

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8094 OF 2002

A.P. Electricity Regulatory Commission

... Appellant

Versus

M/s. R.V.K. Energy Pvt. Ltd. and another

... Respondents

WITH

CIVIL APEPAL NOS. 8101, 8102, 8096,
8095 AND 8093 OF 2002

J U D G M E N T

S.B. SINHA, J.

Interpretation and/or application of the provisions of the Andhra Pradesh Electricity Reforms Act, 1998 (for short the 1998 Act) vis-a-vis the orders passed by the Andhra Pradesh Electricity Regulatory Commission (for short 'the Commission') are involved in these appeals which arise out of the judgments and orders passed by a Division Bench of the Andhra Pradesh High Court.

The matter relating to generation, supply and distribution of electrical energy in the State of Andhra Pradesh used to be governed by the provisions of the Electricity (Supply) Act, 1948 (For short, the 1948 Act).

With a view to bring reforms in the Power Sector and to meet shortages in power supply, the State of Andhra adopted a policy decision for generation of power through MPPs of 30 MW capacity in private sector. For the said purpose it issued two G.Os. being G.O. No.116 dated 5th August, 1995 and G.O. No. 152 dated 29th November, 1995.

In the said Government orders, the liberalization policy of the state in respect of its industrial economy so as to enable the State Government to attract investment from other parts of the country as also from outside

the country was highlighted. It intended to bring about competition in the industry. It is stated to have taken a series of measures for augmenting power including privatization. It took into consideration the fact that the power plants costing less than Rs.100 crores and which do not require Central Electricity Authority's clearance, and in respect of which project clearance at the State level would suffice as a result thereof the period may be reduced considerably.

The relevant extract of G.O. No.116 dated 5th August, 1985 reads :-

“The state government have therefore felt that it would be appropriate to setup mini power plants based on residual fuels in the industrial estates to relieve the burden of the industrial load centres and tail end areas which are suffering from stress on account of transmission and distribution problem.”

It further provided:

“The Government have also felt it necessary to take up mini power plants of 30 MW capacity which could be implemented within a period of 12-18 months at suitable locations where industries are concentrated and the power plants can meet the demand of industries without any interruption.”

The G.O. further provided that the residual fuel shall be used and that the pricing arrangement was subject to fixation of tariff by the Commission.

In this context, the supply of electricity generated by the MPP to the identified consumers was allowed.

We, may, however, notice that at a later stage the capital costs invested for the said purpose was raised to Rs.250 crores.

By G.O. Ms. No.152 dated 29th November, 1995 the terms and conditions of setting up of MPPs were laid down, some of which read thus :-

“3. Energy from the mini power plants can be supplied to identified consumers using either Andhra Pradesh State Electricity Board's existing distribution network or setting up a dedicated transmission after obtaining a licence under section (3) of the Indian Electricity Act, 1910. In the case of the former, Andhra Pradesh State Electricity Board may on request, lease out the distribution net work to the developer. Detailed arrangements like lease, rent etc., will be worked out on mutually acceptable terms between the Andhra Pradesh State Electricity Board and the Mini Power plant developers. Similar arrangement can also be finalised for the dedicated net works established by Mini

Power Plant developers so as to confirm to statutory requirement.

6. In the event of the mini power plants generating power in excess of the requirement of their consumers, the same can be purchased by the Andhra Pradesh State Electricity Board. Such purchases by the Andhra Pradesh State Electricity Board may be upto 15% of individual Mini Power Plant capacity. The Andhra Pradesh State Electricity Board may also purchase power beyond 15% of the Mini Power Plant capacity, at Andhra Pradesh State Electricity Board's option without conferring any pre-emptive right of sale on the Mini Power Plant. The price for supplies made to the Andhra Pradesh State Electricity Board will be weighted average price of purchase of power made by the Andhra Pradesh state Electricity Board from Central and other State Electricity Enterprises on a monthly basis. Settlement of accounts will be on a monthly basis. The above procedure would be in force upto the end of December 2000 AD and would be subject to review thereafter.

8. The Mini Power Plant developer shall necessarily sell power to the consumers above the Board's High Tension tariff rate”

Indisputably, pursuant to or in furtherance of the said policy decision, 31 companies in the private sector showed their interest for setting up MPPs. The Government of Andhra Pradesh, upon taking into consideration the said applications allowed the respondents herein to set

up MPPs capacity in private sector with residual fuel in industrial load centres in the State, whereafter, approval for the same had been granted.

We may at this stage notice the fact of the matter involved in the respective appeals including the proceeding before the Commission.

CIVIL APPEAL NO. 8093 OF 2002

Permission was granted to LVS Power Ltd. to set up a 37.8 MW residual fuel based power plant at Visakhapatnam so as to enable it to generate and supply power directly to specified industrial consumers by using the existing transmission and distribution network of APT. In the letter for grant of permission issued to LVS Power Ltd. by the Secretary to the State Government letter dated 24th July, 1996. Clauses 1 and 4 of the permission letter read :-

“1. The total completed cost of the project (MPP) including the cost of land and the total EPC cost shall not exceed Rs.100 crores”.

4. The copies of actual supply agreements with the identified consumers shall be furnished to the

A.P. State Electricity Board in advance of commencement of supply. Along with the agreements, 3 months notices seeking termination of the Agreements with the A.P. State Electricity Board by the identified consumers of generating company, if they so desire, shall be submitted to the A.P. State Electricity Board.”

Alongwith the said letter it annexed the names of the consumers with their possible demand, which read :-

<u>“S.No.</u>	<u>Name of the Consumer</u>	<u>Demand</u>
1.	Hindustan Shipyard Ltd., Visakhapatnam	6,000 KVA
2.	Hindustan Zinc Ltd., Visakhapatnam	22,000 KVA
3.	Essar Steels Ltd., Visakhapatnam	40,000 KVA
4.	Andhra Cements Ltd., Visakhapatnam	9,000
KVA		
		<u>77,000 KVA”</u>

All the aforementioned industries are located in the State of Andhra Pradesh.

The proposal of the company was accepted in terms of Section 18A(a) of the 1948 Act.. The MPP was allowed to be operated on multifuels (LSHS/Furnace Oil/Naptha) alongwith tie-line.

The terms and conditions of setting up of the MPP were amended from time to time in terms of letter dated 20th October, 1997; 18th May, 1999 and 21st August, 2001. We are not concerned with the details thereof.

Pursuant to or in furtherance of the approval granted by the Government of Andhra Pradesh to the company for setting up of MPP it entered into Wheeling Agreement with APTRANSC wheeling power from generating station to the consumers. In terms of the Wheeling Agreement, the company was required to pay 8 % to 12 % of power generated as wheeling charges to APTRANSCO for utilizing their transmission lines. It also entered into Power Sales Agreements with 13 industrial consumers for sale of powers.

In the meantime in the year 1998, the Parliament enacted The Electricity Reforms Act, 1998. The State of Andhra Pradesh also enacted

the 1998 Act; in terms whereof, Andhra Pradesh Electricity Regulatory Commission (for short 'the Commission') was constituted on or about 23rd January, 2000.

Indisputably, after coming into force of the 1998 Act the MPPs applied for grant of exemption under the said Act as envisaged in Section 14 thereof, before the Commission.

The said Act provided for grant of licence and the exemption therefrom. The Company applied for grant of licence as provided in Section 15 of the Act. By an order dated 18th May, 2000 the Commission directed the company to come back to it for the said purpose four months prior to the commencement of commercial operation. In view of the said direction of the Commission, the company commenced construction of the project in June, 2000. For the said purpose it drew 'equity' from the promoters and investors and term loans from the lenders. The total cost of the project was said to be Rs.133 crores.

When the said plant was nearing completion, having regard to the said direction dated 18th May, 2000, the company approached the Commission on 5th March, 2001 as the project was expected to be completed by July, 2001. The Commission, however, by a letter dated 4th

May, 2001 informed the company that it was of the opinion that no third party sale of power should be permitted and asked it to send specific proposals to APTRANSCO for sale of entire power from the project purported to be in terms of Central Government's Notifications within fifteen days.

It appears that before the Commission the Andhra Pradesh State Electricity Board Engineers Association intervened. The said intervention was entertained by the Commission.

The Commission noted that out of 31 MPPs which received permission/sanctions of the State to generate energy based at residual fuels, only 19 survived. The name of the respondent company was also found therein. The Commission also noticed the essential features of the grant of such permission, one of which being clause 5, which reads :

“(v) Copies of the supply agreements entered into with the identified consumers should be supplied to the APSEB. The agreement with the APSEB for wheeling shall reflect the conditions in G.O.Ms. No.152 dated 29.11.1995 besides other conditions.”

At paragraph 14 of the said order, the Commission recorded that various Associations of the officers of the Andhra Pradesh State Electricity Board inter alia submitted that third party right should not be allowed as it affected the financial viability of the main licensee, APTRANSCO, apart from the fact that they should not be permitted to generate power with residual fuel as the same is too costly for the purchase by the grid. It was also noted that third party sale should not be allowed as MPPs would not suffer Transmission and Distribution losses which the Licensee suffers and the Tariffs of the Licensee for industrial consumers include considerable cross-subsidies.

The Government of Andhra Pradesh, was, however, not represented. A contention, however, was raised by a letter representing that the permission may be given to MPPs for third party sales to HT Industrial consumers and in the event APTRANSCO loses on account of the said arrangement, the Commission can fix appropriate wheeling charges taking into account the cross subsidization forgone by APTRANSCO on account of third party sales.

The Commission stated that it was not inclined to permit third party sale for the following reasons :-

“(19). For reasons already stated elaborately in our order in O.P. No.2/1999 (GBR Projects Ltd.) and O.P. No.348/2000 (Astha Power Corporation Pvt. Ltd.) the Commission is not inclined to permit third party sales. Currently the tariffs include substantial cross subsidy to the tune of about Rs.2,000 crores by industrial and commercial consumers. If these consumers are supplied power by MPPs, instead of the Licensee, the cross subsidy element now existing will come down, calling for increased tariffs for agriculture and domestic consumers giving rise to a rate shock to them or alternatively, the GoAP may have to bear the increased burden in terms of subsidy. Further, to the extent the government subsidy is limited the burden of cross subsidy will increase on those industrial and commercial consumers who stay with the Licensee. This would in turn lead to these consumers going out of the system as they would not be competitive for their products in the market with such high tariffs. Finally, the Licensee would be left with agricultural and domestic consumers who are highly subsidized. This would effect totally the viability of the Licensee and will result in failure of Licensee to discharge its functions in the matter of supply of power. It is, therefore, evident that permitting mushroom growth of MPPs and third party sales would not at all be in the interest of the organized growth of the electricity industry which is essential for the progress of any civil society. Permitting third party sales would create discrimination between industrial consumers drawing power from IPPs and the industrial consumers drawing power from APTRANSCO DISCOMS who will be paying for power at different rates. Further, the cost for supply of power for the Licensee includes cross subsidization and transmission and distribution losses in the system spread over the entire State and approved by the Commission whereas, the cost to the MPP developer does not include cross subsidization and transmission and distribution loss cost. Thus, allowing third party

sales by MPPs at the same rate at which the Licensee supplies to HT consumers, would result in either unjust enrichment of developers which is neither contemplated nor permissible in a regulatory industry, or in supply of power at lower prices than prescribed resulting in differential prices for the same categories of consumers, leading to discriminatory treatment.

(20) In O.P. No.2/1999 and O.P. No.348/2000, the Commission has directed the developers to approach APTRANSCO and negotiate the sale of power on the basis of their project cost. It would be appropriate if directions are also issued to the eight developers mentioned in para 18 above to make an offer of price on the basis of the various Government of India Notifications (including the Notifications dated 30.03.1992). These Notifications set out the method and manner of calculation of tariff for generating companies mutually agree on the price for the power to be supplied and other conditions, a PPA may be drawn up and submitted to the Commission for its approval under Section 21 of APER Act. If on the other hand they are not able to agree on the price and other terms and conditions, they may apply to the Commission for appropriate orders.”

It noticed that pursuant to its interim order, the company had entered into a Wheeling Agreement with APTRANSCO on 25th February, 1999. While directing renegotiations regarding price and other terms and conditions at which they would be willing to supply power to APT it was directed:-

“(22). The Commission hereby directs that the eight MPPs mentioned above send a specific proposal in writing based on the existing Central Government

Notifications on the basis of their project costs to APTRANSCO within a fortnight of the receipt of this order, with a copy to the Commission. APTRANSCO shall respond by communicating views on the offer to the MPPs and the Commission within another fortnight. If the parties need more time for negotiations in the matter, they are free to approach the Commission in the matter. If APTRANSCO and the MPPs agree on the price and the other terms and conditions, a (fresh) PPWA may be drawn up and sent for the consent of the Commission.

(23). If there is no agreement between APTRANSCO and the MPPs on supply terms within a month's time, the Commission will hear the eight MPPs and APTRANSCO on 4.6.2001 for further orders.”

Pursuant to and in furtherance of the said order of the Commission the Company submitted a proposal on or about 18th May, 2001 for sale of its entire power from the project as per the norms laid down or set up by the Central Electricity Authority alongwith necessary supporting documents assuming the cost of the project at about Rs. 125 crores. Negotiations took place inter alia on 17th August, 2001 when the company agreed to the proposal of the APTRANSCO to sell power as per the said norms assuming the project cost at Rs.125 crores. The said proposal of the company was accepted in its entirety by the APTRANSCO. According to it the tariff could be re-fixed after the capital cost is approved by the Government of Andhra Pradesh

whereafter the consent of the Commission to purchase power from the company was sought for.

The Commission accorded its consent to the said proposal by its letter dated 18th August, 2001. Keeping in view the aforementioned consent of the Commission on 24th August, 2001 the company terminated the power sales agreements entered into by it with the industrial consumers to avoid any liability

The project was completed on 18th October, 2001. APTRANSCO asked for extension of time from the Commission to purchase power from the company by its letter dated 30th November, 2001 till the end of February, 2001 on the purported ground that firm proposal (PPA) could not be sent since the project cost was yet to be approved by the Government of Andhra Pradesh. A reminder was also sent by APTRANSC on 9th November, 2001 to the Commission. The Commission again by its letter dated 26th November, 2001 granted permission sought for by APTRANSCO stating :-

“With reference to letter (1) and (2) cited above, Commission accepts the proposal of APTRANSCO to purchase power from M/s. LVS Power Limited at the rates specified in letter (3) cited above and extends the period of purchase of power from 31.10.2001 to 30.11.2001 purely as an interim measure. This is

without prejudice to the rights of the Commission to pass any further order in this matter.

APTRANSCO is directed to send the Firm Proposal with the approved Project cost from competent Authority latest by 30.11.2001, for the Commission to pass appropriate orders.”

On or about 26th November, 2001 by a letter addressed to the Government of Andhra Pradesh, the APTRANSCO sought for its approval of the project cost stating that it was willing to purchase power from the company if the project cost was restricted to Rs.125 crores. As the said consent was not forthcoming another extension was sought for by the APTRANSCO from the Commission for purchase of power till the end of January, 2002 by its letter dated 3rd December, 2001. The Commission by its letter dated 27th December, 2001 directed the APTRANSCO to submit firm proposal alongwith the approval of the capital cost of the project from the competent authority by 31st January, 2001. The matter was posted for hearing on 7th February, 2002.

The Government of Andhra Pradesh in the meantime sought for the opinion of the Central Electricity Authority as regards the reasonableness of the project cost. It may be noticed that the Central Electricity Authority by a letter dated 26th February, 2002 stated that the

capital cost of the company is lowest among the similar type of plants in the country by observing :-

“Reference is invited to GOAP letter dated 29.12.2001 seeking the advice of CEA under Section 3 of Electricity (Supply) Act, 1948. The matter has been examined based on the subsequent details/clarifications received vide APTRANSCO letters dated 28.1.2002 & 4.2.2002 and GOAP letter dated 15.2.2002. The following observations are made :

- (i) Clarifications furnished vide GOAP letter dated 15.2.2002 do not indicate as to whether GOAP Order dated 29.11.1995 giving revised policy guidelines regarding generation of power through Mini Power Plants in Private Sector had been reviewed as contemplated in Para 6 of the said order w.r.t. capital costs. Etc.
- (ii) It is seen that the clarification on the increase in capital cost ceiling from Rs.100 crores as earlier contemplated to Rs.250 crores was given to M/s. LVS only w.r.t. their request. It is not clear whether all the MPP developers were informed of this increase in capital cost ceiling and whether any reference is made to capacity of the plant to be generated within the capital cost of Rs.250 crores.
- (iii) The capacity of the LVS plant has been reduced from 55 MW as originally approved in July, 1996 to 46.08 MW vide GOAP letter dated 9.7.1997 and again to 37.8 MW vide GOAP letter dated 11.4.2001 whereas the capital cost ceiling was increased from Rs.100 crores as originally approved in July, 1996 to Rs.250 crores in January, 1999. The compulsions for reduction in plant capacity are not clear from the documents received from GOAP/APTRANSCO.
- (iv) The APTRANSCO's consultant had in their report indicated that revised capital cost of Rs.125.23 crores for 2 x 18.9 MW was without complete audit of the cost incurred and

physical verification. As now the project has been completed, it will be necessary to look into the final audited cost corrected to the admissible provisions.

In view of the above mentioned observations, it is not possible for CEA to advise on the reasonableness of the capital cost specific to LVS project. It may, however, be mentioned that CEA, while granting TEC for similar type of projects for IPPs have cleared the estimated completion capital cost in the range of Rs..3.62 crores to Rs.3.8 crores per MW as the ceiling cost depending on the scope of work, site specific features, financial package, debt-equity ratio, exchange rate, taxes and duties, foreign exchange etc.

GOAP may please take further action based on the above.”

In the meanwhile, the APTRANSCO informed the Commission by its letters dated 6th February, 2002 that the plant may have to be backed down on account of high tariff cost as such the company may be advised to sell the power outside the State by paying wheeling charges as per the order of the Commission. The matter was heard on 7th February, 2002. APTRANSCO took a complete turn around stating that it was unable to purchase power on the ground that the plant may have to be backed down in the merit order dispatch due to high variable cost. A protest was made thereto by the company in terms of its order dated 22nd February, 2002. The discussion was held between the Managing Director of the Company and the Chief Engineer of APTRANSCO on 22nd March, 2002 when the

company agreed to the demands of APTRANSCO for reduction in the cost of power to prevent further losses to the investors and the lenders. APTRANSCO increased the wheeling charges four fold.

It may, however, be noticed that the Commission by its order dated 23rd April, 2002 observed :-

“At the hearing the applicant argued that it had always complied with the orders of the APERC and on-off-on attitude of ANTRANSCO was very confusing not only to LVS but also to other energy developers and the credibility of APTRANSCO and GoAP was at stake. It requested the APTRANSCO should be directed to enter into PPA on the basis of the latest negotiations. On the other hand, Shri Manmohan Rao, CE, APTRANSCO, stated the APTRANSCO is unable to buy power as the purchase cost might not pass muster in the merit order and APTRANCO might not be able to buy any power from LVS and end up only paying fixed charges, even if a PPA is entered into.”

The Commission for all intent and purport took a policy decision that the electricity generated by the company would be transferred to APTRANSCO. Whereas most of the respondents could not start production, LVS Power did. We will state the facts of the same at some details at an appropriate place but suffice it to point that pursuant to the

interim decision taken by the Commission, LVS Power cancelled the agreements it had entered into with the consumers. Negotiations were held for fixing the rate of the tariff. It did not succeed. The Commission by its order dated 23rd April, 2002 stated that:

“The Commission can only grant or withhold consent for a PPA submitted to the Commission. If APTRANSCO does not wish to enter into PPA with LVS there is no way the Commission can compel APTRANSCO to do the same. In the circumstances, there is no need to pass any order u/s. 21(4) of the A.P. Electricity Reform Act, 1998 either granting or withholding consent.”

The writ petition filed by the company before the High Court was allowed directing :-

“65. In the light of the above infirmities, the order of the Commission is liable to be set aside and we are of the opinion that there are sufficient grounds to allow the appeal.

66. In the result, the appeal is allowed with costs by setting aside the order of the A.P. Electricity Regulatory Commission in OP No. 70-A(LVS)/2001 dated 23-4-2002 holding that APTRANSCO cannot go back from its promise and refuse to purchase the power on the pretext of surplus power position in the State. We direct the Commission to consider the matter afresh as per the norms of Central Electricity Authority and the directions given in the appeal

and to direct the APTRANSCO to enter into Power Purchase Agreement and purchase the power from the appellant.

67. Now the further question that falls for consideration by this Court would be, what should happen to the generation plant which is ready for commercial operation till the Commission decides the issue as per law, in the light of the directions given by us?

68. It is not in dispute that apart from the investment made by the private entrepreneur, about 104 crores of rupees of public money was invested by various financial institutions, under the leadership of Industrial Development Bank of India (IDBI) and everyday the appellant has to suffer a loss of about rupees 8 lakhs towards interest component itself. If we allow the situation to continue, the losses of the unit will be mounting up and it may reach a point of no return and the public monies invested will go waste. The burden will again fall on the man with loin cloth in the shape of indirect taxes. Hence, we cannot allow the situation to continue further, more so, in the light of the permission given by the Commission on 18-8-2001 to the APTRANSCO to purchase the power from the appellant. We therefore direct the APTRANSCO to purchase the power at the rate at which it purchased during the trial operations, subject to the final orders to be passed by the Commission, or to takeover the plant from the appellant and to perform the duties of a generating company, as provided under Section 18-A(2) of the Electricity (Supply) Act, 1948, until it enters into Power Purchase Agreement with the appellant after fixation of the terms by the Commission. The above arrangement made to save the plant will

be subject to final orders to be passed by the Commission in the matter.

69. Before we part with the case, we place on record our displeasure over the unhelpful and un-cooperative attitude of APTRANSCO in accepting a reasonable suggestion made by this Court i.e., the power generated by the appellant may be purchased at the rate at which it is purchasing from other units, pending disposal of the appeal, since we are pre-occupied in hearing a batch of electricity appeals preferred against the orders of the A.P. State Electricity Regulatory Commission regarding Wheeling Charges and Grid Support Charges wherein the senior Advocates from other States are advancing arguments and granted sufficient time to think over the matter and report to the Court. The learned senior Counsel appearing for APTRANSCO expressed his inability to convince his client in accepting the suggestion made by the Court. Therefore, in order to dispose of this matter, we were made to take up this appeal by stopping arguments in those cases and complete the hearing by sitting in the Court beyond Court hours.”

Re: Civil Appeal No. 8094 of 2002

On 29.2.96, permission was granted to RVK Energy Pvt. Ltd. to set up a 32.7 MW residual fuel based power plant at Medak district so as to enable it to generate and supply power directly to specified industrial consumers by using the existing transmission and distribution network of APT. On 5.12.98, the State Government on a request made by RVK Ltd.,

allowed the change of location for the project to Krishna district. On 1.2.99, the 1998 Act was brought into force whereby the licensing provision under Section 14 became applicable in the State of Andhra Pradesh. In terms of Section 14(4), the State Government issued provisional licenses to all persons who were engaged in the business of supply of electricity. On 23.2.99, the State government permitted RVK to partly change the fuel for the project from Residual Fuel to Natural Gas. On 2.4.99, the Andhra Pradesh Electricity Regulatory Commission (APERC) was constituted under the Reform Act. On 6.5.99, a Power Purchase Agreement was signed between RVK Pvt. Ltd. and Indian Cements Ltd. The Agreement inter-alia provided that as RVK was in the process of signing the Power Wheeling Agreement with APTRANSCO, India Cements thus had notice of the execution of the Wheeling Agreement between the parties as a pre-requisite of the implementation of the Agreement between it and RVK Pvt. Ltd. On 10.9.99, APTRANSCO requested APERC to approve the drafts of the Power Purchase and Wheeling Agreement with RVK Pvt. Ltd. On 20.9.99, RVK made an application being O.P. No. 2 of 1999 to APERC seeking exemption from the requirement of license to supply electricity to its consumers under Section 16 of the Reform Act. In response to the application of APTRANSCO dated 10.9.99, APERC by its letter dated

22.9.99, listed the requirements to be complied with which inter-alia included RVK Pvt. Ltd. to obtain a licence or exemption from APERC and to agree to APERC deciding third party sales including the extent and manner of the supply and affixing the tariff, transmission and wheeling charges. APTRANSCO was called upon to amend the draft agreement with RVK.

Vide its letter dated 24.9.1999, RVK requested APERC to process the exemption application dated 20.9.1999 expeditiously.

On 14.10.1999, the Power Purchase and the Wheeling Agreement was signed between RVK and APTRANSCO. In terms of the Agreement, it was agreed by RVK to set up a power generating plant to generate electricity upto 20.31 MW with natural gas as fuel in Krishna district and to sell power through APTRANSCO to identified consumers via the APTRANSCO grid. It was also agreed by RVK to pay the transmission (wheeling) and banking charges as per the provisions of Section 26 of the 1998 Act. RVK agreed to take a licence as required under Section 15 or an exemption under Section 16 of the Reform Act for third party sale including supply to (other than a licensee) regardless of the general approval granted under G.O.M. No. 152 dated 29.11.95. The agreement

also provided for RVK to take the consent of APERC for wheeling of power and submit a list to APERC for its consent of the consumers to whom RVK proposed to sell the power. The agreement stipulated the submission of all disputes regarding third party sale and supply to sister concerns including the extent and manner of such supply and the tariff charged to the APERC.

On 9.12.1999, RVK entered into a Power Purchase agreement with Super Spinnings/Precott mills for sale of electricity. The agreement noted that Super Spinnings/Precott Mills had notice of the terms of the Power Wheeling Agreement that had been entered into between RVK and APTRANSCO.

By its letter dated 10.12.99, RVK sought orders from APERC to sell electricity to third parties so as to avoid paying minimum guarantee charges of Rs. 2.40 lacs per day to the Gas Authority of India for non-utilization of the gas so allocated to generate electricity in the power project. In the light of the urgency shown by RVK, APERC by its interim order dated 3.1.2000 approved the Wheeling Agreement and third party sales which specifically stated that the order would not prejudice the power of APERC to pass such an order as it may consider necessary at

any stage of the proceedings. The proceedings were however kept pending.

On 10.2.2000, RVK entered into a Power Purchase agreement with Super Nagarjuna Agro-Tech for sale of electricity. The agreement referred to the Power Purchase agreement entered into between RVK and APTANSCO.

After hearing RVK on 28.3.2000, APERC by its order dated 31.3.2000. rejected the request of RVK for grant of licence/exemption from licence. It was held that G.O. Nos. 116 and 152 did not give any vested right to the mini power plants to get a licence or an exemption after the Reform Act had come into force. APERC directed RVK to sell electricity to APTRANSCO only and not to third parties at a fair and reasonable price to be mutually agreed to by the parties or in the event of the failure to do so, to be decided by the APERC.

Aggrieved by the said order, RVK preferred an appeal under Section 39 of the 1998 Act before the Andhra Pradesh High Court wherein the prohibition of the third party sales was challenged. By an order and judgment dated 8.6.2001, the High Court dismissed the said

appeal. Upholding the order of APERC, the High Court was of the opinion that the license or sanction under the Reform Act was necessary, notwithstanding any previous licence or sanction that was granted under the 1910 Act. It furthermore held that any approval envisaged under Section 43 A of the 1948 Act granted to a generating company for sale of electricity did not authorize the supply of electricity to the consumers.

Re: Civil Appeal No. 8101 of 2002

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On 9.12.1995, the State Government under Section 18A of the 1948 Act granted permission to M/s Astha Power Corporation Pvt. Ltd. to set up a 28.7 MW residual fuel based power plant at Balanagar, Hyderabad so as to enable it to generate and supply power directly to specified industrial consumers by using the existing transmission and distribution network of APT. Further, permission was granted by the state government under Section 28 of the 1910 Act to Astha Power Pvt. Ltd. for supplying energy to the identified consumers and also under Section 43A of the 1948 Act for entering into a contract for the sale of electricity to the consumers.

On 12.11.1996, the State Government on a request made by Astha Power Pvt. Ltd., allowed the change of location for the project to Pashamylaram, Medak district.

By a notification dated 19.8.1999 issued by APERC, the public was informed that a licence was required to be taken from APERC for the transmission or supply of electricity in the state.

On 10.9.1999, APTRANSCO requested the Commission to approve the Power Purchase and Wheeling Agreement with Astha Pvt. Ltd.

On 23.10.1999, the Power Purchase and the Wheeling Agreement was signed between Astha and APTRANSCO. In terms of the Agreement, it was agreed by Astha to set up a power generating plant to generate electricity of about 28 MW with H.F.O. as fuel in Medak district and to sell power through APTRANSCO to identified consumers via the APTRANSCO grid. It was also agreed by RVK to pay the transmission (wheeling) and banking charges as per the provisions of Section 26 of the Reform Act. Astha agreed to take a licence as required under Section 15 or an exemption under Section 16 of the Reform Act for the third party sale including supply to (other than a licensee)

regardless of the general approval granted under G.O.M. No. 152 dated 29.11.1995. The agreement also provided for Astha to take the consent of APERC for wheeling of power and submit a list to APERC for its consent of the consumers to whom Astha proposed to sell the power. The agreement stipulated the submission of all disputes regarding third party sale and supply to sister concerns including the extent and manner of such supply and the tariff charged to the APERC.

On 23.12.1999, Astha made an application to APERC seeking exemption from the requirements of taking license to supply electricity to its consumers under Sections 15 & 16 of the Reform Act.

After hearing Astha on 18.4.2000, APERC by its order dated 1.7.2000. rejected its request for grant of licence/exemption from licence. It was held that G.O. Nos. 116 and 152 did not give any vested right to the mini power plants to get a licence or an exemption after the Reform Act had come into force.

APERC directed Astha to sell electricity to APTRANSCO only and not to third parties at a fair and reasonable price to be mutually agreed to by the parties or in the event of the failure to do so, to be decided by the APERC.

Aggrieved by the said order, on 24.7.00, Astha preferred an appeal under Section 39 of the Reform Act before the Andhra Pradesh High Court wherein the prohibition of the third party sales was challenged.

In the meanwhile, on 23.4.01, APERC after observing that Astha had not approached APTRANSCO as per its directions to arrive at an agreement for sale of electricity, directed Astha again to negotiate with APTRANSCO so as to arrive at an agreement.

By an order and judgment dated 8.6.01, the High Court dismissed the said appeal. Upholding the order of Commission. The High Court was of the opinion that the license or sanction under the Reform Act was necessary notwithstanding any previous licence or sanction that was granted under the 1910 Act. It furthermore held that any approval envisaged under Section 43 A of the 1948 Act granted to a generating company for sale of electricity did not authorize the supply of electricity to the consumers.

Entry 38 of the Concurrent List in the Indian Constitution provides for “Electricity”.

The Parliament enacted the Indian Electricity Act (for short the 1910 Act). Section 3 of 1910 Act provides for issue of licence to the undertakings generating, supplying and distributing electrical energy.

Section 28 of the 1910 Act provides for grant of sanction required by non-licensees in certain cases.

The State is an appropriate Authority both for grant of licence in terms of Section 3 and sanction in terms of Section 28 of 1910 Act.

In the year 1948, the Parliament enacted the Electricity (Supply) Act, 1948 (for short the 1948 Act) in terms whereof each State was statutorily obliged to constitute Electricity Boards in their respective States. Electricity Boards are ‘deemed licenses’ in terms of the said Act. In terms thereof licence cannot be granted to any private party.

Sections 2(4)(A), 2(5), 2(6) of the 1948 Act provide for the definitions of “Generating Company”, “Generating Station” and “licensee”, respectively.

Section 18A specifies the duties of a generating company.

Section 26A of the 1948 Act provides for exemption grant of a licence so far as a generating company is concerned.

Section 43A of the 1948 Act provides for terms, conditions and sale of electricity by generating company.

The State of Andhra Pradesh enacted the 1998 Act to provide for the constitution of an Electricity Regulatory Commission, restructuring of the Electricity Industry, rationalisation of the generation, transmission, distribution and supply of electricity avenues for participation of private sector in the Electricity Industry and generally for taking measures conducive to the development and management of the Electricity industry in an efficient, economic and competitive manner and for matters connected therewith or incidental thereto.

“APTRANSCO” has been defined in Section 2(b) of the 1998 Act to mean Transmission Corporation of Andhra Pradesh Limited incorporated as a transmission company under the Companies Act, 1956 (Central Act 1 of 1956) and as referred to in Section 13 thereof.

“Commission” has been defined in Section 2(c) of 1998 Act to mean the Andhra Pradesh Electricity Regulation Commission constituted under sub-section (1) of Section 3.

“Licensee” or “licence holder” has been defined in Section 2(e) of 1998 Act to mean a person licensed under Section 14 of the Act to transmit or supply energy including APTRANSCO.

Section 3 of 1998 Act provides for establishment and constitution of the Commission.

Functions of the Commission have been dealt with in Section 11 of the 1998 Act, clauses (e) and (f) whereof read as under :-

“11. Functions of the Commission, :-

- (e) to regulate the purchase, distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected.

- (f) to promote competitiveness and progressively involve the participation of private sector, while ensuring fair deal to the customers.”

Section 12 provides for the general powers of the State Government to issue policy directions on matters concerning electricity in the State including the overall planning and co-ordination. All policy directions are required to be issued by the State Government consistent with the objects sought to be achieved by the said Act and accordingly shall not adversely affect or interfere with the functions and powers of the Commission including but not limited to determination of the structure of tariffs for supply of electricity to various classes of consumers.

Section 13 of the 1998 Act provides for constitution and functions of APTRANSCO. Section 14 provides for licensing, sub-section (1) whereof reads as under :-

“14. Licensing:- (1) No person, other than those authorized to do so by licence or by virtue of exemption under this Act or authorized to or exempted by any other authority under the Electricity (Supply) Act, 1948, shall engage in the Sate in the business of, -

- (a) transmitting electricity ; or
- (b) supplying electricity.”

Section 15 of 1998 Act provides for grant of licences by the Commission in respect of transmission of electricity in a specified area of transmission and supply electricity in a specified area of supply including bulk supply to licensees or any person.

Section 16 of 1998 Act provides for exemption from the requirements of having a licence.

Section 17 of 1998 Act provided for general duties and powers of the licensees. Section 21 imposes restrictions on licensees and generating companies.

The Parliament enacted Indian Electricity Act, 2003 (in short 2003 Act).

Sub-section (2) of Section 10 of the said Act enables a generating company to supply electricity to third parties. It reads :-

“Section 10 - Duties of generating companies

(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer.

Section 14 of 2003 Act provides for grant of licence.

The Schemes of 1910 Act, 1948 Act and 1998 Act being different, any licence or sanction granted in terms of Section 3 and 28 of the 1910 Act or permission under Section 43A of the 1948 Act would not mean that no licence was required in terms of 1998 Act. The Regulatory Commission in absence of any direction issued by the State in terms of Section 12 of the Act, that too being an expert body was entitled to take its own decision. The power of the Commission to regulate supply would include a power to issue necessary direction (s) to supply electrical energy only to the licenses under the 1948 Act. The 1998 Act stipulates that the manner in which the power to regulate would be exercised has been left with only an expert body.

There are principally two categories of cases before us, viz.:

- i) Where the State of Andhra Pradesh had granted express permission to establish Mini Power Plants (for short MPP) prior to 1995 where residual fuel which were to be used as raw-material had been specified.
- ii) The Government of Andhra Pradesh also permitted the producer of electricity to supply it to heavy industrial units including public sector undertakings.

The issues involved in relation to these industries are two fold.

Where the industries had been asked to sell electrical energy to the APTRANSCO, writ petitions filed thereagainst had been allowed by one Division Bench of the High Court. It, however, appears that another batch of cases where interim order had been passed by the Commission to supply power to the APTRANSCO at one stage and pursuant to the said directions, supply of energy had been taken for sometime but while negotiations were going on for fixation of price between the parties at first instance, which having failed, when the matter came up again before the Commission, the APTRANSCO refused to enter into such an agreement resulting in an order passed by the Commission, that it cannot enforce the APTRANSCO to enter into such an agreement.

These orders were subject matter of writ petitions before the Andhra Pradesh High Court. Another Division Bench of the said High Court, keeping in view the stand taken from the very beginning by the State of Andhra Pradesh; the power of the Commission as also the orders passed by it from time to time as also the negotiations held between the parties, directed APTRANSCO to enter into an agreement with the MPPs.

Mr. Shanti Bhushan, learned senior counsel appearing on behalf of the appellant- APTRANSCO, would submit :-

- 1) Whereas the Commission has the requisite power to regulate supply of electrical energy in terms of Section 11 of the 1998 Act, it had no jurisdiction to compel the APTRANSCO to enter into a Power Purchase Agreement.
- 2) Power of the Commission in terms of sub-section (4) of Section 21 being limited, the High Court committed a serious error in issuing the impugned directions.

- 3) The High Court while exercising its appellate jurisdiction in terms of Section 39 of 1998 Act could not have issued any direction which was beyond the power of the Commission.
- 4) In any event the High Court being not an expert body should not have ordinarily interfered with an order of the Commission which is an expert body, as has been held by this Court in West Bengal Electricity Regulatory Commission vs. C.E.S.C. Ltd. etc. etc : (2002) 8 SCC 715.

Mr. Ramachandran, learned counsel, appearing on behalf of the Commission would submit :

- 1) That sanction granted in terms of Section 28 of 1910 Act or permission granted under Section 43 A of the 1948 Act would not lead to the conclusion that the MPPs were not required to take fresh licence or apply for grant of exemption.
- 2) Applications for grant of exemptions were filed by the MPPs, as even they as also the financial institutions thought that the same was necessary.

- 3) The Commission in its order did not interfere with the agreements which had been entered into by and between the MPPs and the third party prior to coming into force of the 1998 Act.
- 4) The decision to direct the MPPs to supply power to APTRANSCO was taken with a view to adjust the equities between the parties, as otherwise, whereas on the one hand MPPs would be supplying power to industrial companies and commercial concerns which would attract a higher tariff, the APTRANSCO would have been left with only agricultural consumers and domestic consumers for whom the tariff was on a lower side resulting in sufferance of loss by it
- 5) The Commission had the jurisdiction to issue such directions, apart from its power to grant licence or grant exemption in terms of Section 14 of the 1998 Act but also in exercise of its power to regulate supply and all that is contained in Section 11 thereof.
- 6) Apart from LVS Power, as no other company, had set up the power plant, although the Commission in its order dated 4th May, 2001, in purported exercise of its suo motu power,

expressed its disinclination to permit third party sales and fixation of rate, it asked the parties to negotiate thereabout and only in the event such negotiations failed, they were given the liberty to approach the Commission in the matter.

- 7) When, however, it was found that the cost of supply would be beyond the capacity of APTRANSCO to bear, the Commission refused to issue to it to make compulsory purchase of electricity from LVS.
- 8) The Commission had no intention to restrict sale of electricity to third party by MPPs, particularly when APTRANSCO itself was unable to take supply.

Mr. Harish N. Salve, learned senior counsel appearing on behalf of the respondent LVS Power, on the other hand, urged :-

- 1) Section 21(4) of the 1998 Act has no application to the facts of the present case.
- 2) Sections 11(1)(e) and (f) of 1998 Act clearly postulate a wide power in the Commission, which in effect and substance, clearly go to show that while exercising its power to regulate supply of electrical energy by generating station

to a consumer, it, while directing the MPPs to supply electrical energy to APTRANSCO had the requisite power to direct the APTRANSCO to purchase the same.

- 3) In any event the APTRANSCO itself having invited the order and furthermore having suffered two directions of the Commission as contained in its orders dated 18th August, 2001 and 26th November, 2001 whereby and whereunder the Commission directed the APT to purchase electrical energy from the company subject to fixation of rate by negotiations, and in the event of failure, to come back to the Commission cannot now turn round and question its jurisdiction to do so and, thus the High Court was within its jurisdiction to issue the directions.
- 4) APTRANSCO had been changing its stand from stage to stage, in so far as at one point of time it complained of the capital costs being too high; when the company came down to fix costs, it did not accept the same and asked for the factor of variable costs for the purpose of fixation of tariff and when the company, as an act of desperation, keeping in view its commitments to various financial institution, had

even agreed therefor, took a complete turn about to contend that they do not require the power.

- 5) The Government of Andhra Pradesh having referred the matter to Central Electricity Authority for its opinion and having obtained the same, the Commission was bound to compel APTRANSCO to agree thereto.
- 6) In any event, as by reason of the stand taken by APTRANSCO, the company had to cancel all the agreements of supply entered into by and between the parties for supply of electrical energy, it could not have resciled from its representation and refused to purchase electrical energy from it.
- 7) Once it is contended by the APTRANSCO that the Commission had the power to direct the MMPs to sell their produce only to it, as a matter of policy, could not have contended that the Commission can have only half a power and it had no power to ask it to purchase the same.
- 8) The Commission which itself has made a mess of everything, was bound as an expert body to take the interim direction of the Commission to its logical conclusion.

- 9) The State having the power to lay down the policy decision in terms of Section 12 of the 1998 Act, the Commission is bound to give effect thereto having regard to its functions as envisaged in Section 11(1)(f) of the Act. It was, thus, bound to promote competitiveness involving participation of private sector progressively and not regressively.
- 11) APTRANSCO having been constituted under the Act and its functions being subject to supervision by the Commission, was bound to obey the directions of the Commission.

Mr. Narsimhan and Mr. Dushyant Dave, learned senior counsel appearing on behalf of G.V.K. and Astha Power submitted that having regard to the fact that the MPPs had been granted licences by the State in terms of Section 28 of 1910 Act and Section 43A (1)(c) of 1948 Act the provisions of the 1998 Act as regards grant of licences would not be applicable in their cases.

The learned counsel submitted that the Commission had no jurisdiction to ignore the policy decision of the State, particularly when the consumers to whom the MPPs would supply power upon generation thereof had been fixed. Such a policy decision, in view of Section 12 of

the Act was binding on the Commission. Respondents were ill advised to approach the Commission for grant of exemption which was not necessary as has been found by the High Court. The Commission in any event had no jurisdiction to direct sale of electricity only to APTRANSCO. The power to regulate sale and supply of electrical energy as contained in Section 11 of the 1998 Act must be held to be subject to other provisions of the Act and in particular Sections 15(1)(h) and 15(1)(k) and Section 17 thereof.

The permission granted in terms of Section 43A of 1948 Act having been repealed by 1998 Act, the Central Government had recognized the same by introducing the Electricity (Removal of Difficulties) Second Order, 2005 in the light of Section 10(2) of the Electricity Act, 2003. The sanction and permission granted by the State, which was the only competent authority therefor, having conferred a benefit upon the MPPs by granting licences, as a result whereof the legal rights vested in them, the same could not have been taken away.

While issuing a direction that MPPs must sell the electricity only to APTRANSCO the Commission had not only failed to address the question raised before., it passed an order only on the basis of misplaced conception.

The State took a policy decision. It was with a view to develop growth of generation and supply of electrical energy. Monopoly of the State Electricity Board was sought to be given a go bye. The intention of the State to lay down the policy decision in regard to privatization of generation and supply of electrical energy is manifest from the GOMs. issued by it.

There is absolutely no doubt whatsoever that the Commission, which is a statutory authority, is bound by the direction of the State but it would not be so bound if it is contrary to or inconsistent with any of the provisions contained in 1998 Act. Respondents herein sought for an exemption from the provisions thereof. They filed applications in terms of Section 16 of 1998 Act. Whether such an application was filed on a mistaken belief or not is one question but the action taken by the Commission must be construed upon taking a holistic view of the matter.

Respondents herein acted pursuant to the promise made by the State. They altered their position. They have invested a huge amount. They secured foreign collaboration, raised huge loans from financial institutions. They not only entered into Power Purchase Agreements but also entered into Power Wheeling Agreements with APTRANSCO. The

said arrangements were entered into in view of the fact that the private generating companies did not have the requisite infrastructure for transmission of electrical energy from their generating stations to the consumers.

It was in the aforementioned background, we must take into account that the applications for exemptions were filed pursuant to the order passed by the Commission as indicated hereinbefore. It was the Commission which opined that such an application for exemption was not required to be filed. However, while dealing with the application, Commission issued a direction that the power generated by MPPs must be sold to APTRANSCO only and the sale to the 3rd party was prohibited. Direction was issued in this behalf in great details. The said direction was the subject matter of appeal before the Andhra Pradesh High Court.

Indisputably the letter dated 29th February, 1996 issued by the State to the private entrepreneurs is also in consonance with the said objective.

The power of the Commission in terms of 1998 Act must be considered having regard to the provisions of Section 11 thereof. We may at the outset notice two different functions specified under the Act. Section 11 of 1998 states about the functions of the Commission whereas Section 12 thereof states about the powers of the State Government.

No doubt the functions of the Commission is wide. It, in terms of clause (e) of sub-section (1) of Section 11 of the 1998, is entitled to regulate the purchase, distribution and supply as also utilization of electricity but when the Act speaks of regulation, the same would not ordinarily mean that it can totally prohibit supply to third parties. It may do so in exceptional situations. Such an order is not to be passed.

The Commission, keeping in view the purported object of the Act, ordinarily was bound to give effect to the policy decision of the State. The Act was enacted to encourage competition. It speaks of privatization of generation of power. The Commissioner's power to regulate supply of power must be considered keeping in view the purport and object of the Act.

In Advanced Law Lexicon, 3rd edition, page 4026 “Regulation”

has been defined as under :-

“A regulation is a rule or order prescribed by a superior for the management of some business or for the government of a company or society or the public generally.”

In State of Tripura and others vs. Sudhir Ranjan Nath : (1997) 3

SCC 665, this Court held :-

“This in turn raises the question, what is the meaning and ambit of the expression "regulate" in Section 41 (1) of the Act? (Section 41(1) empowers the State government "to regulate the transit of all timber and other forest-produce".) The expression is not defined either in the Act or in the rules made by the State of Tripura. We must, therefore, go by its normal meaning having regard to the context in which, and the purpose to achieve which, the expression is used. As held by this Court in *Jiyajee Cotton Mills Ltd. and Anr. v. Madhya Pradesh Electricity Board and Anr.* [1989] Suppl. 2 S.C.C. 52 the expression "regulate" 'has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions, and as has been repeatedly observed, the court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied" (at page 79). Having regard to the context and other relevant circumstances, it has been held in some cases that the expression "regulation" does not include "prohibition"

whereas in certain other contexts, it has been understood as taking within its fold "prohibition" as well.:

It has been held by this Court in Jiyajeerao Cotton Mills Ltd. and another vs. Madhya Pradesh Electricity Board and another : 1989 Supp (2) SCC 52 that the power to regulate does not include power to prohibit.

The Court held :-

“ The expression "regulate" occurs in other statutes also, as for example, the Essential Commodities Act, 1955, and it has been found difficult to give the word a precise definition. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions, and as has been repeatedly observed, the Court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied.”

In Talcher Municipality vs. Talcher Regulated Market Committee and another : (2004) 6 SCC 178, this Court held :-

“14. The power to regulate buying and selling of agricultural produce must be interpreted in the context in which the same has been used. Each person whoever is engaged in buying and selling of the agricultural produce in the market shall be subject to the regulation for which the same has been enacted. The expression "regulation" is a term which is capable of interpreted broadly. It may in a given case amount to prohibition.”

If the State had accorded sanction for sale of electrical energy generated by the MPPs, the Commission save and except for cogent and compelling reasons could not have directed the sale of entire production of electricity energy to APTRANSCO. If that was the stand of the Commission and the APTRANSCO, the question of entering into any Wheeling Agreement did not arise. It is one thing to say that the privileges conferred by G.O.Ms. issued by the State Government were prior to the coming into force of the 1998 Act and appointment of the Commission, but then the Commission was bound to give due weight to the policy decision taken by the State even prior to its establishment and coming into force of the 1998 Act, particularly when the Act was enacted in furtherance thereof.

Indisputably respondents were entitled to produce electrical energy under Section 28 of 1910 Act. They were authorized to generate

electrical energy. The question which arises is as to whether they were required to file appropriate applications for grant of licence or for exemption which should have been dealt with accordingly. At that point of time, the Commission was not exercising its other functions. A condition, which is per se unreasonable should not have been imposed. It is one thing to say that the statutory authority exercised its powers one way or the other but it is other thing to say that in the garb of exercising power of grant of licence and/or exemption thereunder, it issued a direction which has nothing to do directly therewith.

Commercial relationship between a generating company and the consumer has all along been accepted. Public interest would not mean the interest of APTRANSCO alone. Equity in favour of one of the generating companies could not have been the sole ground for coming out with such a policy decision and that too while considering application for grant of exemption from the purview of the licensing provision..

We will assume that the Legislature of the State with some purpose in mind provided for taking of licence under the 1998 Act but the very fact that they had the requisite licence in terms of the provisions

of 1910 Act, itself was one of the relevant considerations for the purpose of grant of exemption. It could have been rejected in which event the MPPs would have applied for grant of licence. Indisputably the State Government has the power to grant provisional licence. In terms of sub-section (4) of Section 14 of 1998 Act, the provisional licences are also issued by the State Government. Indisputably again the said provisional licences have been granted to avoid a situation as a result whereof the MPPs would be forced to stop their function during interregnum period. Even if the licences were required to be issued, each case should have been considered on its own merit.

When an application for grant of exemption is filed, the same is required to be dealt with independently. What was necessary for the said purpose was interest of the consumers as well as the consideration that supply and distribution cannot be maintained unless the charges for electricity supply are adequately levied and duly collected.

The Commission, therefore, was bound to strike a balance. It should have given due consideration as to how and in what manner the MPPs were established. They were not per se inconsistent with the object sought to be achieved by the 1998 Act.

Reliance in this behalf has been placed on Andhra Pradesh Gas Power Corporation Ltd. vs. Andhra Pradesh State Regulatory Commission : (2004) 10 SCC 511 and Grid Corporation of Orissa Ltd. vs. Indian Charge Chrome Ltd. : (1998) 5 SCC 438 para 15, which reads :-

“15. Another question which was seriously contested on behalf of GRIDCO before the Regulatory Commission as well as before the High Court was that ICCL is not a licensee within the meaning of Section 2(h) of the Indian Electricity Act, 1910 and also under Sections 2(e) and (f) of the Reform Act, 1995. The High Court recorded a finding that ICCL is a licensee under the Indian Electricity Act, 1910 and it continued to be a licensee even after the Reform Act, 1995 came into force. The High Court placed reliance on Section 14 (1) of the Reform Act and held that ICCL is authorised by the State Authority in the business of supplying the electricity. It was thus concluded that ICCL in view of Section 14 of the Reform Act, 1995 shall continue to be a licensee. In view of this finding the High Court held that the dispute is arbitrable under Section 37(1) read with Section 33 of the Reform Act, 1995. It is not seriously disputed that ICCL after a long-drawn correspondence with the Orissa Government had received no objection to put up the Captive Power Plant at Choudwar to generate power. Accordingly in 1989 the Captive Power Plant started generating power which was supplied to the OSEB. This arrangement continued till 1994 when MOU

and agreement were entered into between ICCL and OSEB. The GRIDCO being a successor of OSEB, naturally the MOU of 1994 and agreement of 1995 will be binding upon the GRIDCO in the absence of any material to the contrary. It is not the contention of the GRIDCO that ICCL did not supply any power at all during the period for which the bills were raised on ICCL. Despite this factual position it appears that no formal licence was issued under Section 2(h) of the Indian Electricity Act, 1910 or under the Reform Act, 1995. It cannot be ignored that the investment of ICCL in putting up a Captive Power Plant at Choudwar is running into few hundred crores. Sections 2(e) and (f) of the Reform Act read as under:

“(e) ‘licence’ means a licence granted under Chapter VI;

(f) ‘licence’ or ‘licence-holder’ means a person licensed under Chapter VI to transmit or supply energy including GRIDCO.”

Chapter VI deals with licensing of transmission and supply.

Section 14(1) reads as under:

No person, other than those authorised to do so by licence or by virtue of exemption under this Act or authorised or exempted by any other authority under the Electricity (Supply) Act, 1948 shall engage in the State in the business of

(a) transmitting; or

(b) supplying electricity.

From the facts noted hereinabove and in view of Section 14(1) of the Reform Act it is

quite clear that ICCL was/is authorised and engaged in supplying the electricity to OSEB and thereafter to GRIDCO and if this be so the dispute between the GRIDCO and ICCL could be arbitrable under Section 37 (1) read with Section 33 of the Reform Act, 1995.”

Reference made to the decision of Grid Corporation of Orissa Ltd. (supra) is not apposite. The same was rendered in a different fact situation. The question as regards the effect of Section 14 has not been considered therein.

We are, therefore, of the opinion that it was necessary for the MPPs to apply for licence under Section 14 of the Act.

We are, however, of the opinion that while considering the application for grant of exemption, the Commission did not have any jurisdiction to issue a direction that all MPPs must supply electricity to APTRANSCO only. The power and extent of jurisdiction of the Commission to regulate supply is a wide one but the same, in our opinion, does not extend to prohibition or positive direction that the supply of total energy produced must be made to APTRNASCO while exercising the said jurisdiction. In fact there was no occasion for issuing

such a direction. It is one thing to say that the Commission is entitled to fix tariff but therefor then it cannot take into consideration the case of APTRANSCO alone.

What should be the basis for issuing any tariff could have been the question which was to be posed by the Commission to itself. For the said purpose, the Commission was required to take into consideration all aspects of the matter including the fact that Wheeling Agreement had already been entered into and only by reason thereof, the APTRANSCO may generate a lot of revenue. The decision of the Commission, therefore, being illegal has rightly been set aside by the High Court.

This takes us to the case of LVS Powers Ltd.. So far as LVS Powers Ltd. is concerned it had acted on the basis of the directions of the Commission. It for all intent and purport proceeded on the basis thereof. It not only held negotiations with APTRNASCO for the purpose of arriving at a mutually settled tariff, it having regard to huge loan taken by it and presumably on the pressure of IDBI accepted almost all the suggestions made by APTRANSCO.

From the letter dated 24th July, 1996 to M/s. LVS Power Ltd. it is evident that its consumers were Hindustan Shipyard Ltd.; Hindustan Zinc Ltd.; Essar Steels Ltd. and Andhra Cements Ltd. all situated at Visakhapatnam i.e. within the State of Andhra Pradesh. The Commission appears to have even succumbed to the pressure of the employees of the State Electricity Board. It allowed the employees to be impleaded as parties. It heard them. Why the employees of APTRANSCO had to be heard is beyond our comprehension.

From the order dated 4th May, 2001 it appears that APSEB Engineers' Association and Assistant Engineers' Association, APSEB were heard. The main contention appears to have been advanced as to whether MPPs should be allowed to generate power with residual fuel. The Commission noticed that out of 31 MPPs permission granted to 12 were cancelled. Out of 19, LVS Power Ltd. survived.

It noticed that some of the MPPs changed their capacities. It furthermore took notice of the fact that LVS had already drawn moneys from the financiers and the extension granted by GOAP in their case was to expire on 30th April, 2001.

Interestingly the State of Andhra Pradesh did not put in their appearance before the Commission. The Commission merely received a communication from the Principal Secretary to the Government which was noticed as under:-

“Nobody appeared on behalf of the GoAP. But a letter has been filed in which the principal Secretary to Government has urged that permission may be given to MPPs for third party sales to HT Industrial consumers. If APTRANSCO loses on account of this arrangement, the Commission can fix appropriate wheeling charges taking into account the cross subsidization foregone by APTRANSCO on account of third party sales.”

The same per se was illegal.

It took into consideration the question of subsidy. The Commission reiterated that it was not inclined to permit third party sale. It unfortunately laid serious emphasis on the contentions raised by civil societies at the relevant time. It furthermore noticed that its earlier order, and directions were issued to eight developers to make an offer of price on the basis of the various Government of India notifications, by abdicating its own jurisdiction. On the one hand, it was conscious of its functions but, on the other hand, it failed to determine the issues between the parties.

However, the order dated 30th March, 1992 was not challenged by APTRANSCO. The Commission furthermore noticed that wheeling agreement had been entered into by and between the parties on or about 25th February, 1999. After taking into consideration some submissions of the parties, directions were issued as has been noticed hereinbefore.

What for, it asked the parties to negotiate is evident from that in the event of their failure to agree on the price and the other terms and conditions, the Commission itself would do it. The aforementioned order dated 4th May, 2001 has also not been challenged by APTRANSCO.

It is in the aforementioned backdrop that we will notice the letter dated 17th August, 2001 written by Chief Engineer, Vidyut Soudha to the Commission where after duly noticing that since finalization of PPA has to be done after the abovesited GoAP approvals are received, it was proposed to purchase power produced at the above cited rate from the COI as the plant, subject to consent of the Commission. From the said letter it appears that APTRANSCO had reviewed the capital cost furnished by the developer. They were agreeable to the levelised tariff mentioned therein with payment on year to year basis as per CEA norms

and variable charge. As per CEA, APTRANSCO was permitted to purchase the power from LVS Powers Ltd. at the rate specified in paragraph 5 of the letter which is to the following effect:-

“5. APTRANSCO’s consultants have reviewed the capital cost furnished by the developer and opined that the capital cost can be brought down to the order of Rs.125.00 Crs. The revised tariffs with this capital cost and CEA norms for unit generated will work out to as follows:

	Unit generated	
	FC	VC
Total		
With FE variation -	115.4	157.5
272.9		
Without FE variation -	112.6	157.5
270.2		

The above tariff projections have been informed to the developer on 17.8.2001. In reply, the project company has informed that they are agreeable to the levelised tariff of 115.4 FC 157.5 VC per unit generated and with foreign exchange variation on ROE, presently accepting the capital cost of Rs. 125 Crs. Subject to condition that the tariff is to be re-fixed after the capital cost is approved by the GoAP.”

Supply commenced in September, 2001. On the aforementioned basis only the private agreements were terminated. Important developments took place in the next three months.

By a letter dated 26th November, 2001, APTRANSCO asked the Principal Secretary to the Government of Andhra Pradesh inter alia the following :-

“ In view of the above, it is requested that the capital cost of the project may be limited to that of Rs.125.33 Crs. It is also to inform that in case APTRANSCO is unable to purchase power from this MPP, the MPP may be permitted to sell the power outside the State subject to consent of APERC allowing APTRANSCO to collect wheeling charges. It is requested that the approval of the capital cost may be communicated early to fix the final fixed cost of the tariff and seek the approval of APERC to continue purchase of power if it is found on par with the earlier ad hoc tariff fixed. Early action is solicited since the permission given by APERC for purchase of power from the developer has expired on 31.10.2001.”

It was suggested that the capital cost is too high and, therefore, the tariff should be fixed on the basis of fixed costs. It was opined that there was no need to consider variable costs. What would be the effect of

power purchase beyond 30th November, 2001 was stated in the letter of APTRANSCO dated 3rd December, 2001 to the Commission, which was in the following terms :-

“This has reference to the correspondence cited regarding purchase of power from M/s. LVS Power Ltd.

2) In the reference 4 dated 26.11.2001 cited above. APERC permitted the APTRANSCO to purchase power from M/s. LVS Power Ltd. at the rate as per APERC Order in the reference (2) cited and extended the period of purchase of power from 31.10.2001 to 30.11.2001 purely as an interim measure and directed APTRANSCO to send the firm tariff proposal with the approved project cost from competent authority latest by 30.11.2001 for the commission to pass appropriate order.

3) In this connection, the following are submitted –

- i) The GOAP have been requested vide this office letter dated 26.11.2001 ref (5) cited to limit the capital cost of the LVS Power Ltd. to Rs.125.33 Crs. and for approval of the capital cost to fix the final fixed cost of the tariff and seek the approval of APERC to continue purchase of power.
- ii) After the project cost is approved by GOAP the tariff is to be worked out and a firm proposal is to be submitted to APERC for approval.
- iii) It may take some time for approval of capital cost and finalization of tariff and

approval of power purchase from APERC.

iv) APTRANSCO cannot take power from the project in the absence of provisional approval from APERC.

4) In view of the above, it is requested that the time limit of power purchase from M/s. LVS Limited may kindly be extended for a further period of two months i.e. from 30.11.2001 to 31.1.2002 early to enable APTRANSCO to avail supply beyond 30.11.2001.”

A stand appears to have been taken by the Commission in its letter dated 27th December, 2001 addressed to the Chief Engineer, APTRANSCO by the Commission stating :-

“This is to inform you that further proceedings in the above matter will be held at 11 AM on 7th February 2002 at the Commissions office with the APTRANSCO, GOAP and LVS representatives must attend. In the meanwhile APTRANSCO shall finalise all the documents and issue outstanding including with the Government of Andhra Pradesh as stated in the letter dated 03.12.2001 addressed to the Commission and file with the Commission relevant documents, details etc. by 31.01.2002.”

In the meantime the State referred the matter to the Central Electricity Authority seeking advise under Section 3 of the 1948 Act about the reasonableness of the capital cost of the project proposed by APTRANSCO in view of the experience and expertise of the Authority in Power Projects.

APTRANSCO thereafter filed its written submissions before the Commission expressing its inability to purchase power from the MPPs. The Government of Andhra Pradesh was asked to consider the question as to whether they can sell power outside the State duly permitting APTRANSCO to collect wheeling charge as per the Commission's order.

Several other new contentions were raised with which we are not concerned but we are noticing the same only for the purpose of showing as to how and in what manner APTRANSCO has been changing its stand from stage to stage.

However, it is of some significance to notice that Central Electricity Authority in terms of its letter dated 26th February, 2002 opined that the capital costs works out to be on lower side from the other projects by stating :-

“It may, however, be mentioned that CEA, while granting TEC for similar type of projects for IPPs have cleared the estimated completion capital cost in the range of Rs.3.62 crores to Rs.3.8 crores per MW as the ceiling cost depending on the scope of work, site specific features, financial package, debt-equity ratio, exchange rate, taxes and duties, foreign exchange etc.

GOAP may please take further action based on the above.”

The Government of Andhra Pradesh in view of that letter asked APTRANSCO to proceed with the exercise for arriving at PPA and submit the same to the Commission for approval. APTRANSCO by its letter dated 11th April, 2002 addressed to the Commission, inter alia stated :-

“After detailed examination of the above offer by APTRANSCO, I am directed to convey that in the context of surplus power situation and APTRANSCO’s proposal to surrender NTPC Eastern Region Power and not to draw Power from Central Generating units due to Merit Order Dispatch, dispatch from the power station poses a serious problem. Further, APTRANSCO’s inability to dispatch the station will lead to payment of fixed charges irrespective of generation by this power station. In view of the above, it is requested to take

necessary action and pass appropriate orders in this regard.”

It is in the aforementioned background that the order of the Commission dated 23rd April, 2002 stating that it had no jurisdiction to direct APTRANSCO to purchase power from LVS must be considered.

It is strange that while Commission was so conscious of its own power as envisaged under clause (e) of sub-section (1) of Section 11 of the Act in prohibiting third party sale so far as MPPs are concerned, it even could not take its own order to its logical conclusion. It is with some displeasure that we must notice as to how Commission mis-directed itself at every stage. Despite the State supported the application for grant of exemption, the third party sale was prohibited. Parties were asked to negotiate and come back for fixation of tariff but then without realizing the consequence which has to be suffered by the parties, it says it could not do anything in the matter. If APTRANSCO was not agreeable to the orders passed by the Commission, which might have been passed during the pendency of the proceedings, it could have questioned the same. It did not do that. It accepted the orders. It for all intent and purport forced the respondent to alter its position to its great detriment. The Commission itself is responsible for the said situation.

If it has the power to regulate, as it has been contending, it should have proceeded progressively and not regressively. It could have taken into consideration the provisions of Section 11 (1)(f) whereby one of its function is to promote competitiveness and progressively involve the participation of private sector, while ensuring fair deal to the customers.

The Commission, as we have noticed, hereinbefore had been waiting for some directions of the Government of Andhra Pradesh. It is from that angle it must be held that the decision of the State to allow MPPs. to generate electricity was a matter of policy. The Commission for all intent and purport has frustrated the policy and object of the Act. APTRANSCO in terms of Chapter V of the Act also acts as a statutory authority. The Commission must function within the fourcorners of the 1998 Act. It is again subject to the power of the State Government under Section 12. It has referred the matter again and again to the State and when the State asked it to proceed in the manner, it backed out and APTRANSCO was constituted with the principal object of engaging the business of promoting and supply of electrical energy. It is required to obtain licence for the said purpose. Sub-sections (4) and (5) of Section 13 of the 1998 read as under :-

“13.(4) APTRANSCO shall undertake the functions specified in this section and such other functions as may be assigned to it by the licence to be granted to it by the Commission under this Act.

(5) Upon the grant of licence to the APTRNASCO under clause (a) of sub-section (1) of Section 15 of this Act, the APTRNASCO shall discharge such powers and perform such duties and functions of the Andhra Pradesh State Electricity Board including those under the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or the rules framed thereunder as the Commission may specify in the licence and it shall be the statutory obligation of the APTRNASCO to undertake and duly discharge the powers, duties and functions so assigned.”

We have held hereinbefore that licence under section 14 is necessary but the same is only for transmission and supply and not for generation of electrical energy. Such a licence is required so as to enable the Commissioner to effectively control and regulate transmission and supply. It is also relevant to note that Section 21 provides for restriction on licensees and generating companies. Sub-section (4) empowers a holder of supply or transmission licence to enter into arrangements for the purchase of electricity. Sub-section (5) provides that any agreement relating to any transaction of the nature described in any of the sub-

sections unless made with or subject to such consent as aforesaid, shall be void. It, therefore, restricts the power and activities of APTRANSCO.

It is in the aforementioned situation that the doctrine of promissory estoppel should be held to be applicable.

In Southern Petrochemical Industries Co. Ltd. vs. Electricity Inspector and ETIO and others : (2007) 5 SCC 447, on the question of doctrine of promissory estoppel, it was held :-

“121. The doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff. Such a policy decision on the part of the State shall not only be expressed by reason of notifications issued under the statutory provisions but also under the executive instructions. The appellants had undoubtedly been enjoying the benefit of (*sic* exemption from) payment of tax in respect of sale/consumption of electrical energy in relation to the cogenerating power plants.”

The Court further opined :

“128. In MRF Ltd. it was held that the doctrine of promissory estoppel will also apply to statutory notifications.”

As regards setting up of MPPs the principle of estoppel shall also apply. It is now a well settled principle of law that nobody should suffer for the wrong done to by a quasi-judicial body. In view of the principle analogous to '*actus curiae neminem gravabit*', we are of the opinion that because of the unreasonable stand taken by APTRANSCO before the Commission, LVS Powers should not suffer. In the aforementioned situation the High Court has issued the directions.

APTRANSCO did not intend to increase its efficiency. It did not equip itself so as to be able to compete with others. It might have been in a disadvantageous position. On the one hand the Commission asked for total prohibition for third party sale on the premise that it had to supply electricity to agriculturist, but then when a situation came that it must purchase the power pursuant to the impugned directions of the Commission from MPPs it made a contradictory stand that MPPs can sell the power outside the State.

Before us IDBI intervened. Indisputably it had granted financial assistance to the first respondent-LVS Power. IPDB granted loan only on the basis that the unit shall be functional.

This Court on 11th October, 2002 and 2nd December, 2002 passed interim orders

Mr. Shanti Bhushan states that the first respondent has been paid a huge amount pursuant to the said orders and this Court may issue a direction for refund thereof. We do not agree. The interim order by this Court was passed to maintain a balance and in the interest of the parties.

We are, therefore, of the opinion that in this case interest of justice would be subserved if in modification of the order passed by the High Court, the impugned judgments are set aside and the Commission constituted under the 2003 Act is directed to consider the matter afresh in the light of the new statute.

We hope and trust that the Commission shall pass appropriate orders upon taking into consideration all the material factors. It would be at liberty to vary, modify, rescind the order of the old Commission and issue directions as may be considered just and reasonable. It may, in the changed situation, also allow the parties to effect third party sale. It will be at liberty to evolve a scheme for revival of the companies, keeping in

view the public interest involved and in particular the interest of the financial institutions. The time granted for completion of the projects should be extended by one year. Till such time as the Commission may not pass an appropriate interim order, the interim order passed by this court shall continue.

The appeals are disposed of in the abovesaid terms. In the facts and circumstances of the case, there shall be no order as to costs.

.....J.
[S.B. Sinha]

.....J.
[D.K. Jain]

New Delhi;
May 16, 2008