2025 INSC 1439

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5700 OF 2014

TAMIL NADU GENERATION AND
DISTRIBUTION CORPORATION LTD. …Appellant(s)

VERSUS

M/s PENNA ELECTRICITY LIMITED …Respondent(s)

J U D G M E N T

K.V. Viswanathan, J.

1. The present appeal calls in question the correctness of the judgment and order dated 10.07.2013 passed by the Appellate Tribunal for Electricity (for short 'APTEL') in Appeal No.112 of 2012.

2. The Tamil Nadu Electricity Regulatory Commission (for short 'TNERC') and the APTEL have concurrently found in favour of the respondent. It has been held that the power generated by the respondent by the open cycle gas turbine

for the period from 29.10.2005 to 30.06.2006 (hereinafter called as 'Relevant Period') and supplied to the appellant could not be termed as "infirm power" and that it could only be treated as "firm power". The consequence of the said finding was that the Commercial Operation Date (for short the 'COD') for the Gas Turbine in Open Cyc006Ce was held to be 29.10.2005 (i.e. the synchronization date) and since power was delivered on a continuous basis, the appellant was ordered to pay fixed charges for the relevant period.

3. Aggrieved, the appellant is in appeal. The principal argument is that any sale of electricity prior to "COD" would be infirm power and would entail the supplier only to variable charges i.e., the cost of the fuel. To support this, the appellant relies on the clause in the Power Purchase Agreement (for short 'PPA') originally entered on 29.04.1998 and undisputedly amended on 25.08.2004. According to the appellant, under the PPA, as amended, date of commercial operation was the day on which the project achieved entry into commercial operation i.e., 01.07.2006.

4. The relevant clauses under the PPA dealing with Date of Commercial Operation are as under: -

> "Date of Commercial Operation "means the Day on which Project achieves Entry into Commercial Operation""
>
> "4.2 Entry into Commercial Operation
>
> (a) The Project shall be deemed to have achieved Entry into Commercial Operation on the date of issue by the Company to the Board of the Certificate of Project Completion, provided that the Company shall not be entitled to issue such a certificate unless during the Capacity Test to establish Entry into Commercial Operation conducted pursuant to the provisions of Section 4.1, the Project achieves a Tested Capacity of at least 47.52 MW.
>
> (b) If the Tested Capacity at the time of Entry into Commercial Operation is more than 55.44 MW then any revision in the Contracted Capacity, and the adjustment in the Fixed Charges shall be mutually decided between the Parties."

Attention is also drawn to the definition of "infirm power" under the PPA which reads as follows: -

> " "Infirm Power" means the Electricity produced by the Project and delivered to the Board prior to the Date of Commercial Operation at the Supply Point, not on any request or Despatch Instruction of the Board, in respect of which the Board shall pay to the Company, Variable Charges calculated as per the formula pursuant to Section 7.3."

FINDINGS OF THE TNERC:-

5. The TNERC recorded the following findings: -

a) Any PPA executed after the enactment of the Electricity Act, 2003, (for short '2003 Act') should have been placed before the TNERC for approval under Section 86(1)(b) of the 2003 Act, but both the parties in this case have failed to do so.

b) That the original PPA dated 29.04.1998 and the amended PPA dated 25.08.2004 which incorporated the requirements of combined cycle power project were not placed before the TNERC especially when the amended PPA was executed after the enactment of the 2003 Act.

c) Though the original PPA was dated 29.04.1998 and was based on the notification of the Government of India dated 30.03.1992 issued by the Ministry of Power under Section 43A(2) of the Electricity (Supply) Act, 1948 (for short the '1948 Act') the notification ceased to have force from 10.06.2004 i.e. after one year of the commencement of the 2003 Act.

d) The PPA dated 25.08.2004 should have been aligned with the 2003 Act and the Regulations framed thereunder.

e) Though the TNERC notified the Tariff Regulations on 03.08.2005, the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (for short 'CERC Regulations') were in force from 01.04.2004 and the PPA should have been aligned with the CERC Regulations dated 01.04.2004.

f) Under the CERC Regulations dated 01.04.2004 'Date of Commercial Operation or COD' was defined as under:-

> "14(x) 'Date of Commercial Operation' or 'COD' in relation to a unit means the date declared by the generator after demonstrating the Maximum Continuous Rating (MCR) or Installed Capacity (IC) through a successful trial run after notice to the beneficiaries and in relation to the generating station the date of commercial operation means the date of commercial operation of the last unit or block of the generating station;"

g) Similarly, 'Declared Capacity' was defined as under:-

"14(xi) 'Declared Capacity' or 'DC' means the capability of the generating station to deliver ex-bus electricity in MW declared by such generating station in relation to any period of the day or whole of the day, duly taking into account the availability of fuel;

Note

In case of a gas turbine generating station or a combined cycle generating station, the generating station shall declare the capacity for units and modules on gas fuel and liquid fuel separately, and these shall be scheduled separately. Total declared capacity and total scheduled generation for the generating station shall be the sum of the declared capacity and scheduled generation for gas fuel and liquid fuel for the purpose of computation of availability and Plant Load Factor respectively."

h) The TNERC Regulations also had identical definitions though it came into force from 03.08.2005. Under the Regulations, Gas based power projects can operate in two modes viz., Gas Turbine in Open Cycle and Steam Turbine in Combined Cycle.

i) The power dispatched in open cycle on firm basis as per schedule 6 of the PPA would be firm power and, therefore, fixed charges are payable on a pro-rata basis in accordance with schedule 29 of the PPA which provides for fixed charges on Rs/Kwh basis.

j) In the case of M/s Aban Power Ltd., the appellant had agreed to pay fixed charges and actually made the payment.

6. The appellant carried the matter in appeal to APTEL.

FINDINGS OF APTEL:-

7. The APTEL, by its impugned judgment dated 10.07.2013, held as follows: -

a) In view of the proviso to Section 61 of the 2003 Act in which only one year period was provided for saving validity of the notification issued earlier, the Government of India Tariff Notification dated 30.03.1992 cannot be relied upon for the amended PPA which was entered into on 25.08.2004. In the absence of approval of the PPA, it would not become a binding contract between the parties. Regulation 35 of the TNERC Regulations relied upon by the appellant would not apply as it only applied to Existing Generating Stations and the stations in question were not Existing Generating Stations.

b) The TNERC correctly relied upon the CERC Tariff Regulations since under Regulation 4 of the TNERC Regulations, the State Commission was to be guided by the principles and methodologies specified by the Central Commission for determination of tariff in the absence of its own Regulations. The Tariff Regulations framed by the Central Commission under the 2003 Act provided a separate COD for each of the units of the Combined Cycle Operation generating stations.

c) The State Commission was entitled to direct the alignment of the terms of the PPA with the Rules and Regulations. The PPA dealt with only one COD for the Combined Cycle Operation of the plant. The State Commission Regulations, 2005 also contemplates, like the Central Commission Regulations, separate CODs for Open Cycle and Combined Cycle.

d) Even assuming that the Central Commission Regulations were not applicable, the only Regulation that can apply is the State Regulations which also

prescribe different CODs for Gas Turbine generating unit and Steam Turbine generating units.

e) The offer of payment, subject to audit objections itself, shows the understanding of the appellant that the respondent was entitled to fixed charges during the relevant period under the Open Cycle Operation.

8. We heard Mr. Amit Anand Tiwari, learned senior advocate and AAG, for the appellant and Mr. Shyam Divan, learned senior advocate, and Mr. Buddy A. Ranganadhan, learned senior advocate, for the respondent. We have perused the records. We have also read the written submissions filed by both the parties.

CONTENTIONS OF THE APPELLANT:-

9. Mr. Amit Anand Tiwari, learned Senior Counsel, made the following submissions:-

a) According to the PPA, the COD is only for the project, i.e., the combined cycle operation and not for the Gas Turbine generator in Open Cycle mode

independent of the Steam Turbine generator. While the gas turbine generator in the Open Cycle was functional from 29.10.2005, the combined cycle with the Steam Turbine Generator was functional only from 01.07.2006.

b) Any power supplied before the COD is only infirm power.

c) That the series of correspondence under which the respondent admitted that till COD, energy generated by the plant will be treated as infirm power, and payment will be made for variable charges only, has not been appreciated at all by the fora below. In this context, he referred to the letters dated 17.10.2005 written by the appellant and the reply dated 28.10.2005 of the respondent. The respondent cannot rescind from its undertaking to receive the price for "infirm power" for the supply during the relevant period.

d) Dealing with the Regulations, the learned Senior Counsel contended that a careful reading of the definition of 'COD' under the CERC Regulations would

show that all that it provides is "what COD is for a unit" and "what COD is for a generating station". The submission of the learned Senior Counsel was that in any given case, a PPA can prescribe a clause like the one similar to the prescription in the present PPA as contained in clause 4.2 and there is nothing irreconcilable between the Regulations and the PPA.

e) For enforcement of the terms of PPA, the approval or non-approval of the PPA is not significant. The terms of the PPA are enforced or not enforced only in cases where they are in direct conflict with the regulations or being against public interest or being contrary to the parameters of Section 61 of the 2003 Act, particularly with respect to the terms of the price of the electricity purchased.

f) The respondent received the benefits under the PPA and cannot seek to contend that the PPA was not approved.

g) The TNERC and APTEL have erroneously interpreted the CERC Regulations to find a case of conflict between the Regulations and the PPA.

h) Even if the interpretation of the respondent, on the aspect of the Regulations, that it envisages a COD for open cycle generation is to be accepted, there is nothing within the regulations that mandates it.

i) That capacity testing and reliability testing was done between 28.06.2006 and 01.07.2006 and COD was achieved only on 01.07.2006 for the respondent's unit.

j) Reliance placed on M/s Aban Power is misplaced as the supply of power by M/s Aban Power was at the request of the appellant.

k) If the appellant had known that higher price was required to be paid, it would not have accepted the supply at all and would have looked for supply from more economic sources.

l) Accepting the contention of the respondent would be contrary to public interest because higher prices will have to be recovered from the general public.

m) In ***State of Himachal Pradesh vs. JSW Hydro Energy Ltd., 2025 SCC OnLine SC 1460***, it has been held that parties cannot wriggle out of contractual obligations when there is no prohibition in the Regulations.

CONTENTIONS OF THE RESPONDENT: -

10. Mr. Shyam Divan and Mr. Buddy A. Ranganadhan, learned senior counsels, submitted the following :-

a) No approval was obtained by the appellant, which was the distribution licensee, for the PPA under Section 86(1)(b) of the 2003 Act.

b) Where there is a conflict between an unapproved PPA and the concerned notification and regulations, it is

the provision in the said notification and regulations which would hold the field.

c) Under the 30.03.1992 notification of the Government of India issued under Section 43A(2) of the 1948 Act, each of the units viz., the Gas Turbine in the Open Cycle Mode and Gas Turbine and Steam Turbine in Combined Mode will have separate CODs and the relevant date is the date of synchronization with the Grid.

d) In this case, Gas Turbine in the Open Cycle Mode was tested for reliability and capacity, and permission for synchronizing the unit with the Grid was granted and power was supplied on a continuous basis. Reliance was placed on the letter dated 10.11.2005 of the respondent to the appellant pointing out about the synchronization of the gas turbine unit with the grid of TNEB on 29.10.2005. It was also pointed out in the letter that as per the Commissioning procedure, respondent had reached the base load of the gas turbine generator and

it will deliver continuously power at 30 MW under open cycle operation on a firm basis. Indeed, there was continuous supply during the relevant period. Hence, the power supplied was firm power.

e) The CERC Regulations came into force on 01.04.2004 and the TNERC Regulations 2005 was notified on 03.08.2005. Under Regulation 4 of the TNERC Regulations, the State Commission, while determining the tariff, has to be guided by the principles and methodologies specified by the Central Commission. Hence, there was absolutely nothing illegal in the TNERC placing reliance on the CERC Regulations. In any event, the State Regulations were also broadly on identical terms, though they came into force on 03.08.2005. The CERC Regulations additionally had express definitions for "Infirm Power", "Small Gas Turbine Power Generating Station" and "Unit" in the following terms:-

> "(xv) 'Infirm Power' means electricity generated prior to commercial operation of the unit of a generating station;
>
> (xxiii) 'Small Gas Turbine Power Generating Station' means and includes gas turbine/combined cycle generating stations with gas turbines in the capacity range of 50 MW or below;
>
> (xxiv) 'Unit' in relation to a thermal power generating station means steam generator, turbine-generator and auxiliaries, or in relation to a combined cycle thermal power generating station, means turbine-generator and auxiliaries;"

f) That even under the 30.03.1992 Regulations issued under Section 43A(2) of the 1948 Act, the COD of the individual unit was the date of synchronization.

g) The CERC Regulations which came into force on 01.04.2004 and the TNERC Regulations which were notified on 03.08.2005 also has the "unit" as the basis for reckoning the COD.

h) That the PPA was directly in conflict inasmuch as instead of "unit" as the basis of COD, it dealt with "Project". The definition of "Project" in the PPA was to the following effect :-

" 'Project' means the multifuel power station based on gas based Combined Cycle Gas Turbine technology proposed to be established by the Company in or near Valantharavi, Ramnad District in the State of Tamil Nadu, India, comprising the plant equipment, all plant machinery, ancillary equipment, land, buildings and infrastructure and other facilities, ancillary and related establishment erections, conveniences and all installations, control and protective panels, PLCC equipment at both the ends i.e., at the switchyard of the Company and as well as at the substation of the Board, communication facilities such as telemetering facilities including RTUs at the switchyard of the Company, and devices including transformer stepping up voltage to Grid System requirements, along with facilities and space for installation of VSAT terminal."

i) Attention was drawn to Clause 4.2 of the PPA which also spoke of 'project' and the need for 47.52 MW capacity for entering into commercial operation. This is possible only when both the Gas and the Steam turbines were commissioned in combined cycle. This militated against the regulations and since it is not an approved PPA, any interpretation placed should align the PPA with the regulations. If it is so aligned, from the date of commencement of the operation of the Gas Turbine unit on 29.10.2005 i.e., the synchronization date, and as long

as continuous supply was ensured, pro-rata payment of fixed charges along with variable charges for the power supply ought to have been made. There was no error in the order of the fora below.

j) That when expert bodies like TNERC and APTEL have taken a view, this Court should be slow in interfering. Further, the civil appeal did not raise any substantial question of law as mandated under Section 125 of the 2003 Act.

k) That similarly placed generating company, namely, M/s Aban Power Limited was granted the benefit of fixed charges when the respondent was denied the same.

l) The judgment in **State of Himachal Pradesh (supra)** is distinguishable.

11. Both parties referred to certain case laws in support of their propositions.

DISCUSSION AND ANALYSIS:-

Electricity (Supply) Act, 1948 & the 30.03.1992 Notification:-

12. Prior to the coming into force of the 2003 Act, the 1948 Act provided for the rationalization of the production and supply of electricity. Section 43A dealt with the terms, conditions and tariff for sale of electricity by Generating Company. Section 43A of the Act read as under: -

> "**43A. TERMS, CONDITIONS AND TARIFF FOR SALE OF ELECTRICITY BY GENERATING COMPANY. –**
>
> (1) A Generating Company may enter into a contract for the sale of electricity generated by it-
>
> (a) With the Board constituted for the State or any of the States in which a generating station owned or operated by the company is located;
>
> (b) With the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section (3) of Sec. 15-A; and
>
> (c) With any other person with consent of the competent Government or Governments.
>
> **(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority and in accordance with the**

rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette:

Provided that the terms, conditions and tariff for such sale shall, in respect of a Generating Company, wholly or partly owned by the Central Government, be such as may be determined by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments, be such as may be determined, from time to time by the Government or Governments concerned."

(Emphasis supplied)

13. As will be noticed, under Section 43A(2) of the 1948 Act, the tariff for the sale of electricity by a Generating Company to the Board was to be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors that may be determined, from time to time, by the Central Government, by notification in the Official Gazette.

14. By virtue of powers under Section 43A(2), the Central Government (Ministry of Power) issued a notification on 30.03.1992. Under the said notification, for Thermal Power Generating Stations (including gas and Naphtha based

stations), there was to be a two-part tariff for the sale of electricity. It was to consist of the recovery of annual capacity (fixed) charges consisting of interest on loan capital, depreciation, operation and maintenance expenses (excluding fuel), taxes on income reckoned as expenses, return on equity and interest on working capital at a normative level of generation on the one hand and energy (variable) charges covering fuel cost recoverable for each unit of energy supplied based on certain prescribed norms and Plant Load Factors on the other. The said notification prescribed that the date of commercial operation for gas and Naphtha based units was to be the date of synchronization. The notification also prescribed the method of computation of annual capacity (fixed) charges.

PPA OF 29.04.1998:-

15. When this notification was in vogue, on 29.04.1998, a Power Purchase Agreement was entered into between Tamil Nadu Electricity Board, the predecessor of the appellant (prior to unbundling) and M/s DLF Power, the predecessor of

the respondent. The predecessor of the respondent was selected through the international process of competitive bidding pursuant to Request for Qualification (RFQ) and Request for Proposal (RFP) for setting up small capacity, multifuel power projects in the State of Tamil Nadu issued by the Tamil Nadu Industrial Development Corporation Limited in 1996 to develop, procure, finance, construct, own, operate and maintain the project and sell electricity generated therefrom to the Board. The Board agreed to purchase all such electricity from the project as per the terms and conditions of the Agreement. Admittedly, when this Agreement was entered into, the 2003 Act was not in force and, as such, the approval under Section 86(1)(b) of the 2003 Act could not have arisen.

THE ELECTRICITY ACT, 2003

16. The 2003 Act came into force on 10.06.2003 and was enacted to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of

electricity industry and so on. Part VII of the Act deals with Tariff. Section 61 provided for Tariff regulations and authorized the Appropriate Regulatory Commission, subject to the provisions of the Act, to specify the terms and conditions for the determination of tariff, and in doing so, the Commission was to be guided by the principles prescribed thereon. Some of the prescriptions are:

a) that the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

b) that the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

c) that the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments; and

d) that safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner. (Emphasis supplied)

17. Section 61 had a proviso which reads as under:-

> "Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

Under the proviso, the old regime was to operate for one year or until the terms and conditions for tariff are specified under Section 61, whichever was earlier. The one-year period expired on 10.06.2004.

18. When the matter stood thus, w.e.f 01.04.2004, the CERC in exercise of powers under Section 178 of the 2003 Act framed the Central Electricity Regulatory Commission (Terms and Conditions of Tariff), Regulations, 2004. We will revert to these Regulations a little later. Going back to the 2003 Act, Section 62 provided for determination of tariff by

the appropriate Commission and Section 62(1) reads as under:-

> **"62. Determination of tariff. -**(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for--
>
> (a) supply of electricity by a generating company to a distribution licensee:
>
> Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;
>
> (b) transmission of electricity;
>
> (c) wheeling of electricity;
>
> (d) retail sale of electricity:
>
> Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity."

19. Section 63 is set out hereunder:-

> **"63. Determination of tariff by bidding process.-**
>
> Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government."

20. What is important is also to notice that Section 79 prescribed the functions of the Central Commission and

Section 86 prescribed the functions of the State Commission. Section 86(1)(b), which is relevant for the case at hand, reads as under:-

> **"86. Functions of State Commission.**
>
> (1) The State Commission shall discharge the following functions, namely:--
>
> (a) xxx xxx
>
> (b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;"

CERC REGULATIONS, 2004

21. Reverting back to the CERC Regulations of 2004, which came into force on 01.04.2004, as explained in the earlier part of the judgment, it defined the 'Date of Commercial Operation' or COD in relation to a unit and in relation to the generating station. It also defines 'Declared Capacity' as well as 'Infirm Power' which have already been set out hereinabove.

22. Regulation 14(xxiv) defined the "unit" as follows:-

> "Unit" in relation to a thermal power generating station means steam generator, turbine-generator and auxiliaries, or in relation to a combined cycle thermal power generating station, means turbine-generator and auxiliaries"

Regulation 15 sets out the components of tariff which reads as under:-

> "15. **Components of Tariff:** (1) Tariff for sale of electricity from a thermal power generating station shall comprise of two parts, namely, the recovery of annual capacity (fixed) charges and energy (variable) charges.
>
> (2) The annual capacity (fixed) charges shall consist of:
>
> (a) Interest on loan capital;
>
> (b) Depreciation, including Advance Against Depreciation;
>
> (c) Return on equity;
>
> (d) Operation and maintenance expenses; and
>
> (e) Interest on working capital.
>
> (3) The energy (variable) charges shall cover fuel cost."

AMENDED PPA OF 25.08.2004: -

23. What is, however, crucial for the present matter is the PPA between the parties came to be amended on 25.08.2004. While the first PPA was with reference to diesel engine based generation and tariff was fixed at Rs.2.374102 per unit, in the amended PPA, the tariff was to be 2.2798 per unit.

Further, there was change in location, change in fuel and change in technology in the generation.

ALIGNING PPA WITH THE REGULATIONS: -

24. Rejecting the argument of the appellant that Section 63 of the 2003 Act would also protect the amended PPA, the APTEL rightly held as under:-

> "34. According to the Appellant, the original PPA which had been entered into between the parties based on the tariff based competitive bidding process and therefore, the State Commission ought to have merely adopted the determined tariff u/s 63 of the Act, 2003.
>
> **35. The First Power Purchase Agreement was executed on 29.4.1998 with reference to the Diesel Engine Based Generation Technology. In the said Agreement, the tariff was fixed as Rs.2.374102. During the year, 2002, the Government of Tamil Nadu approved the change of location, change of fuel and change of technology with an amendment to the tariff. Thereupon, the amended Power Purchase Agreement was entered into on 25.8.2004. As per this Agreement, the tariff was to be Rs.2.2798 per unit. Therefore, the amended Power Purchase Agreement dated 25.8.2004 was virtually a new Power Purchase Agreement executed between the parties. Admittedly. (1) There was a change in location (2) there was a change in fuel (3) there was a change in technology in the generation and (4) a change in the tariff also. Therefore, the amended PPA dated 25.8.2004 in which the entire base had been altered. could not be linked to the First Power Purchase Agreement dated 29.4.1998 executed pursuant to the selection of the Project under Tariff based competitive bidding during 1996.**

36. The competitive bidding undertaken in the year 1996 cannot be said to be a bid undertaken in terms of the guidelines issued after the Electricity Act, 2003 was enacted.

37. In other words, the principle propounded by the Appellant would apply only to the competitive bids under taken after 10.6.2003 i.e. the date of enactment of Electricity Act, 2003 that too, in accordance with the guidelines issued by the Government of India pursuant to Section 63 of the Act, 2003.

38. Section 63 of the Electricity Act, 2003 relates to the determination of the tariff by bidding process notwithstanding anything contained in Section 62 which empowers the State Commission to determine the tariff in accordance with the provisions of the Electricity Act, 2003. Even Section 63 of the Act, 2003 does not dispense with the mandatory approval of the Power Purchase Agreement by the State Commission as provided u/s 86 of the Electricity Act, 2003. Admittedly, in this case, the PPA had not even been placed before the State Commission for approval. Hence, the question of application of Section 63 of the Electricity Act, 2003 would not arise.

39. As a matter of fact, u/s 62 of the Electricity Act, 2003, the State Commission is required to determine the tariff and accordingly in the present case, the State Commission has rightly determined the same by invoking section 62 of the Electricity Act, 2003 as Section 63 of the Electricity Act, 2003 cannot be invoked. As such, there is no infirmity in the finding rendered by the State Commission on this issue."

(Emphasis supplied)

25. It is now well settled that:-

a) terms and conditions of a PPA are not unregulated and are subject to approval by the Commission. In ***Tata Power Company Limited*** vs. ***Reliance Energy Limited***

and Others[1],. In ***Tata Power (supra)***, it was held as under:

> **"108.** A generating company, if the liberalisation and privatisation policy is to be given effect to, must be held to be free to enter into an agreement and in particular long-term agreement with the distribution agency; terms and conditions of such an agreement, however, are not unregulated. Such an agreement is subject to grant of approval by the Commission. **The Commission has a duty to check if the allocation of power is reasonable. If the terms and conditions relating to quantity, price, mode of supply, the need of the distributing agency vis-à-vis the consumer, keeping in view its long-term need are not found to be reasonable, approval may not be granted."**
>
> (Emphasis supplied)

b) In ***KKK Hydro Power Limited*** vs. ***Himachal Pradesh State Electricity Board Limited and Others***[2], this position was reiterated. It was held thus:-

> **"26.** This **provision**[3] puts it beyond the pale of doubt that fixing of the price for the purchase of electricity is not a matter of private negotiation and agreement between a generating company and a distribution licensee. The price as well as the agreement, i.e., PPA, incorporating such price and providing for purchase of electricity at that price necessarily have to be reviewed and approved by the State Commission under this provision. The order dated 09.02.2010 passed by the Commission, without reference to the appellant's case, required only those existing PPAs

[1] (2009) 16 SCC 659
[2] 2025 SCC OnLine SC 1847
[3] Section 86(1)(b) of the 2003 Act

which stipulated the tariff of Rs. 2.87/- per kWh to be amended so as to give effect to the enhancement of tariff from Rs. 2.87/-per kWh to Rs. 2.95/- per kWh. This order had no application at all to the case of the appellant as its PPA dated 11.03.2008 did not stipulate the tariff of Rs. 2.87/- per kWh. In this scenario, the appellant and the HPSEB were bound to approach the Commission to secure its approval before they could effect any enhancement of the tariff stipulated in the PPA dated 11.03.2008. Without doing so, the appellant and the HPSEB, on their own and without the Commission's review and approval, enhanced the tariff from Rs. 2.50/- per kWh to Rs. 2.95/- per kWh under their supplementary PPA dated 10.09.2010!"

c) Secondly, it is also well settled that even existing PPAs had to be modified and aligned with the regulations made by the Regulatory Commission. See ***PTC India Limited*** vs. ***Central Electricity Regulatory Commission, through Secretary***[4]. In para 66 of ***PTC India (supra)***, it was held thus:

"66. While deciding the nature of an order (decision) vis-à-vis a regulation under the Act, one needs to apply the test of general application. **On the making of the impugned 2006 Regulations, even the existing power purchase agreements (PPA) had to be modified and aligned with the said Regulations. In other words, the impugned Regulations make an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the**

[4] (2010) 4 SCC 603

> **impugned 2006 Regulations have also to factor in the capping of the trading margin.** This itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across the board could have been done only by making regulations under Section 178 and not by passing an order under Section 79(1)(*j*) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word "order" in Section 111 of the 2003 Act cannot include the impugned 2006 Regulations made under Section 178 of the 2003 Act."
>
> (Emphasis supplied)

26. In this case, the original PPA was of 29.04.1998. The 2003 Act gave a one-year window till 10.06.2004 and when the Central Regulations came into force on 01.04.2004, the PPA entered into on 25.08.2004 should have been aligned with the CERC Regulations is the case of the respondent. In any event, the respondent submits that the State Regulations came into force on 03.08.2005 which were broadly identical with the Central Regulations and, as such, the PPA ought to have been aligned is the respondent's case. The only counter to this by Mr. Amit Anand Tiwari, learned Senior Counsel for the appellant, is that the regulations are not in conflict with the PPA.

27. The crucial question for determination is whether the PPA, as amended on 25.08.2004, is in conflict with the CERC Regulations and the TNERC Regulations of 2005.

28. Under the PPA date of Commercial Operation meant the day on which project achieved entry into Commercial Operation. As briefly discussed hereinabove, the PPA in Clause 4.2 provided "entry into commercial operation from the date of issue of certificate of project completion." It further stated that such a certificate shall not be issued unless during the capacity test to establish entry into commercial operation conducted pursuant to the provisions of Section 4.1, the project achieves a tested capacity of at least 47.52 MW. This clearly meant that unless both the gas turbine in the open cycle and the steam turbine in the combined cycle is both completed and synchronized to the grid, capacity of 47.52 MW cannot be achieved.

29. The Regulations, on the other hand, clearly prescribed that the COD in relation to a unit meant the date declared by the generator after demonstrating the Maximum Continuous

Rating [MCR] or Installed capacity [IC] through a successful trial run. It further prescribes that in relation to the generating station, the COD means the date of commercial operation of the last unit or block of the generating station. Further, the definition of declared capacity or DC meant the capability of the generating station to deliver ex-bus electricity in MW declared by such generating station in relation to any period of the day or whole of the day, duly taking into account the availability of fuel. Further, the note appended states that in case of a gas turbine generating station or a combined cycle generating station, the generating station shall declare the capacity for units and modules on gas fuel and liquid fuel separately, and these shall be scheduled separately. Total declared capacity and total scheduled generation for the generating station shall be sum of the declared capacity and scheduled generation for gas fuel and liquid fuel for the purpose of computation of availability and Plant Load Factor respectively. There is a clear dichotomy between the Regulations and the PPA.

30. The fora below have rightly taken the view that PPA was not in tune with the Regulations and that the PPA ought to be aligned since it does not recognize COD in relation to a unit. Further, in this case, during the relevant period, power has been continuously drawn and the appellant is seeking to classify it as infirm power only by falling back on the definition of 'entry into commercial operation' in the PPA. The definition of 'Infirm Power' under the Regulations state that Infirm Power means electricity generated prior to commercial operation of the unit of a generating station. The reason for payment of variable charges alone for Infirm Power is that the payment before the commencement date amounts to reduction in capital.

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31. The question here is, is the power generated during the relevant period continuously up to 153 million units from the gas turbine open capacity of 30 MW after all trials is firm or infirm power? Applying the Regulations, we have no doubt in our mind that it is firm power and that for the said period,

as rightly held by the fora below, the respondent was entitled to fixed charges. Further the mandate under Section 61(d) of the 2003 Act, is that in the determination of tariff recovery of the cost of electricity in a reasonable manner is to be ensured. The respondent, having supplied continuous power, cannot be denied the annual fixed charges for the relevant period, and if it were done so, they will permanently lose that amount, which will be unjust and contrary to law.

32. The argument of Mr. Amit Anand Tiwari, learned Senior Counsel, that the letters constitute waiver and/or estoppel also does not appeal to us. We have perused the letters. The letter dated 17.10.2005 of the appellant to the respondent in para three states that till the COD, energy generated by the plant will be treated as infirm power and payment will be made for variable charges only as per clause 5.3 of the PPA. The respondent wrote back on 25.10.2005 stating that once the capacity and performance of the Gas Turbine Generator and auxiliaries were established, they will commit firm power to the appellant which may be treated as firm power.

This was the request of the respondent. The appellant wrote back on 28.10.2005 stating in para 2 that till the date of COD the energy generated by the plant will be treated as infirm power only and only variable charges will be paid. On the very same day, the respondent wrote back, *inter alia*, saying that para 2 of the appellant's letter of 28.10.2005 was agreeable to them. The letters take us back to the issue of COD and it really begs the question as to what the commercial operation date was. We have extended the definition of 'COD' as it prevails under the regulations. Hence, we reject the argument based on estoppel and waiver advanced by the appellant.

33. The further argument that the State Regulations came only after the amended PPA also is not appealing. As rightly found by the fora below, the Central Regulations operate as guiding factors under Regulation 4 of the State Regulations and in any event when the State Regulations came into force on 03.08.2005, the PPA can only be read in a manner as to be

aligned with the State regulations. That is the mandate of the law.

34. The argument of the appellant that capacity testing and reliability testing was done between 28.06.2006 and 01.07.2006 and COD achieved only on 01.07.2006 also is not tenable. The letter of the respondent dated 10.11.2005 clearly brings out the fact that w.e.f. 29.10.2005, they followed the commissioning procedures, reached the baseload of the gas turbine generator and that the unit along with its auxiliaries was running trouble-free and will be able to deliver continuously power at 30 MW under open cycle operation on a firm basis. In fact, there was continuous supply from 29.10.2005.

35. Further, the judgment in **The State of Himachal Pradesh *(supra)*** is distinguishable inasmuch as in the said case, this Court found that legal effect of cap on free supply of power was not to override the contractual obligations between the parties. Further, it was held that the regulation therein covered a situation where, in cases where the

obligation to supply free power to the State was in excess of 13%, only free power up to 13% would be considered for tariff determination. The Court understood the contractual obligation to supply power in excess of free power as a form of "royalty" payable to the State in lieu of being allowed to utilize river water which was a public and common resource. **The State of Himachal Pradesh** *(supra)* turned on its own facts.

36. There was considerable debate at the Bar as to whether M/s Aban Power Ltd. was identically situated. We have considered the rival submissions. Considering that we have independently found for the respondent and its entitlement for fixed charges for the relevant period, the aspect of whether M/s Aban Power Ltd. was identically situated need not detain us any further.

CONCLUSION: -

37. For all these reasons, we find no good ground to interfere with the impugned judgment. The judgment passed by the TNERC directing that fixed charges shall be

payable for the relevant period as affirmed by the APTEL in the impugned judgment dated 10.07.2013 in Appeal No. 112 of 2012 calls for no interference and the said directions are affirmed. The appeal is dismissed. No order as to costs.

38. On 25.08.2014, while passing an interim order staying the judgment of the Tribunal, this Court directed the appellant to pay a sum of Rs. 50 Crores to the respondent, without prejudice to the rights and contentions of either party. It is not disputed that the said amount has been paid. In terms of our directions, the balance amount, if any, shall also be paid to the respondent within a period of 12 weeks from today.

.....J.
[J. B. PARDIWALA]

.....J.
[**K. V. VISWANATHAN**]

New Delhi;
16th December, 2025