEB shall pay to JTPC the full value of Threshold Power at the applicable tariff as above.

(c) The Threshold Power Value is 75 MW (Energy 54 MU per month).

6. The minimum supply and the minimum consumption as per para 5(a) and 5(b) above are applicable on a monthly basis.

7. If there is escalation in fuel cost beyond 5% at any time, JTPC reserves the right to terminate the contract with 3 months' notice, if KEB does not agree to compensate for such escalation.

8. KEB shall open irrevocable revolving letter of credit corresponding to 100 MW (Energy 72 MU per month) power sales under which JTPC can get payment for its monthly bills. It shall also be supported by Escrow mechanism.

9. The initial term of the agreement should be 5 years till March 31, 2004, with a provision for renewal on terms mutually acceptable. We request you to agree to the above terms and conditions and convey your acceptance at the earliest. We will approach our Board and the lenders on getting your acceptance.

We also request you to let us have drafts of the PPA, Escrow agreement and the Letter of Credit at the earliest. We propose to have one more meeting with your officials, after studying these drafts.

Looking forward for your early favorable response, Thanking you, Yours faithfully For JINDAL TRACTEBEL POWER CO., LTD.

Sd/-

S.S. Rao Dy, Managing Director & CEO CC: Superintending Engineer El. Projects. KEB”

70. 23.04.1999 is the next milestone. After referring to the previous development leading up to the proposal dated 31.03.1999, KEB wrote that there were two options available. The fall in the rupee was noted. Thereafter, it is stated as under:

> “The firm in its letter No.JTPC/KEB dated 31- 3-1999 has confirmed that the tariff payable by KEB for power purchased will be Rs.2.60/unit in the first year with an annual escalation of 5% every year. They have stated that they will be offering 50 MWs (equivalent to 36 MU per month) from the date of commissioning of the first unit and 100 MW (equivalent to 72 MU per month) with the commissioning of the second unit The first unit is expected to be commissioned in June 1999 and the second unit in August 1999. They have also indicated that in case they have any surplus power beyond 50 MWs and 100 MWs after commissioning of unit I and unit 2, with the approval of KEB, they will sell power in excess of 50 MWs and 100 MWs.
>
> The firm has also proposed the following after commissioning of Unit 2:
>
> 1. They will supply power with a threshold value of 75 MWs equivalent to 54 MU per month.
>
> 2. If supply is less than the threshold power value, then JTPC will pay penalty of 10% of the tariff for supplies below the threshold power value.
>
> 3. KEB shall guarantee that it will consume the threshold power value. In case the consumption is less than the threshold value, KEB shall pay to JTPC the full value of threshold at the applicable tariff as above.

4. The minimum supply and minimum consumption as above are on monthly basis.

5. If there is a escalation in fuel cost beyond 5% at any time, JTPC reserves the right to terminate the contract with 3 months notice, if KEB does not agree to compensate for such escalation.

6. KEB shall open irrevocable revolving letter of credit corresponding to 100 MW (energy 72 MU per month) power sales under which JTPC can get payment for its monthly bills. It shall also be supported by Escrow mechanism.

7. The initial term of the Agreement should be 5 years till March 31, 2004 with a provision for renewal on terms mutually acceptable. These are issues to be negotiated with the firm while

finalising the PPA and will be taken up later on.

This is for information of the government and it is requested that orders may please be obtained and communicated to us.

With regards, Yours sincerely, Sd/-

(K.P. SINGH) Shri Arvind Jadav, Secretary to Government, Department of Energy, Government of Karnataka, Bangalore."

71. Thereafter, on 12.05.1999 emerges the Government Order which reads as under:

1. KEB is permitted to finalize a Power Purchase Agreement with M/s Jindal Tractebel Power Company Limited (JTPCL) for the purchase of surplus power and submit the same to the Government for approval.

2. The rate per unit being Rs. 2.60 including variable charges with an annual increase of 5% every year.

3. The term of the PPA shall be for a period of five years.

4. To adopt the same principle of negotiated tariff for captive generating power project who intend to sell power to KEB.

By Order and in the name of the Governor of Karnataka (K.T. VUAYARAJ URS) Under Secretary to Government Energy Department" DEVELOPMENTS POST 01.06.1999

72. Nearly, six months after 01.06.1999, i.e., on 04.01.2000, the Superintending Engineer of KEB wrote to the first respondent stating that the communication related to the tariff of Rs.2.60 per kw/hr negotiated for purchase by the appellant. The first respondent was requested to furnish details of the break-up of the tariff so as to enable KEB to take further action in the matter. It may at once be noticed that appellant could not have negotiated prior to 01.06.1999. This is for the reason that the appellant was only an offspring of the Act, which came into force with effect from 01.06.1999. The first respondent wrote letter dated 06.04.2000 to the chairman of the appellant. It refers to the agreement between the first respondent and the appellant and that thereunder first respondent was to return 215.810 MU to the appellant. It is indicated that as on 06.04.2000, the first respondent had returned 199.80 MU to the appellant. Referring to order dated 12.05.1999, it was stated that it permitted the appellant to purchase power from it at Rs. 2.60 inter alia. It was also stated that it permitted appellant to finalise the PPA with the first respondent. It was also stated that the first respondent had finalised the PPA with the appellant and the final draft as accepted was submitted to the appellant in September-October, 1999.

73. It may be noticed that the aforesaid statement indicates that the final draft which was accepted between the parties was submitted only in September/October 1999. This is significant as it fortifies

us in our view that the parties did contemplate the PPA and the relevant terms were to be embodied in the PPA. The final draft was clearly ready only after 01.06.1999. Thereafter, referring to G.O. dated 7th July 1999, the first respondent goes on to state that the said order directs the appellant to operate the PPA as per the order dated 12.05.1999 only after complying with the obligations of GoK under order dated 07.07.1999. This is with reference to serial no.8 of order dated 7th July 1999. The first respondent goes on to state in the letter dated 06.04.2000 that it was continuously pursuing the appellant and GoK for signing of the PPA. It is further stated that even though the PPA was not yet signed, being pending with appellant, the absence of the PPA should not come in the way of supplying power by the first respondent to the appellant from 12.04.2000 as the order dated 12.05.1999 along with the details of the tariff does exist. Significantly thereafter, the first respondent indicated that pending finalisation and signing of the PPA between the parties, appellant was requested to accept power despatched by the first respondent from 12.04.2000. Invoices would be generated by the first respondent in terms of letter dated 12.05.1999. It was indicated by the first respondent that it was to be again subject to any changes required to be done subsequently as per the terms and conditions of the PPA, to be agreed and signed between the parties. The contents of the communication have been emphasised by Shri Raghavendra S. Srivatsa, learned counsel for the appellant as clearly indicating that matters were in a state of flux and uncertainty and still furthermore articulation was to await the finalisation of the PPA. On 12.04.2000 the appellant responded to the communication dated 06.04.2000. The appellant communicated its approval for the continued supply pending finalisation of the PPA but subject to certain conditions. We may notice those conditions:

> 1. The Grid support charges envisaged in the Wheeling & Banking and Grid support Agreement i.e., Rs. 1.73 Crores Annum will be provisionally deducted from the tariff invoices when the amount is paid. This will be subject to change and has to be paid as per the terms of PPA to be signed.

2. The 115% energy imported will be deducted from the energy exported, provisionally pending finalization.

3. The energy will be accounted only after signing of PPA.

4. The energy banked prior to signing of PPA will be treated as energy banked with the Corporation and will be accounted as per the Corporations rules.

5. This order is only for facilitating continued operations of the Power Plant and Corporation makes no commitments with respect to terms of PPA which is being finalized separately.

6. The metering arrangements should be as per the Article No. 4 of the Wheeling, Banking Agreement and Grid Support Agreement already signed copy of the same is enclosed.

[Emphasis supplied]

74. Pertinently, it is noteworthy that the appellant appointed a professional body CRISIL to re-examine the matter relating to tariff. CRISIL submitted report to the appellant that the rate should be Rs. 2.10 per KWH in the first year. The appellant found the figure indicative and recommended that Rs. 2.45 per KWH should not be exceeded. GoK issued corrigendum dated 08.05.2000 fixing the rate at Rs. 2.52 per KWH. A perusal of the letter dated 24.05.2000 sent by the Additional secretary of the appellant to the Chief Engineer Electricity, KTPCL indicates that Corporation gave its approval for the energy supplied to the Grid from 15.04.2000 onwards at Rs.2.52 per unit pending signing of PPA. It also contains certain terms. They are as follows:

> 1. The procedure for payments should be as per the standard procedure followed in case of IPP Projects.
>
> 2. 115% of imported energy should be deducted form the exported energy and payments will be made for net exported energy so arrived.
>
> 3. The metering should be as per the terms of Wheeling & Banking Grid support Agreement between KEB and JTPCL signed on 23-01-96, till such time PPA is finalized.
>
> 4. The firm has to submit an undertaking that the terms and conditions of PPA between KPTCL and JTPCL will be applicable for the payments made by KPTCL for the energy supplied by JTPCL from the date as approved by government till the PPA is signed.

5. This is only an order to facilitate payment of energy charges to M/s. JTPCL and Corporation makes no commitments in this regard and the terms of PPS will be finalized separately.

6. The energy transaction prior to 15-04-2000 will be finalized separately." (Emphasis supplied)

75. Therefore, the said communication would not indicate conduct which matches action in accordance with the concluded contract allegedly under the GO dated 12.05.1999, as the rate stood reduced from Rs.2.60 to Rs.2.52. Various conditions as noticed by us are incorporated. Importantly, condition no.5 indicates that it is only an order to facilitate payments. It was unambiguously indicated that the appellant did not make any commitment in this regard and clinchingly it was indicated that the terms of the PPA will be finalised separately.

76. The last communication after 1.6.1999, to bear in mind, is the Order dated 17.07.2000. Therein, in the Preamble, it is, inter alia, stated that KEB was permitted to finalise the PPA for purchase of the surplus power, as provided therein. Reference is made further to the Government Corrigendum dated 08.05.2000, whereunder, the rate was reduced to Rs.2.52 per unit. Next, it is stated that, on examination, it was found that, continuing with earlier rate of Rs.2.60 per unit, would result in honouring the commitment of the Government. There would be advantage of procuring the better price every year. The formal Order was passed by the GoK, permitting the appellant to purchase power at the rate of Rs.2.60, with an annual increase of five percent every year, as indicated in the

Preamble to the Order. The Order was to be implemented from the date of issue of the Order. The other conditions of the Government Order dated 12.05.1999 were to remain unaltered. It is thereafter that the draft PPA was prepared dated 07.11.2000. We may observe, that as far as the rate is concerned, the rate indicated in G.O. dated 12.05.1999, being restored and bearing in mind the contents of G.O. dated 07.07.2000, it could be found, that the 'rate' as such was concluded under G.O. dated 12.05.1999.

77. However, a golden thread, which runs through the correspondence is that, both the KEB, GoK and the appellant and the first respondent, did contemplate the execution of the PPA. The correspondence after 01.06.2000 also, unerringly, points to the fact that parties did not view the PPA as a mere desire. They have clearly proceeded on the footing that the terms of the agreement must be evidenced in writing. Quite clearly, the High Court has erred in not bearing in mind the contents of the communications and their true purport.

78. It is true that there is no express provision in the proviso to Section 27(2) of the Act within the meaning of second part of Section 10 of the Indian Contract Act, that the contract, which is concluded, must be in writing. However, the question would arise, as to whether there is a contract, which was concluded within the meaning of proviso to Section 27(2). It is further true that Section 27(2) does not use the words 'Power Purchase Agreement'. Section 19(4)(j) of the Act refers to 'contracts concluded'. Placing the said words side-by-side with the words used in the proviso to Section 27(2), we find that they are identical. The said words, viz., 'contracts concluded' must bear the same meaning, both in Section 19 and in Section 27. It is true that there is no format prescribed for a PPA. The format came in 2005. Section 27(2) and Section 19(4)(j), do not expressly refer to a PPA. However, the search must continue to ascertain the purport of the words 'contracts concluded'. In order that there must be a contract concluded, undoubtedly, there must be a proposal made, which must be accepted. There must be consideration for the promise. The proposal must be accepted, which must be communicated, as already explained. The acceptance must be unqualified. This is an over simplification of a complex process. We say this, as the parties can be said to have entered into a contract or a contract would be said to be concluded only when they are ad idem on all the essential terms of the contract. In other words, if the proposals containing the essential terms have been accepted, and the acceptance is communicated and, if the other conditions in Section 2 of the Indian Contract Act are complied with, viz., that is there is consideration and the contract is enforceable in law, within the meaning of Section 10 of the Act, it would lead to the creation of a concluded contract. Here, as we have noticed, the KEB, the GoK and, what is more, the first respondent, clearly contemplated that there should be a PPA.

79. We may further notice that there was a Banking, wheeling and grid agreement, executed in the year 1996 between the KEB and the first respondent. It is with the execution of the draft PPA, that it was decided that the earlier agreement of 1996, was to remain in abeyance during the period of the PPA. In the proposal dated 21.11.1998, the rate was initially shown as Rs.2.90/KWH but even this rate was exclusive of certain six elements, which meant that the rate would be even more. Thereafter, communication dated 19.01.1999, addressed by KEB to the GoK would indicate that negotiations were held, and what is more, detailed discussions were held, whereunder, it was decided that a price of Rs.2.60 per unit can be offered, comprising of Rs.1.70 as fixed charges and

Rs.0.90 as variable charges. Fixed charges were to be escalated by five per cent every year beginning from the second year. Conditions of penalty to be paid by the firm for short supply of power and assured offtake was also indicated. The KEB sought approval from GoK. The GoK responded to this recommendation by KEB by letter dated 05.03.1999. It was indicated that the present proposal kept the tariff open-ended and possible revision. The PPA being for a period five years, KEB was advised to negotiate with the first respondent for fixed tariff for five years. Revised proposal was called for, which led to further discussions. In the said communication, KEB expressed its willingness to buy power subject to certain terms and conditions. They included a penalty clause, both for short supply and short drawal and that the PPA was to be a simple document. A two-part tariff was ruled out. Equally, was payment of fuel cost, at actual. Therefore, on 31.03.1999, it is that, what has been described as the proposal, as such, was made by the first respondent. KEB was asked to convey its acceptance at the earliest. This is as first respondent was to approach its Board and its lenders on getting its acceptance. We will proceed on the basis that it was a matter of internal arrangement. On 23.04.1999, KEB wrote to the GoK. KEB mentioned about two options. Further, the KEB also, indicated it must be noted that the first respondent had made an offer as detailed in letter after the commissioning of Unit 2. They are seven aspects. They included obligation to supply power with a threshold value of 75MW equivalent to 54MU per month, penalty to be paid by the first respondent in case of supply being less than threshold value, payment by KEB of full value of threshold in case consumption is less than the threshold value and minimum supply and minimum consumption being on monthly basis, right of first respondent to terminate the contract, if there is escalation in fuel cost beyond five per cent at any time unless KEB agreed to compensate for such escalation. What is most important is, with regard to these matters, it was expressly indicated in the letter dated 23.04.1999 that 'these are issues' to be negotiated with the firm while finalising the PPA and will be taken up later on. These issues were not negotiated between the KEB and the first respondent before 01.06.1999. There is no dispute about this aspect. The fact that the appellant did not mention in communication after 01.06.1999 about the need for approval by the Commission is clearly insufficient to oust the jurisdiction of the Commission. The Commission cannot be prevented from exercising the power based on the conduct of the appellant in this regard which included preparation of the draft PPA. Equally, the act of the GoK in issuing corrigendum dated 08.05.2000 or the order dated 07.07.2000, cannot also detract from the power of Commission or lead us to hold that there was a concluded contract under Section 27(2). The fact that issues in letter dated 23.04.1999 have been included in terms of the PPA is clearly besides the point as the question is whether the parties were agreed on them as on 01.06.1999. They were clearly not. In this regard we may notice the sheet anchor of the first respondent, viz., the G.O. dated 12.05.1999. GoK in the said G.O., undoubtedly, agreed for the rate per unit to be Rs. 2.60, including variable charges. It also agreed for an annual increase of five per cent every year. The term of the PPA was to be five years. The other two aspects must, however, are not be lost sight of. By G.O. dated 12.05.1999, actually KEB was permitted to 'finalise a Power Purchase Agreement' and to submit the same to the Government for approval. What could be said to be approved by the Government was the rate, as indicated, and the term. The G.O. clearly indicated that all the parties, including the GoK contemplated a PPA with the execution of which alone, they were to be bound. The Principle of Negotiated Tariff for captive generating power project, who intend to sell power to KEB, was to be adopted. Several matters remained unsettled. It is not in the region of dispute that the issues, which KEB, in its letter dated 23.04.1999, had indicated, as issues to be negotiated while finalising the PPA and to be taken up later on, never came to be negotiated pursuant to the GO dated 12.05.1999 before 01.06.1999. This is crucially fatal to the case of the first respondent. We conclude that the parties contemplated a written PPA containing various details apart from the tariff rate and the tenure. There was no concluded contract with respect to several aspects, at least, as on 01.06.1999, which is the date on which the Act came into force. The fact that power was supplied after the Act came into force, must be understood in the context of the correspondence, which we have elaborately referred to. Even here, we may notice that there were doubts about the rates itself. An Expert Body was appointed. It recommended Rs.2.10 per KWH. The appellant, which, in the meantime, came upon the scene, as a result of the Act, and succeeded to the KEB, recommended that supply of power may be made by the first respondent subject to the finalisation of the PPA at a rate not exceeding Rs.2.45 per unit. GoK issued a Corrigendum providing for the rate of Rs.2.52 per unit. Supply was made and payments made at Rs.2.52 per unit. Government issued Order dated 07.07.2000 reinstating the rate of Rs.2.60 per unit. There may be merit in the contention of the first respondent that as far as the rate is concerned, there is consistency in that, GoK restored the rate at Rs.2.60 by way of honouring its contractual commitment. It is here that we must unravel the true scope of the words ‘contracts concluded’ in Section 27(2) of the Act. The proviso when it uses the words ‘contracts concluded’, does not use the words ‘contracts concluded as regards tariffs’. A contract of the nature, we are concerned with, cannot be said to consist only of a rate and the term or even the quantum included. In a contract of this nature, there are obviously various other aspects about which the parties must be ad idem. The rate, the term and quantum are integrally interconnected with other terms. There cannot be concluded contract without parties being ad idem about those terms. We found that the parties were not ad idem as regards the issues which were expressly left open for negotiations in the communication dated 23.04.1999. GoK also contemplated ‘finalising’ a PPA. The word ‘finalising’ and the word ‘PPA’, both of which did not take place before 01.06.1999, in our view, has resulted in a situation where a contract could not be said to be concluded even within the meaning of the proviso to Section 27(2) of the Act. In other words, even proceeding on the basis that even in a given case, a contract could be concluded within the meaning of the proviso, even in absence of a written PPA, bearing in mind also the absence of the word ‘PPA’ in the said provision and contrasting it with Section 18 where the same Law-Giver has used the word ‘PPA’, if the parties were not ad idem about the necessary terms and if the parties equally contemplated a PPA to bring it into existence a contract within the meaning of Section 27(2), then, clearly a PPA would be indispensable to attract the proviso to Section 27(2). This is not even a case where, in other words, parties were ad idem on all the essential aspects, which go into the formation of a complex contract as is involved in the facts of this case. Therefore, the supply of power, in our view, by the first respondent, after 01.06.1999, cannot be relied upon, in view of the facts revealed by the correspondence, which itself makes it a stop gap arrangement, and what is more subject to conditions which included execution of a PPA, to conclude that the subsequent conduct, unerringly pointed to the fact that a contract within the meaning of Section 27(2) stood concluded before 01.06.1999.

80. In Alexander Brogden (supra), from which considerable support is sought to be drawn by Dr. Abhishek Singhvi, learned Senior Counsel, the appellants who were defendants claimed that there was no binding contract between them and the plaintiffs. The appellants had supplied coal for some time to the plaintiffs. The appellants suggested after some time that there should be a contract entered into between the parties. After the agents met, the terms of the agreement came to be drawn

up by the agent of the plaintiff and sent to the defendants. The defendants filled up certain parts which had been left in blank, and what is more, the name of a person was shown as an arbitrator. The word ‘approved’ was written at the end of the paper. The chief partner in the defendant’s firm signed. Though the usual form of the signature of the partnership was “B & Sons”, it was the chief partner who signed. The defendant sent the paper to the agent of the plaintiff who put it in his desk. Nothing towards the execution of the formal agreement took place. Both parties acted upon the same. Coals were supplied. Payments were made. In fact, when there were some complaints in regard to the correctness of the supply in accordance with the paper containing the approval of the appellant through its chief partner, explanation and excuses were given, ‘the contract’ came to be alluded to in the correspondence. Further supplies resumed. However thereafter arose disputes. The appellants refused to honour the agreement to supply. In much of the correspondence which followed again the word ‘contract’ made its appearance. The plaintiff brought an action for damages for breach of contract. It was on these facts that Lord Hatherley inter alia held:

> “Now, my Lords, I apprehend that if it had stopped here, this is a course of action from which the inference would fairly be drawn which becomes quite conclusive afterwards. Up to the present stage to which I have brought it the case stands thus: Agreement proposed first of all by the coal company, sent as a proposition to the railway company, converted by the railway company into a definite agreement with some very slight alterations, sent back again with these few alterations and then adopted and approved by the coal company with only one important farther alteration, namely, the insertion of Mr. Armstrong's name as the arbitrator — a letter written with it by the person engaged in the whole negotiation on the one side, saying that he could not see the person who was negotiating on the other side until the time when the agreement was to come into effect — that immediately followed by an order for coals to the extent of 250 tons — an inquiry sent by telegram, and an anxious inquiry by letter also saying:— “Let us know whether we can rely upon your supplying us with 220 tons of coal per week, because, upon your answer whether you can or cannot supply us with that quantity will depend the arrangements I am to make with other coal companies in the North.

It was said that this was inconsistent with the Plaintiffs having an agreement by which the Defendants had bound themselves to supply that quantity of coal. I do not see any such inconsistency whatever. It might possibly bear on the question of whether the agreement was actually clenched at that moment or not. It might indicate this: If you cannot answer definitely that you can supply us with the 250 tons of coal, we may feel ourselves at liberty then to deal with the other coal companies — that might possibly be the true view of it, in which case it struck me it might be said that it was not eo instanti that the agreement was clenched. However, what followed did clench it most distinctly, because there not only comes the answer,... XXX XXX XXX My Lords, I will not go through the whole of these transactions, If you ask me, when in my judgment the agreement was complete, I answer that the agreement was complete when the first coals, the 300 tons of coal supplied in January, were invoiced at the differing price, and when that differing price was accepted and paid. I think that did bring the case up to what Mr. Herschell very fairly admitted, as he was bound to admit it, would be a sufficient case to make out on the part of the Plaintiffs. It does establish a course of action on the part of the Plaintiffs of such a character as necessarily to lead to the inference on the part of the Defendants that the agreement had been accepted on the part of the Plaintiffs, and was to be acted upon by them; and they did act upon it accordingly.”

81. We have noticed the facts. It was a contract for sale of coal. There was a long course of dealing between the parties. The defendant wanted, however, to have a written contract. The agents met. The terms of the draft agreement were prepared by the agent of the buyer and sent to the seller. The chief partner of the Seller firm, in fact, filled up certain parts of the terms which had been left in blank. What is more, the name of the arbitrator to decide in the case of a dispute was also written. Most importantly, the word ‘approved’ was written. It was signed by the chief partner. It was sent to the agent of the buyer. Though the matter did not culminate in the drawing up of a formal written agreement as such, the evidence revealed that the coal was supplied and paid for. It is pertinent to notice the context in which the question arose. It did not involve the aspect about a statute like the Act in question, with its ramifications both qua the alleged contracting parties and the impact on the object of the Act bearing in mind the interests of the consumers as well. At any rate, the view taken in the said case cannot be safely applied even otherwise to the facts of the case before us. It is not a case where the parties were not ad idem on all the essential terms of the contract. It is not a case where the correspondence revealed that a concluded contract did not exist. The conduct of the parties in the supply of the goods in question, and the acceptance of the same and the payment made therefor and the not infrequent reference to the terms of ‘the contract’ as approved by the chief partner of the Seller firm “as contract” fortified the Court in the facts in concluding that there was a concluded contract. On the other hand, the correspondence in this case establish a completely different factual matrix. Both before 01.06.1999 and thereafter, the parties clearly contemplated the execution of the PPA. They were not ‘ad idem’ on seven matters which are expressely left open for negotiations as indicated in letter dated 23.04.1999. We are unable to brush aside these as not constituting essential terms. To conflate ‘concluded contract’ even in the context of the proviso to Section 27, as one merely agreeing to the tariff, tenure and the quantum overlooks the complex nature of the working of such a contract. We cannot be oblivious to the impact of provisions relating to penalty, threshold value, consumption and other terms. Before 01.06.1999, it is not in dispute that no negotiation as was contemplated in regard to the same took place. Even negotiations after 01.06.1999, and the preparation of a draft PPA on 07.11.2000, cannot clearly suffice. This is a case of a contract involving a public body. This is also a case where the implications of the contract are not confined to the parties alone. The contract impinges on interest such as interest of the consumer and other relevant aspects. We, therefore, are of the view that we cannot permit the first respondent to draw support from the said judgment.

82. In Kollipara Sriramulu (Dead) by His Legal Representative (supra), the Court was dealing with a question, whether there was an oral agreement for the sale of shares by the partners of the firm. One of the contentions of the appellant therein was that there was no contract because the sale was conditional upon a regular agreement being executed and there was none. It is apposite that we notice the following discussion:

> “3. ... We do not accept this argument as correct. It is well established that a mere reference to a future formal contract will not prevent a binding bargain between the

> parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed.

The question depends upon the intention of the parties and the special circumstances of each particular case. As observed by the Lord Chancellor (Lord Cranworth) in Ridgwa y v. Wharton [6 HLC 238, 63], the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In Von Hatzfeldt-Wildenburg v. A lexander [(1912) 1 CH 284, 288] it was stated by Parker, J. as follows:

> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contact is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

4. In other words, there may be a case where the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract. In Rossiter v. Miller [3 AC 1124] Lord Cairns said:

"If you find not an unqualified acceptance subject to the condition th at an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise then you cannot find a concluded contract." In Currimbhoy and Company Ltd. v. Creet [60 IA 297] the Judicial Committee expressed the view that the principle of the English law which is summarised in the judgment of Parker, J. In Von Hatzfeldt-Wildenburg v. Alexander [(1912) 1 CH 284, 288] was applicable in India. The question in the present appeals is whether the execution of a formal agreement was intended to be a condition of the bargain dated July 6, 1952 or whether it was a mere expression of the desire of the parties for a formal agreement which can be ignored. The evidence adduced on behalf of Respondent 1 does not show that the drawing up of a written agreement was a pre-requisite to the coming into effect of the oral agreement. It is therefore not possible to accept the contention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written document. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed. We accordingly hold that Mr Gokhale is unable to make good his argument on this aspect of the case." The principle is unexceptionable. But we are of the view that the facts are distinguishable and, on the facts, herein, there was no concluded contract and what is more, a PPA was not a mere desire but an indispensable requirement to conclude the terms.

83. It is clear as day light that all through the parties undoubtedly contemplated entering into a power purchase agreement. The subject matter of the contract, the position of the parties, the implications of the working of the contract and more importantly, the intention of the parties do not persuade us to safely gather that there was a concluded contract upon negotiations and correspondence, culminating in the Government Order 12.05.1999. It is clear that even the GO dated 12.05.1999 expressly contemplated only a permission by the Gok to the KEB to finalise "a PPA" for the purchase of surplus power. The word "finalise" in the context of the PPA cannot be played down in the context of the previous correspondence at any rate. It was, in fact, also contemplated that the PPA which was to be finalised must after finalisation be submitted again to the government. GoK was thereafter to grant its approval. This cannot be overlooked. C.A. @ S.L.P. (C) NO. 23793 OF 2004

84. The contention of the appellant-Commission is that it was not a party originally in the appeal. The Court, on 17.08.2002, directed the Commission to be ready with the written submission on the question of interim relief. On 19.11.2002, the High Court directed the appellant in the other case to add the Commission as a party. On this basis, it is contended that the findings in the impugned Order, that at no stage, the High Court had directed the Commission to be impleaded, is not correct.

85. Next, it is contended that the finding that Commission filed extensive pleadings and contested the appeal, exhibiting an abnormal interest, is not correct. The Order dated 17.08.2002, hereinbefore referred to, is relied upon. The finding, therefore, that the Commission exhibited an abnormal interest in contesting the appeal or filed extensive pleadings, is impugned. As regards the decision of the Court to not allow the impleadment of the Commission, it is contended that the appellant does not seek to challenge the same. All that the learned Counsel submits is that the observations made against the appellant-Commission may be set aside.

86. Shri Gopal Jain, learned Senior Counsel for the first respondent has no objection to the same. Therefore, the appeal filed by the Commission is to be disposed of, setting aside the observations made against it and the appeal is to be allowed on the said basis.

THE CONTOURS OF SECTION 41 OF THE ACT

87. Section 41 of the Act reads as follows:

> "41. Appeals against the order of the Commission. - Any person aggrieved by any decision or order of the Commission passed under this Act may file an appeal to the High Court of Karnataka within sixty days from the date of communication of the decision or order of the Commission to him, on questions of law arising out of such order:

> Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding thirty days." (Emphasis supplied)

88. A Right of Appeal is a creature of a Statute. The right can be qualified or conditioned. The ambit of the appellate power is to be discerned from the terms of the Statute. A 'question of law' is not the same as a 'substantial question of law'. However, when the Statute insists on a 'question of law' to maintain an appeal, the Appellate Body stands constrained to that extent.

89. Interpreting Section 15Z of the Securities and Exchange Board of India Act, 1992, which also conditions the Right of Appeal, 'on any question arising out of such Order', this Court, speaking through P.S. Narasimha J., in Securities and Exchange Board of India v. Mega Corporation Limited11 held, inter alia, as follows:

> "14. On a 'textual' interpretation, the expression 'question of law' is defined in the Black's Law Dictionary as follows:
>
> "1. An issue to be decided by the judge, concerning the application or interpretation of the law;
>
> 2. A question that the law itself has authoritatively answered, so that the Court may not answer it as a matter of discretion;
>
> 3. An issue about what the law is on a particular point; an issue in which parties argue about, and the court must decide what the true rule of law is;

4. An issue that, although it may turn on a factual point, is reserved for the court and excluded from the jury; an issue that is exclusively within the province of the judge and not the jury"

17. The jurisdiction of the Supreme Court under Section 15Z to consider any question of law arising from the orders of the Tribunal should therefore be seen in the 'context' of the powers and jurisdiction of the Tribunal under Sections 15K, 15L, 15M, 15T, 15U and 15Y of the Act. It is in the functioning of the Tribunal to re-examine 11 MANU/SC/0362/2022 all questions of fact at the appellate stage while exercising jurisdiction under Section 15T of the Act. In Clariant18 and National Securities Depository19, this Court had an occasion to examine the jurisdiction of the Tribunal and explain that the Tribunal has wide powers. Being a permanent body, apart from acting as an appellate Tribunal on fact, the Tribunal routinely interprets the Act, Rules and Regulations made thereunder and evolves a legal regime, systematically developed over a period of time. The advantage and benefit of this process is consistency and structural evolution of the sectorial laws.

19. It is in this very context that the UK Supreme Court in the case of Jones v. First Tier Tribunal,20 formulated certain principles for appellate courts to interfere against the orders of Tribunals on the ground of existence of questions of law. The Court held as under:

"16 ... It is primarily for the tribunals, not the appellate courts, to develop a consistent approach to these issues [of law and fact], bearing in mind that they are peculiarly well fitted to determine them. A pragmatic approach should be taken to the dividing line between law and fact, so that the expertise of tribunals at the first tier and that of the Upper Tribunal can be used to best effect. An appeal court should not venture too readily into this area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals."

20. The scope of appeal under Section 15Z may be formulated as under:

20.1 The Supreme Court will exercise jurisdiction only when there is a question of law arising for consideration from the decision of the Tribunal. A question of law may arise when there is an erroneous construction of the legal provisions of the statute or the general principles of law. In such cases, the Supreme Court in exercise of its jurisdiction of Section 15Z may substitute its decision on any question of law that it considers appropriate.

20.2 However, not every interpretation of the law would amount to a question of law warranting exercise of jurisdiction under Section 15Z. The Tribunal while exercising jurisdiction under Section 15T, apart from acting as an appellate authority on fact, also interprets the Act, Rules and Regulations made thereunder and systematically evolves a legal regime. These very principles are applied consistently for structural evolution of the sectorial laws. This freedom to evolve and interpret laws must belong to the Tribunal to subserve the Regulatory regime for clarity and consistency. These are policy and functional considerations which the Supreme Court will keep in mind while exercising its jurisdiction under Section 15Z." The Commission is an Expert Body. Interference with its findings cannot be sustained, to begin with, if it is bereft of reasons. Findings of such a body must receive due deference. Perversity in the sense of findings, which are wholly without basis or material or which no person with the professed skills would arrive at, may merit interference. A finding, which ill squares with a clear statutory injunction, would leave the door ajar for overturning the finding. THE OTHER FINDINGS OF THE HIGH COURT

90. We must deal with the three other findings. The High Court has found that there is merit in the argument based on principles of promissory estoppel and legitimate expectation. We would have explored the matter and rendered our findings qua the approach of the High Court in regard to this matter which at least at first blush looks 'wholly untenable' but since the first respondent has taken the stand before this Court that it may not seek to draw support from the said principles and rightfully so, we desist from further enquiry.

WHETHER THE FINDINGS OF THE COMMISSION ARE PERVERSE, ARBITRARY AND WITHOUT APPLICATION OF MIND (POINT NO.4)?

91. As regards the finding by the High Court answering point no. 4, namely, whether the impugned orders are perverse, arbitrary and passed without application of mind, our attention is drawn by the appellant to the limited nature of jurisdiction exercised by the High Court under Section 41 of the Act.

92. It has been the endeavour of the appellant to point out that contrary to the point which was raised, namely, whether the orders were perverse, arbitrary and passed without application of mind at any rate, the point has been answered in a manner which cannot be sustained. The High Court opens the discussion under point no. 4 by referring to the contention of the first respondent that the impugned order suffers from certain errors apparent on its face. Reliance is placed on a decision of this Court dealing with power of this court under Article 136 of the Constitution.

93. The High Court has proceeded to find that patent errors have been committed by the Commission. It is found that the Commission has wrongly calculated the fixed charges for 487MUs while fixing the tariff. This is after finding that the fixed charges should be for 657Mus. The second error, it is found, lay in the Commission finding that the incentive payment charges should be Rs.0.952, in arriving at the tariff rate whereas incentive payment charges were taken as Rs.0.924 per unit. The tariff would stand raised to Rs.2.54 per unit, if the aforesaid errors were corrected. Next, it is observed that these errors were not disputed by the appellants in the pleadings before the High Court or in the course of argument. The learned Senior Counsel for the appellant Shri S.S. Naganand, who submits that he had appeared in the High Court, pointed out that, in the first place, being a Statutory Appeal, there is no provision for pleadings, as such, in the High Court. Further, the Commission has given a basis for what it has done. A detailed note is also made available, in this regard, to this Court. The learned Counsel has further said that the matter was argued threadbare before the Court. We find that the High Court has not given any independent reasoning except as we have referred to. Next, the High Court has found that, having agreed to a negotiated single part tariff, the Commission could not have unilaterally ignored the well-established parameters and applied norms, which were, undoubtedly, valid for a two-part tariff and super impose the same in calculating tariff on a single part tariff basis. The two-part tariff applied uniformly, it is found would have resulted in a tariff rate of Rs.3.16 per unit, which was much higher than Rs.2.60 under the draft PPA. Here again, these findings appear to be based on there being a concluded contract and, secondly, are bereft of any reasons and material. The High Court proceeds to note the case of the first respondent that tariff of the first respondent was one of the cheapest as it was based on least cost tariff basis unlike other companies. No attempt is made to deal with the findings of the Commission or the power and duty of the Commission. This part of the finding is summed-up by finding that there is ‘some substance’ in the contention of the first respondent that it was at the receiving end of ‘invidious discrimination and arbitrariness’. We take exception to this approach by the High Court in a Statutory Appeal conditioned by the requirement that a question of law must arise. A finding that there is ‘some substance’ cannot be the approach, when it is finally disposing of an appeal and finding fault with the Order of an Expert Body, in particular. Equally, we are mystified by the invocation of the Doctrine of Invidious Discrimination and Arbitrariness in the facts of the case.

94. Next, the High Court proceeded to find fault with the fixing of the heat rate disregarding the norms laid down by the Ministry of Power/CEA or whichever is lower. The High Court has been critical of the Commission fixing of the plant load factor disregarding the norms under the Electricity Supply Act or the negotiated plant load factor. There are no reasons forthcoming to support this finding. High Court next found fault with the Commission for doubling the penalty. There is no rationale. There is no appreciation within the limits of its qualified jurisdiction.

Reduction of escalation by the Commission from five per cent to two and a half per cent per annum, is apparently with reference to what transpired during the negotiations and, therefore, proceeding on the basis that the matter was a concluded contract, as it was, indeed, the finding of the High Court. It is without considering the ambit of the power of the Commission and the objects of the Act. There are similar findings with respect to fixed costs, disproportionate loading, tantamounting to cross subsidisation being contrary to the Judgement of this Court in West Bengal Electricity Regulatory Commission v. CESC Ltd.12. Again, there is no discussion and the High Court has purported to proceed as if it is itself an Expert Body. At least, the reasons have not been furnished for justifying the Commission being arraigned in the manner done. Likewise, there is impugning of the findings of the Commission in regard to grid support charges being unjustified and ultra vires the Act. It is also stated that objections filed by the first respondent were not considered by the Commission. Lastly, it was found that the Commission has not given reasons.

95. We are of the view that the High Court has apparently proceeded on the basis that there existed a concluded contract within the meaning of proviso to Section 27(2). We have found that it is unsustainable. We are of the view that findings which have been rendered under Point No. 4, have been considerably influenced by the finding relating to there being 12 (2002) 8 SCC 715 negotiations and the emergence of the concluded contract. We are of the view that, at any rate, particularly bearing in mind, the limited nature of the jurisdiction of the High Court under Section 41 of the Act, the approach and the findings of the High Court under Point No. 4, may not be sustainable. But, at the same time, we are of the view that, being an assessment of the findings of an Expert Body, the High Court must reconsider the matter. To the said extent, the matter must be remitted back to the High Court in regard to Point No.4.

CPP V. IPP (POINT NO.3)

96. The last question which remains relates to point no.3 that is, whether the first respondent was a CPP or an IPP.

97. Under point no.3, the High Court has relied upon the orders of GoI dated 09.10.1995, 31.01.1996, 06.11.1996 and 09.01.1997. The High Court has found that under these orders there is a distinction between the IPP and CPP and the first respondent has complied with the requirement under the Supply Act for establishing a generating company with reference to Sections 29 to 31 for sale, pursuant to Section 43A, making it an IPP. It is found that CPP would have to get clearance under Section 44 of the Electricity (Supply) Act, whereas an IPP would require to process the matter under Sections 29 to 31 of the Electricity (Supply) Act, 1948. Reliance was placed on the fact that the first respondent was granted techno-economic clearance by order dated 22.03.1996.

98. It is further found with reference to the G.O. dated 07.03.1994, which we have referred to that GoK gave approval so that continuous power could be supplied to the grid making it more stable. Reliance is also placed on letter dated 01.03.1995 allegedly issued by the appellant (whereas it is actually issued by the KEB) confirming to the CEA, that the first respondent was an IPP. It is next found that under the Wheeling and Banking Agreement dated 26th January, 1996 sale of firm capacity to the appellant was provided for. GoK also confirmed to the CEA that the first respondent

was an IPP under Section 43A of the Supply Act. GoK order dated 2nd March, 1996 providing for consent for sale of power under Section 43A of the Supply Act is referred to. The techno economic clearance granted by the CEA dated 22nd March, 1996 is adverted to and it is further found that such a clearance was unnecessary if the first respondent was a CPP. The appellant is alleged to have, by letter dated 29th March, 1996, supported the project cost and forwarded the same for the approval of GoI. The appellant is also alleged to have participated in the discussion with the CEA for approval of the project and started the transmission system as availed by all IPPs. It was further found that the procedure for payment of charges for supply of electricity was to be a standard procedure followed in case of IPP projects. Next, the High Court reasons that if the first respondent was a CPP, it would have set up a 140 MW plant to meet the requirements of JVSL and not 260 MW plant. 260 MW plant was contemplated to provide firm capacity to the appellant as evident from the order dated 7th March, 1994. The detailed project report provided that the requirement of steel plant was only 150 MW and rest 110 MW will be supplied to KEB to reduce the power deficit in the State. If the first respondent was a CPP, it could not have dedicated firm capacity to the appellant and guaranteed continuous supply of power. The Commission itself, having recognised the fact that the status of IPP was granted, it could not treat it as CPP for determining the tariff. The mere use of common infrastructure for coal handling and water supply could not render the first respondent a CPP. The power plant was designed to fire either corex gas or coal as fuel which confirmed that the first respondent plant was not a captive plant and it was intended to supply power to the appellant even with the Steel plant not working and not producing corex gas. The first respondent and JVSL were distinct corporate entities having obtained financial assistance and project approval on stand-alone basis. The fact that the capacity of 240 MW was underwritten by JVSL was also found not germane to conclude that the first respondent was a CPP. The Commission, it was found, erred in arriving at 1637 MUs at 77 per cent PLF and fixed charges at 1150 MUs supplied to appellant ignoring that the first respondent was supplying energy to JVSL at 85 per cent PLF. Such direction was based on the wrong conclusion that the first respondent was CPP. The High Court concluded that the power plant of the first respondent was having the status of IPP and not CPP.

99. According to the appellant, the operation of first respondent and JVSL was intertwined and interdependent. It is contended by the appellant that they share common infrastructure for coal handling, water supply and the coal is purchased for the first respondent by its sister company, JVSL, and JVSL raised invoices on the first respondent. Therefore, the first respondent is to be treated as a CPP as it is supplying power to JVSL. Reliance is placed on the Wheeling, Banking and Grid Support Agreement dated 23.01.1996. The priority of the sales was to begin with sales being made to its dedicated customers firstly. Secondly, power was to be wheeled to third party exclusive customers, and only if excess power is available, it was to be supplied to the KEB on negotiated terms. The Government Order dated 12.05.1999 itself makes it clear that the first respondent was selling surplus power to the appellant and indicates that the same principle of negotiated tariff for CPP would be applicable to the first respondent. The agreement dated 14.10.1999 entered into between KEB and the first respondent for supply of power from KEB to JVSL on barter basis makes it clear that the entire net capacity is underwritten by JVSL and it has permitted the first respondent to enter into a Wheeling and Banking Agreement as well as PPA with KEB for sale of excess power. It is further pointed out that the Government of Karnataka has extended concessions for payment of electricity taxes by treating it as a captive unit by Government Order dated 21.12.2000. The power

proposed to be supplied by the first respondent to the appellant was surplus power and the grant of status of IPP by GoK would make no difference. The appellant has a case that the grant of status of IPP was also based on the difference in the shareholding of the companies but that cannot overlook the other aspects about the transactions from which it could be concluded that the first respondent was a CPP, it is contended.

100. The first respondent would support the findings of the High Court. Reliance is undoubtedly placed on the Government of India policies stressing the distinction between the IPP and CPP. Having obtained consent under Sections 29 to 31 of the Supply Act, 1948, it is contended that it is an IPP. Prior to the Electricity Act, 2003, there was no definition of a CPP nor were their requirements set out. Such requirements evolved only with the Electricity Rules of 2005. The first respondent has been recognised by the KEB and the GoK as an IPP. Reliance is placed on GoK order dated 07.03.1994, KEB letter dated 01.03.1995 confirmation by GoK of the IPP status, GoK Order dated 02.03.1996, CEA letter dated 22.03.1996, granting techno-economic clearance, and GoK letter dated 22.03.1996, supporting project cost. G.O. dated 02.03.1996, according the exemption to the first respondent from electricity tax only on the power supplied to JVSL, its sister concern. The alleged CPP status was only qua power sold to the sister concern to benefit it and not the first respondent and it is not as projected. The establishment of the plant of 260 MW can be explained not with it being CPP, in which latter case, it would have sufficed to set up a plant of 140 MW. The letter dated 01.03.1995 sent by KEB confirmed that the first respondent was an IPP. An affidavit of the appellant dated 18.10.2001 admitted that the first respondent was an IPP. The DPR contemplated the need to supply power to the grid and the appellant and GoK approved the project cost as an IPP and it was forwarded to the CEA for approval.

101. The guaranteed minimum supply of threshold power is compatible with the first respondent being an IPP. Penalties for failure to sell the firm capacity or rather for short supplies is relied upon. Payment of charges for supply of electricity was based on procedure in IPP projects. The tariff order of the commission for the years 2000, 2002 and 2003 shows that the first respondent was an IPP. Sharing of common infrastructure did not necessarily imply that the power plant of the first respondent was a CPP. There were other projects taking advantage of such infrastructure. It was intended only to optimise the project cost. FINDINGS

102. It is not in dispute that it is with the Electricity Rules of 2005 that the requirements of a captive generating plant were laid down. It is the admitted position that at the relevant time there was no definition of a CPP in existence. The requirements of a captive generating plant was, according to the first respondent, not available.

103. It would appear that the private power policy of the GoI was announced in the year 1991. GoI letter dated 09.10.1995 would show that there were a number of proposals through IPP route. It was found however that it would have a long gestation period. Captive power plants provided an alternative. GoI decided that captive power plants of industries could be allowed to sell the surplus power, if any, to the grid on a remunerative tariff as per mutually agreed terms. This would add to the generating capacity in the country. There is mention of co-generation as also small power production. It was therefore suggested to all Chief Secretaries of the states that they may create an

institutional mechanism which may allow captive power units an easy automatic entry into power sector by quickly clearing such applications by the state governments by giving them rational tariff for purchase of surplus power by the grid and the third-party access for direct sale of power to other industrial units. We may notice that this communication is after GoK order dated 07.03.1994 by which the first respondent was permitted to be set up. Moreover, what is contemplated under captive power plant was that it could sell surplus power, if any, to the grid as per mutually agreed terms. Therefore, in the case of the captive power plant, primarily, the industries could satisfy their power requirements from the captive units.

104. On 01.03.1995 the KEB responding to the request from the Director of the CEA to clarify whether the generating plant set up by the first respondent was captive plant under Section 44 of the Supply Act, 1948 or a generating plant, stated that it was an independent generating plant. The copy of the approval granted by the GoK for setting up the generating plant was enclosed. This would take us to G.O. dated 07.03.1994 which we have already adverted to. What is stated therein is that the first respondent's sister company namely Jindal Iron and Steel Company was setting up a combined gas cycle plant of 300 MW x 150 MW within the site allotted for a steel plant for which GoK had already given approval. There is reference to the financial aspects. Thereafter, it is recited that the advantage of setting up the power plant at Bellary- Hospet was that the excess power generated will be fed to the KEB grid and can sell to other industrial units in the area, besides generation of additional employment. The KEB was found seeking a detailed project report indicating the cost of the project inter alia. It is thereafter that the first respondent was permitted to set up the plant in two phases of 300 MW of 150 MW each. This was subject to approval of the GoI in respect of the foreign investment. It was also subject to obtaining statutory clearances under the relevant Acts. The first respondent was permitted to sell power directly to industrial units in the area at mutually negotiated rates again subject to approval of the state government. The first respondent had to sell the balance power to KEB at tariff to be determined as per norms dated 31.03.1992. We may get the prima facie impression that the said terms would appear to be in tune with the concept of a captive unit, as contemplated in GoI letter dated 09.10.1995.

105. It would appear it is not in dispute that the capacity has been reduced from 300 MW to 260 MW. The circumstances in which it stood reduced is not borne out by any order produced before us. The next development in chronological order, we notice, is the Wheeling and Banking Agreement dated 23.01.1996. The agreement is entered into between the first respondent and the KEB. The agreement refers to the company or the first respondent as a generating company and that it proposed to set up a 2x120MW dual fire which is to be understood with reference to the statement that it is fired, namely, with corex gas with coal firing to supplement it. Next it is stated that the first respondent intended to sell the 'majority' of the power to dedicated or third-party exclusive customers as defined. Dedicated customers has been defined in the agreement as those consumers of power supplied solely by the first respondent through transmission lines set up by it and it was to include the sister concern, JVSL. Third party exclusive customer was defined to mean the consumer who had contracted for its entire demand and energy requirements from the first respondent. However, the power was to be supplied through the KEB's transmission system. It is as we have already noted provided in Clause 2.4 that 'if at any stage' the first respondent offered 'excess' firm capacity for sale to the board (KEB), then, the Board 'may purchase' the same from the first

respondent. Such purchase was to be based on agreement on price and other terms to be negotiated at the time of such sale. Therefore, it would appear that what was contemplated was the sale of the majority or most of the power generated to its dedicated customers which included the JVSL and to other third party exclusive customers. Clause 2.4 appears to provide that if at any stage it was found that there was excess power which could be firmly offered to KEB, KEB may purchase such power. The order dated 30.01.1996 is not seen produced. It is one of the letters of the GoI which has been referred to by the High Court and the first respondent.

106. On 02.03.1996 GoK after referring to the G.O. dated 07.03.1994 and the request by the first respondent for support in various matters offered certain concessions. GoK gave its consent under Section 43A(1)(c) and paragraph-3.2 of the GoI Tariff Notification dated 13.03.1992 as amended for sale of power by the first respondent directly to any customer at rates to be mutually negotiated by the first respondent. It is also provided that the consent was also to be deemed as previous sanction under Section 28 of the Indian Electricity Act, 1910. Still further exemption was granted under Section 3 of the Karnataka Tax on Consumption of Electricity Act, 1959 on the consumption of electricity generated by it for five years from the date on which the power plant of the first respondent went into commercial operation. Likewise, the consumer was exempted. Certain other concessions were promised.

107. Section 43A(1)(c) of the Supply Act, 1948 provided inter alia that a generating company could enter into a contract for sale of electricity generated by it with any other person with the consent of the competent government or governments. The Order, thus, must be viewed in the said perspective. This is apart from it operating as consent for sale within the meaning of Section 28 of the Electricity Act, 1910.

108. On 22.03.1996, we may notice that the ‘scheme’ for establishment of a 2x130 MW corex/ coal based thermal power station was accorded techno economic clearance by the CEA subject to certain conditions which are indicated therein.

109. Next in chronological order is the communication dated 06.11.1996 issued by the GoI. The heading in fact of the said communication is promotion of co-generation power plants. In the said communication after noticing the energy shortage and referring to letter dated 09.10.1995 it was indicated that by the subsequent communication dated 30th January, 1996 (a communication which we are not provided with) regarding clearance process of captive power that the captive power plants of any other persons including the juristic persons and excepting generating companies was not subject to Section 29(2) of the Supply Act. It is further indicated that the Electricity Board [KEB] was to send to the Authority under Section 44(2)(A) if the capacity of a new generation station, inter alia, exceeded 25 MW. Thus, in terms of Section 44 of the Act captive power/ co-generation plants required the approval of the board only. The Board were to refer the proposal for consultation with the CEA where the capacity exceeded 25 MW under Section 44 (2A). Thereafter, the order went on to deal with co-generational units which were understood as units which simultaneously produce two or more forms of energy.

110. The last communication is dated 09.01.1997. Therein, reference is made to the order dated 30th January, 1996 and that it was therein clarified that proposals for setting up captive power plants under Section 44 would not come under the purview of Sections 29 to 31 of the Supply Act, 1948, which related to the CEA's detailed scrutiny and techno economic clearance. It was added that the intention was that in view of the large demand supply gap existing industries should be encouraged to set up their own captive power plants to add quick captive capacity in the electricity supply industry. The letter dated 9th January, 1997, further noticed that there were suggestions from some States that some of the industries found it difficult to set up power plants through the existing companies and they favoured setting up of power plants by an independent entity (IPP) with total dedication of power generated to the existing industry/group of industries but without any sale of power to the State Grid. In the letter dated 01.01.1997, it is further observed pertinently that however these would be generating companies by definition and reference is made to GoI instructions dated 18.01.1995, which required that selection of IPP be through competitive bidding by the government or electricity board. The industries preferred to have the choice of negotiations with parties on a bilateral basis instead of the IPP being selected through competitive bidding. GoI decided to facilitate setting up of 'generating stations' by 'IPP' exclusively for 'the captive use' of an industry or a group of industries without involving any sale to the State Grid. The selection of such IPP through competitive bidding was no longer required. Thus, letter dated 9th January, 1997, appears to indicate that IPP generating stations could be set up exclusively for the 'captive use' of the industry or a group of industries without any sale to the State Grid. Secondly, such IPPs could be selected without competitive bidding. We do not have the letter dated 18.01.1995, which is referred to in letter dated 9th January, 1997. We do not also have the order dated 21.12.2000 which appears to have been relied upon by the Commission and which is relied upon by the appellant before us, as per which the first respondent availed concessions from payment of electricity taxes holding out to be a CPP. We further notice that the High Court in the impugned judgment does not appear to have dealt with order dated 21.12.2000. There is a case for the appellant that when IPP desires to contract for power with the appellant on two-part tariff basis, KEB/ the appellant must be involved in every stage of project formation, finalisation of capital costs. According to appellant, KEB/ KPTCL would be involved during the discussions stage to accord techno economic clearance as well as for whole supply agreement to ensure the least cost and these formalities have not been complied with. In this case the High court has referred to the appellant (KEB) vide its letter dated 29th March, 1996, supporting the project cost and forwarding the same for approval to the GoI. It is also further stated that the appellant participated in discussion with the CEA for approval of the project and supported the transmission system. We are unable to locate the letter dated 29th March, 1996. No doubt, the appellant must be understood as its predecessor the KEB. But there is no communication dated 29th March, 1996 indicating that the KEB supported the project cost. It would appear that a copy of such a letter (29.03.1996) was annexed as Annexure 14A before the High Court. Further, in the appeal memorandum, in paragraph 9 thereof, it would appear that what was contended by the first respondent was that the appellant and GoK approved the project cost and DPR and letter dated 29.03.1996 was produced. Appellant is stated to have participated in the discussion before the CEA and the second respondent (GoK) actively supported the project by granting approval and various benefits. The High Court has apart from finding that the appellant participated also stated that appellant supported the transmission system as availed by all IPPs. Prima facie, we would think also that what was contemplated in the Wheeling and Banking Agreement dated 23.01.1996 was that, if

there was any excess which meant after fulfilling its obligations to the dedicated and third-party customers, it would be offered to KEB.

111. The appellant has a case that what in 'substance' was agreed to be sold to the appellant was only surplus available power. The status of IPP being established also would not by itself be relevant in the determination of the cost, it is contended. We would think that the interest of justice require that taking note of also the fact that first respondent had allegedly specifically claiming to be a CPP availed benefits and this has also not been considered by the High Court, the matter must be reconsidered by the High Court. The findings therefore, that the first respondent was CPP will stand set aside and High Court will undertake a consideration of the matter based on a study of the documents and also taking note of the proceedings by which, the first respondent allegedly claimed as CPP and availed benefits. The High Court will also consider the argument of the appellant that even treating the first respondent as IPP, in the context of the contention of the appellant that the sale contemplated to the appellant was only of 'surplus power', only after the demand of the first two categories were fulfilled on the aspect of fixation of tariff.

112. The upshot of the above discussion is that the appellant is entitled to succeed in the manner we shall hereinafter immediately indicate. The appeal is partly allowed. The finding that there was a concluded contract within the meaning of the proviso to Section 27(2) of the Act will stand set aside. The findings which have been rendered under point no. 4 about perversity, arbitrariness in the findings of the Commission are set aside. The finding relating to the first respondent being an IPP is also set aside. The matter will now stand remitted back to the High Court. It will proceed on the basis that there was no concluded contract within the meaning of the proviso to Section 27(2) of the Act. It will proceed, however, to deal with the appeal under Section 41 of the Act in regard to point no.3 and 4, namely, whether the findings of the Commission are such that they are required to be interfered under the jurisdiction available under Section 41 of the Act including the question whether the first respondent is a CPP or an IPP.

113. We must also deal with the request made by the learned Counsel for the appellant that as Rs.100 crores has been received by the first respondent on the strength of a bank guarantee based on the impugned judgment, under the interim Order passed by this Court, if the appeal is allowed, the first respondent is duty bound to pay the aforesaid amount to the appellant. This was countered by the first respondent by pointing out in the 'unlikely event' of the appeal being allowed only on the point that there was no concluded contract and if the other two aspects are to be reconsidered by the High Court, then the first respondent cannot till these matters are reconsidered be directed to repay the amount. It is also the contention of the first respondent that there will be undue enrichment as the appellant would have shifted the burden to the end customer.

114. This line of argument is sought to be met by the learned counsel for the appellant by pointing out that the appellant is a public authority, and more importantly, the appellant being erroneously compelled to pay under the orders of the court, has witnessed a deprivation of valuable funds from the appellant, which would otherwise have been available to it. Furthermore, what is more important is, if the appellant succeeds in regard to the point canvassed, namely, that there was no concluded contract within the meaning of proviso to Section 27 of the Act and if the amount is

ordered to be given to the appellant, then, it would have a bearing on the interest of the consumers. This is for the reason that in working out the rate to be charged from consumers, even now this amount if it is brought into the coffers of the appellant, it would result in a corresponding reduction in the burden which the consumer would have to bear.

115. We have considered this aspect of the matter. We are remitting the matter back after finding that the High Court was clearly in error in finding that there was a concluded contract. We have also interfered with the other findings. However, at the same time we may not overlook the fact that we are not allowing the appeal entirely. The validity and correctness of the order of the Commission must be decided with reference to the boundaries of the jurisdiction of High Court under Section 41 in regard to the matter. We would at the same time find that the appellant has succeeded in a substantial manner. We would think that the equities must be balanced.

116. We would think that the interest of justice would be met if the first respondent be directed to pay a sum of Rs.50 crores from out of Rs.100 crores which has been paid. The payment of the amount is to be made within a period of 8 weeks from today.

117. Disbursement of further amounts as also the fate of the payment of Rs.50 crores by the first respondent will await the final decision of the High Court in regard to the determination for which we remit the matter.

118. The appeal filed by Karnataka Power Transmission Corporation Limited is partly allowed and the impugned Judgment shall stand set aside. We find that there was no contract concluded within the meaning of Section 27(2) of the Act. We remand the case back to the High Court for reconsidering the points '3' and '4' formulated by the High Court. The first respondent shall pay to the appellant a sum of Rs.50 crores (fifty crores) within eight weeks. As regards further liability to pay, it will await and depend upon the decision of the High Court. So also, the payment of Rs.50 crores (fifty crores) by the first respondent, under this Judgment, will be subject to the determination to be made by the High Court.

119. The appeal filed by Karnataka Electricity Regulatory Commission will stand allowed to the extent that the remarks made against it in the impugned judgment shall stand set aside as indicated hereinbefore. Parties will bear their respective costs.

....J.

[K.M. JOSEPH] ....J.

[ANIRUDDHA BOSE] ....J.

[HRISHIKESH ROY] NEW DELHI;

DATED; NOVEMBER 22, 2022.