**IN THE HIGH COURT OF DELHI AT NEW DELHI**

**O.M.P. 677 of 2011 & IA 14336 of 2011**

Reserved on: March 28, 2012
Decision on: May 15, 2012

PTC INDIA LIMITED ..... Petitioner
Through: Mr. Parag Tripathi, Senior Advocate with Mr. Varun Pathak, Mr. Shadan Farasat and Mr. Ravi Prakash, Advocates.

versus

JAIPRAKASH POWER VENTURES LTD. ..... Respondent
Through: Mr. Shanti Bhushan, Senior Advocate with Mr. Vishal Gupta and Mr. Mukesh Pandit, Advocates.

**CORAM: JUSTICE S. MURALIDHAR**

**JUDGMENT**
**15.05.2012**

1. In this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') PTC India Limited, the Petitioner, has challenged the impugned majority Award dated 28th April 2011 in the disputes between it and the Respondent Jaiprakash Power Ventures Limited (JPVL) [the successor-in-interest of Jaypee Karcham Hydro Corporation Limited ('Jaypee Karcham')] arising out of a Power Purchase Agreement ('PPA') dated 21st March 2006 executed between them for sale and purchase of power from the Jaypee Karcham Wangtoo Hydroelectric Project ('the project') being implemented by the Respondent in Kinnaur in Himachal Pradesh.

***Background Facts***

2. Jaypee Karcham, the predecessor-in-interest of JPVL, a generating company within the meaning of Section 2 (28) of the Electricity Act,

2003 ('EA') was incorporated on 29th April 2002 for implementing the project comprising of four units of 250 MW each. On 31st March 2003, the Central Electricity Authority ('CEA') under Section 4(b) of the Electricity Supply Act, 1948 ('ESA') granted Techno-Economic Clearance (TEC) to the project at an estimated capital cost of US Dollar ('USD') 117.44 million (Rs.5345.88 crores @ 1 USD = Rs.48). One of the conditions of the TEC was in Clause (xviii) which stated that the "tariff shall be decided by the Central Electricity Regulatory Commission ('CERC')". Under Clause 9 of the TEC in the event that the time gap between the TEC by the CEA and the actual start of work of the project was more than three years, a fresh TEC of the CEA had to be obtained before actual start of work.

3. Under the PPA entered into between the parties, Jaypee Karcham was to sell and the Petitioner was to purchase 704 MW gross capacity and corresponding energy from the project at the Project Bus Bar for a period of 35 years from the Commercial Operation Date ('COD') of the project for onward sale on a long term basis. The Petitioner is a trading licencee which meant that it is engaged in the trading of electricity by purchasing all forms of electric power from independent producers, captive power plants and other generating companies for sale to electricity boards, power utilities, transmission companies and other organisations buying power whether in the private or the public sector. In terms of the recital 'E' of PPA, the Petitioner was to enter into suitable arrangements with one or more purchasers for sale of the contracted power from the project. A condition precedent was set out in Article 3.1.3 (iv) of the PPA in terms of which the Petitioner was to execute a Power Sale Agreement ('PSA') with the purchaser approved by the appropriate Commission for the entire contracted power and

make it available to Jaypee Karcham. Under Article 9.1.2 the determination of tariff was subject to approval of the appropriate Commission subject to Article 9.1.1. Under Article 9.1.3 the tariff approved by the appropriate Commission would be applicable for purchase and sale of the contracted power and contracted energy.

4. In terms of Article 3.1.3(iv) of the PPA, the Petitioner entered into a PSA with the Punjab State Electricity Board ('PSEB') on 1st September 2006, another PSA with the Uttar Pradesh Power Corporation Limited ('UPPCL') on 13th September 2006 and yet another with the Haryana Power Generation Corporation Limited ('HPGCL') on 25th September 2006. It entered into PSAs with three distribution companies in the State of Rajasthan on 27th September 2006.

5. The Haryana Electricity Regulatory Commission ('HERC') by its letter dated 18th/21st June 2007 approved the PSA between the Petitioner and HPGCL.

6. On 5th March 2005, Jaypee Karcham wrote to the CEA giving details of the various efforts made towards working the project and sought for an extension of time for finalizing the firm financial package. More than three years later, on 18th March 2008, CEA replied to the Respondent stating that after the enactment of EA, the tariff for all power projects had to be determined by CERC. It further stated that there was no necessity for extending the validity of the TEC as it remained valid in terms of Para 9 of the OM issued by CEA on 31st March 2003.

***The decision of the APTEL in Gajendra Haldea***

7. At this stage, a reference is required to be made to the various decisions of the Appellate Tribunal for Electricity ('APTEL') as well as those of the CERC on the question of the CERC's jurisdiction to determine tariff. The first of these was a decision dated 22nd December 2006 of the APTEL in ***Gajendra Haldea v. CERC*** (hereafter ***Gajendra Haldea***). That was a petition under Section 121 of the EA seeking a direction from the to the appropriate Commission to ensure that all generating companies and licencees abide by the provisions of the Act insofar as they relate to sale and purchase of electricity. A further direction was sought to the appropriate Commission "to fix the trading margins for trading licencees" and certain other reliefs. The CERC and several State Electricity Regulatory Commissions (SERCs) were Respondents in the above petition. They objected to the *locus standi* of the Petitioner to maintain the said petition under Section 121 of the EA. Stating that it had taken cognizance of the petition since the issues therein had far-reaching implications affecting the electricity industry in India and the consumers of electricity, the APTEL overruled the preliminary objection of the Respondents. It then proceeded to formulate the issue "whether Electricity Regulatory Commissions can fix tariff for sale of electricity by (i) a generator to a trader or an intermediary; (ii) a distributor to a trader, and (iii) by a trader to any other person." The APTEL undertook the exercise of interpreting Section 62(1), Section 79(1) (a) and (b) and Section 86(1) (a) of the EA. It was held that under Section 62(1(a), tariff was to be determined by the appropriate Commission for the supply of electricity by a generating company to a distribution licencee and not for the supply of electricity by a generating company to a trader or an intermediary or by a distributor

to a trader or by a trader to any person. An application under Section 64(1) for tariff determination had to be confined to determination of the tariff in respect of the four categories of cases specified in Section 62(1) and not under Section 79(1)(a) and (b) and Section 86(1)(a) of the EA. It was held that the provisions of Section 79(1) (a) and (b) and Section 86(1) (a) had to take colour from Section 62(1) of the EA.

8. In ***Gajendra Haldea***, the APTEL examined the statement of Objects and Reasons ('SOR') as well as the Preamble to the EA and concluded that the various provisions were for promoting a competition and that the object of the EA would be frustrated and defeated in case the words "generation and supply" and the words "tariff of generating companies" occurring in Sections 86(1)(a) and 79(1)(a) and (b) of the EA were construed independently of Section 62(1)(a). Consequently, it was concluded that both CERC as well as SERC by virtue of Section 62(1)(a) read with Section 79 (1)(a) and Section 86(1)(a) were empowered to determine tariff only for the four distinct types of supplies spelt out in Section 62(1). In other words, this left it open to the generating company to have a direct commercial relationship with the trader or an intermediary which was a vital factor for encouraging competition. This was important for securing power to the consumers at reasonable rates. A direction was issued by the APTEL in ***Gajendra Haldea*** that a generating company could sell power directly to the traders and intermediaries at a mutually agreed price which would not exceed the base price plus 4% thereof and that price would continue till such time appropriate Commissions acting under Sections 60 and 66 EA fixed the price over and above at which the sale could be effected. Further, the appropriate Commissions were directed to fix trading margins for intra-State trading in a reasonable

manner.

***The decision in Lanco I***

9. The next relevant decision of the APTEL was the one dated 21st October 2008 in ***Lanco Amarkantak Power Pvt. Ltd. v. Madhya Pradesh Electricity Regulatory Commission,*** (hereafter ***Lanco-I***). The brief facts were that Lanco was a generating company having a coal-based Thermal Power Station in district Korba, Chtattisgarh. It entered into a PPA with PTC India Limited (which incidentally is also the Petitioner in the present case) for sale and purchase of 300 MW power. On 30th May 2005, PTC entered into a PSA with M. P. Power Trading Co. Ltd., ('MPPTCL') which was also a trading company in Madhya Pradesh. On 16th November 2005, the predecessor of MPPTCL filed a petition before the Madhya Pradesh Electricity Regulatory Commission ('MPERC') for approval of the PSA between PTC and MPPTCL. By an order dated 14th December 2005, MPERC opined that the fixation of cost of generation of a GENCO located outside Madhya Pradesh is not within its purview, yet it directed Lanco to voluntarily submit itself to the jurisdiction of MPERC and submit its Detailed Project Report ('DPR') for scrutiny. By a letter dated 19th January 2006 addressed to PTC, Lanco expressed its willingness to supply information and clarifications required by PTC to be submitted to MPERC. It also expressed its willingness to abide by the directions of MPERC generally and the overall guidelines of the CERC. By its order dated 7th March 2008, MPERC granted conditional approval to the PSA between PTC and MPPTCL subject to the condition, *inter alia*, that Lanco would submit to the jurisdiction of MPERC and file a petition for determination of the tariff under the PPA.

10. On 14th March 2008, Lanco terminated the PPA. Meanwhile, MPERC extended time to Lanco to submit the tariff petition first upto 30th April 2008 and then upto 4th October 2008. By an affidavit dated 30rd April 2008, Lanco disputed MPERC's jurisdiction in the matter of fixing the tariff of Lanco under the PPA. This objection was negatived by MPERC by its order dated 6th May 2008 holding that it had jurisdiction to determine the tariff under the PPA and examine and re-determine the levelized tariff contractually stipulated in the PPA. MPERC further directed that till such time the tariff was determined, a provisional tariff of 95% of the levelized tariff indicated in the PPA would be applicable.

11. Lanco then appealed to the APTEL against the order dated 6th May 2008 of the MPERC. While PTC opposed the appeal, it conceded that MPERC could not have directed Lanco, a generating company, to apply for the fixation of tariff for supply of electricity to PTC, which was a trading licencee. Following its earlier decision in ***Gajendra Haldea***, the APTEL allowed the appeal and set aside the order dated 6th May 2008 of MPERC. The contention of Madhya Pradesh State Electricity Board ('MPSEB') that MPERC had jurisdiction to fix tariff under the PPA by virtue of the clause in the PPA whereby the parties had agreed that Lanco would file a petition before the appropriate Commission for approval of the tariff was rejected by holding that SERC derived jurisdiction only from the EA and that parties could not by agreement confer jurisdiction on the SERC.

12. On 9th April 2009, the Supreme Court gave its decision in ***Central Electricity Regulatory Commission v. Gajendra Haldea (2009) 11***

***SC 556***. In a brief order, it was held that in view of the decision of the Supreme Court in ***Grid Corporation of Orissa Limited v. Gajendra Haldea (2008) 13 SCC 414*** the petition by Gajendra Haldea before the APTEL was not maintainable. On that short ground the order of the APTEL in the case was set aside.

***APTEL's decision in Lanco II***

13. On 6th August 2009, the APTEL gave its decision in ***Lanco Amarkantak Power Pvt. Ltd. v. MPERC*** (hereinafter ***Lanco-II***). This time, the APTEL was dealing with a challenge to an order dated 25th August 2008 passed by the MPERC which held that it had jurisdiction to deal with the disputes between PTC and Lanco arising out of PPA dated 11th May 2005. It was held by the APTEL that the MPERC had merely relied upon on its earlier order dated 6th May 2008 to ascertain jurisdiction in disputes between PTC and Lanco. That order had been set aside by the APTEL on 21st October 2008. Secondly, a SERC would have jurisdiction under Section 86 to adjudicate upon a dispute between 'its licencee and a generating company' i.e. a trading licencee for intra-State trading in Madhya Pradesh and not a person granted licence by CERC for inter-State trading. Before the APTEL reliance was placed by the counsel for PTC on the decision of the Supreme Court in ***Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd. (2008) 4 SCC 755*** (hereinafter ***GUVNL***). The said decision did not go into question as to who could be called a licencee for the purpose of invoking the jurisdiction of a SERC. The APTEL held that since PTC had been granted licence by the CERC it could not be a licencee under the MPERC so as to invoke the jurisdiction of the MPERC. Consequently, the appeal was allowed and the order dated 25th August 2008 of the MPERC was set aside.

***CERC's order dated 26th October 2009***

14. Meanwhile on 27th July 2009, Jaypee Karcham filed petition No.153 of 2009 before the CERC praying for revision of the estimated project cost from Rs.5909.59 crores to Rs.7080.38 crores and sought an advance ruling from the CERC. The CERC by an order dated 26th October 2009 discussed in detail the provisions of the earlier ESA, the EA as well as the CERC norms. It noted that under the ESA, the scheme relating to the establishment of generating stations was to be submitted to CEA for its concurrence and that CEA while according its concurrence was expected to take into account the capital cost apart from the other relevant factors. The CERC observed that in enacting the EA, Parliament had not retained the provisions concerning grant of TEC including approval of capital cost by the CEA. Further, while framing the tariff regulations during the period 2004-2009, CERC had made provisions for 'in principle' approval of the project's capital cost for thermal power generating stations. There was no corresponding provision for hydro power generating stations (like PTC India). In other words, while framing the 2009 regulations, CERC had done away with the provisions of 'in principle' approval of the project capital cost applicable to thermal power generating stations. Therefore, granting approval to the estimated project cost for the hydro power generating station by relaxing the provisions of the tariff regulations through invoking Regulation 44 "may amount to restoring the repealed provision, through back door". Consequently, it was held that the prayer made by Jaypee Karcham could not be granted and the petition was dismissed at the admission stage.

***Termination of the PPA by Jaypee Karcham***

15. Following the above decision dated 26th October 2009 of the CERC, Jaypee Karcham on 17th December 2009 wrote to the

Petitioner stating that it had obtained legal advice from a senior counsel to the effect that the PPA dated 21st March 2006 "was void as the procedure contemplated in the PPA for determination of the tariff on the basis of which alone the price for supply of electricity by the company to PTC India Limited was payable, could not be enforced." It was accordingly stated by Japyee Karcham that since the PPA was found to be void, no agreement survived between them.

16. The Petitioner by its letter dated 13th January 2010 protested against the above decision of Japyee Karcham. It filed OMP No.25 of 2010 in this Court under Section 9 of the Act for seeking an *ad interim* stay of termination of the PPA by Jaypee Karcham and to restrain Jaypee Karcham from entering into an agreement for sale of power with any other party.

17. By an order dated 19th February 2010 this Court dismissed the said petition on two grounds. The first was that Clause 13.3 of the PPA did not constitute a negative covenant and, therefore, no relief restraining Jaypee Karcham from either terminating the contract or from entering into another sale agreement with any third party could be granted. The second was that the Petitioner could be compensated in terms of money under Clause 14.6.1 of the PPA. Therefore, in view of the bar under Section 14(1)(a) to (d) read with Section 41 of the Specific Relief Act, 1963 the petition was dismissed.

18. Aggrieved by the above decision, the Petitioner filed FAO (OS) No.146 of 2010. By a detailed judgment dated 13th August 2010, the Division Bench of this Court dismissed the appeal. In the concurring opinion of Justice Mool Chand Garg, there was a discussion on the

provisions of Section 79(1) (b) and Section 62 of the EA. It was opined that the question as to whether the tariff could be fixed in respect of sale of electricity by a generating company to a trading licencee would have to be adjudicated actually by CERC. It was observed that the question whether the PPA between the parties had become void on account of the decision of the CERC would have to be examined only by the CERC.

19. Aggrieved by the above decision of the Division Bench, the Petitioner filed SLP (C) No.26883 of 2010 in the Supreme Court. While directing notice to issue in the said SLP on 21st September 2010, the Supreme Court directed that pending the hearing and disposal of the said appeal, if Jaypee Karcham entered into any agreement for sale of electricity with any third party, the same would abide by and be subject to the result of the SLP.

***Award of the Arbitral Tribunal***

20. During the pendency of the appeal before the Division Bench, the Petitioner on 28th May 2010 invoked the arbitration clause and nominated its arbitrator. Jaypee Karcham nominated its arbitrator and the two arbitrators appointed a third to constitute the Tribunal.

21. By a majority of 2:1 the Tribunal by the impugned Award dated 28th April 2011 held that CERC did not have the power to determine or to decide or settle the tariff for supply of electricity by a generating company, such as Jaypee Karcham, to a trader, such as the Petitioner. It was held that the appropriate Commission was not vested with the power to determine tariff for supply of electricity by a generating company to a trader and, therefore, CERC did not have the power to

decide the tariff for the supply of electricity by Jaypee Karcham to the Petitioner. The argument of severability advanced by the Petitioner was also rejected. It was held that upon severance of the provision that required CERC to approve the tariff, the PPA would not remain enforceable firstly, because it would contain no provision in respect of the price to be paid for the sale of electricity and secondly, because it would violate the TEC for the project which made CERC's decision of the tariff a necessary pre-condition.

22. The dissenting Member of the Tribunal gave a separate Award holding that CERC had "ample and full power" to determine and approve the tariff for supply of electricity by a generating company to a trading licencee and that the dispute in that regard had to be decided by CERC alone as long as a generating company was involved in the dispute. Consequently, it was held that the letter dated 17th December 2009 issued by Jaypee Karcham declaring the contract as void was premature.

***Submissions of Counsel for the Petitioner***

23. Mr. Parag Tripathi, learned Senior counsel appearing for the Petitioner, submitted that although the Petitioner had initiated the arbitral proceedings, in view of the fact that the EA was a complete code in itself in respect of matters pertaining to and connected with the supply of electricity, the Tribunal had no jurisdiction to enter into or entertain a dispute between a generating company and a trading licencee. Reliance was placed on the decisions in ***PTC India Limited v. Central Electricity Regulatory Commission (2010) 4 SCC 603, Executive Engineer, Southern Electricity Supply Company of Orissa Limited v. Sri Seetaram Rice Mill (2012) 2 SCC 108*** and

***Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission (2010) 5 SCC 23.*** It was submitted that the invocation of the arbitration clause would not constitute estoppel or waiver to prevent the Petitioner from questioning the jurisdiction of the Tribunal. Reliance was placed on the decision in ***Isabella Johnson v. M.A. Susai (1991) 1 SCC 494.***

24. Mr. Tripathi submitted that the EA was a special law which overrode the general law. Reliance was placed on the decision in the ***GUVNL case*** which held that all disputes between a licencee and a generating company can be adjudicated either by the CERC, the SERC or by an Arbitrator to whom such disputes are referred to by the CERC, and not by a Tribunal appointed under the Act. Reference was also made to the decision of the APTEL in Appeal No.200 of 2009 [***M/s. Pune Power Development Private Ltd. v. Karnataka Electricity Regulatory Commission***] (hereafter ***Pune Power case***) and Review Petition No.6 of 2011 in Appeal No.184 of 2010 [***Adani Power Limited v. Gujarat Electricity Regulatory Commission***] (hereafter ***Adani Power case***). It is pointed out that the very basis of the earlier judgments of the APTEL in ***Gajendra Haldea, Lanco-I*** and ***Lanco-II*** was taken away by its subsequent decision dated 4th November 2011 in Appeal No.15 of 2011 in ***Lanco Power Limited v. Haryana Electricity Regulatory Commission*** (hereafter ***Lanco-III***) in which the APTEL held that a transaction involving supply by a generating company through a trader to a distribution licencee is not outside the purview of the EA and that the appropriate Commission has the jurisdiction to determine tariff. The APTEL in arriving at that conclusion took note of the decision of the Supreme Court in ***Tata Power Company Limited v. Reliance Energy Limited (2009) 16 SCC***

***659*** and the decision of CERC dated 22nd January and 8th July 2008 [and which was affirmed by APTEL by its judgment dated 21st July 2011 in Appeal No.151 of 2008 ***(Uttar Pradesh Power Corporation Ltd. v. Central Electricity Regulatory Commission***)].

25. Mr. Tripathi submitted that the power to 'regulate' under Section 86(1) (b) of the EA included the power to 'determine'. Referring to the decision in ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited (2011) 5 SCC 53*** it was submitted that disputes where rights *in rem* were involved were not arbitrable and amenable to private arbitration. It is submitted that the observation in Para 4 (x) of the SOR of the EA which stated that in a direct commercial relationship between the consumer and a generating company or a trader the price of power would not be regulated, meant a transaction of direct transfer of electricity from either the generating company to the consumer or from a trader to the consumer. Where the trader was selling electricity to the distribution licencee which was eventually supplying it to the consumer, the tariff would be amenable to regulation.

26. It is pointed out that Jaypee Karcham misunderstood the order dated 26th September 2009 of CERC. In that order CERC had only refused to approve the in-principle capital cost through an advance ruling and did not refuse to determine the tariff. The CERC pointed out that an application at that stage by Jaypee Karcham for determining the tariff was premature. Jaypee Karcham was aware that the application for determination of tariff had to be moved six months prior to the COD, whereas it filed the application much earlier. The Tribunal while referring to the APTEL's decisions in ***Gajendra Haldea*** and ***Lanco-I*** failed to take note of APTEL's subsequent

decisions in the ***Pune Power case, Lanco-III*** and ***Adani Review case.***

27. Mr. Tripathi submitted that even assuming that CERC had refused to approve the tariff, the parties could have done so in terms of Schedule E of the PPA. In the instant case it was Section 9 of the Sale of Goods Act, 1930 ('SGA') and not Section 10 which would have applied. Relying on the decision in ***The Instalment Supply Ltd. v. S.T.O., Ahmedabad-I (1974) 4 SCC 739*** it was submitted that the term 'contract of sale' defined in Section 4 (1) SGA included an 'agreement to sell' which was a sub-species of a contract of sale to which Section 9 or Section 10 might apply depending on the facts and circumstances.

28. Finally relying on the decisions in ***UP State Electricity Board Lucknow v. Ram Barai Prasad AIR 1985 Allahabad 265***, ***Vijaya Minerals Pvt. Ltd. v. Bikash Chandra Deb AIR 1996 Cal 67*** and the decision dated 7th September 2011 of the APTEL in Appeal No. 184 of 2010 (***Adani Power Limited v. Gujarat Electricity Regulatory Commission***) it was submitted that electricity not being a scarce commodity, specific performance was the only available remedy to an aggrieved party when there was a breach of contract. Consequently, the Tribunal was in error in declaring that the PPA had become void and incapable of being enforced.

***Submissions of Counsel for the Respondent***

29. Replying to the above submissions, Mr. Shanti Bhushan, learned Senior counsel for JPVL, contended that under the scheme of the Act it was not contemplated that any objection as to the jurisdiction of the Tribunal chosen by the parties themselves can be allowed to be raised

at the stage of Section 34 unless the objection has first been raised before the Tribunal itself. He referred to Sections 4, 5, 16 and 37(2)(a) of the Act and the decisions in ***Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy (2007) 2 SCC 720, Gas Authority of India Ltd. v. Keti Construction (I) Ltd. (2007) 5 SCC 38*** and ***S.N. Malhotra & Sons v. Airports Authority of India (2008) 2 Arb LR 76 (Delhi)***. He pointed out that the objection as to the jurisdiction of the Tribunal was raised for the first time, in the rejoinder affidavit filed on 25th January 2012. Relying on the decision in ***Delhi Jal Board v. Vijay Kumar Goel (2005) 3 Arb LR 499 (Delhi)*** it was submitted that in view of the proviso to Section 34(3) a new plea could not be allowed to be taken after the limitation period of three months as well as the extended period of 30 days had elapsed.

30. Mr. Bhushan next submitted that a dispute whether a contract for supply of electricity by a generating company to a trading licencee became void or not was not covered by Section 79(1)(f) of the EA, and therefore, was outside the purview of the functions of CERC regarding adjudication of disputes. Since in the present case, the Petitioner was an inter-State trading licencee, the question of applicability of Section 86(1)(f) also did not arise. Relying on the decision of the APTEL in ***Lanco-II*** it was submitted that the word 'licencee' in Section 86(1) (f) referred to only a licencee which has been granted a license by the SERC which claims to have the jurisdiction to decide the dispute and not a licencee which has been granted a license either by some other SERC or by the CERC. Since the dispute in the present case was between a generating company and an inter-state trading licencee which has been granted trading licence by CERC and not by any SERC, no SERC would have jurisdiction to

adjudicate the said dispute. Further, if only because the Petitioner had agreed to sell a part of the power generated by it to a distribution licencee in a State, the concerned SERC exercised jurisdiction to decide a dispute about the validity of the PPA itself, then in a case as the present one it would lead to an absurd situation because all the four SERCs for identical reasons would claim to possess the same power which could give rise to a conflict in the decisions. It is pointed out that the decision of the Supreme Court in the ***GUVNL case*** was distinguishable on facts since the agreement in that case was between a generating company and a distribution licencee. Likewise, the decisions of the APTEL in the ***Pune Power case*** and ***Lanco-III*** were sought to be distinguished on facts.

31. Analysing Section 62 EA Mr. Bhushan submitted that if the legislative intent was to authorize the appropriate Commissions to determine the tariff for supply of electricity by a generating company to entities other than distribution licencees then Section 62 (1) (a) would have merely talked of supply of electricity by a generating company without adding the words *"to a distribution licencee"*. The proviso thereto also brought out this distinction. If in every case of supply of electricity by a generating company even to a trading licencee was intended to be covered by the determination of tariff no occasion could arise to apply the proviso to fix the minimum and maximum ceiling of tariff between a generating company and a licencee. According to him the proviso covered every licencee including a trading licencee. Referring to Section 62 (6) which provides for refund of excess amount in the event of determination of tariff under Section 62, he submitted that if Section 79 or 86 contained independent powers of determining the tariff applicable to supply by

generating companies to an entity different from a distribution licencee, either Section 62 (6) would not have been confined to determination of tariff under Section 62, or a separate provision would have been made for refund of the excess amount even in the case of tariff determination under Section 79 or 86. Given the detailed procedure outlined under sub-sections (1), (2) and (3) of Section 62 and Section 64 for the determination of tariff, and the absence of any corresponding provisions for tariff determined either under Section 79 or Section 86, it was apparent that the power of the appropriate Commissions to determine stood exhausted by Section 62 and the purpose of Sections 79 and 86 was only to identify as to which commission would exercise such power conferred by Section 62 and in which case.

32. Mr. Bhushan referred to paras 4 (ix) and (x) of the SOR and submitted that in terms thereof a trading licencee was supposed to be regulated by fixation of ceilings on trading margins if necessary as provided in Section 79 (1) (j) and Section 86 (1) (j). It showed that neither the purchases nor the sales made by a trading licencee would be subjected to the determination of tariffs. This was why it was necessary to fix trading margins in their case. If the tariff on which a trading licencee would purchase electricity was also to be determined by a regulatory commission and when it sold it to a distribution licencee was also required to be determined by the regulatory commission there would be no reason to fix any ceiling on trading margin. Clause (x) further made it clear that every sale by a generating company or a trader was not subjected to the power of regulating the tariffs. It showed that when a generating company directly sold to a consumer or a trader directly sold to a consumer, the

tariff would not be regulated at all and only the transmission and wheeling charges would be regulated. This system had ensured that no surplus power available anywhere in the country would go unutilized and any big consumer requiring such supply could get it by entering into an agreement with a trader. The trader would keep information regarding the availability of surplus energy anywhere in the country and could also be contacted by a consumer needing electricity. In such cases the EA intended that the price should be fixed by the seller and the purchaser by private negotiations on the basis of market forces and not be regulated by any statutory authority. Considering that the determination of tariffs required an elaborate procedure, it was contemplated for long term and not short term requirement. . Reliance is placed on the decision of the ATE in ***Gajendra Haldea*** and ***Lanco-I*** and of the Supreme Court in ***Tata Power Company Ltd. v. Reliance Energy Ltd.*** and in particular to the observations in Para 83.

33. Mr. Bhushan submitted that the majority Award suffered from no error and even if there was an error in interpretation of the clauses of the PPA or of the provisions of the EA, that by itself did not permit a challenge to the Award under Section 34 of the Act. Relying on the decision in ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705***, he submitted that the impugned Award could not be set aside unless it was opposed to the public policy of India which meant that it should be patently illegal and the illegality should go to the root of the matter.

34. Relying on the decision in ***Sales Tax Officer, Pilibhit v. Messrs. Budh Prakash Jai Prakash (1955) 1 SCR 243*** and Sections 4, 6, 9 and 10 of the SGA, it is submitted that the PPA in question was an

agreement for transfer of property in future and was covered under Section 10(1) of the SGA and not Section 9. Under Article 9.1.1 to 9.1.3 of the PPA, the price payable for the electricity to be generated in future was to be subject to the approval by the appropriate Commission constituted under the EA. Under Article 9.1.1 tariff was to be determined in terms of Schedule 'E' to the PPA i.e. in accordance with CERC (Terms and Conditions of Tariff) Regulations 2004. Since CERC, in any event, had no jurisdiction to fix the tariff, the PPA had been rendered void under Section 10 of the SGA. It was after discussing the above legal position that the majority of the Tribunal in the impugned Award came to the conclusion that the PPA was an agreement to sell electricity which was yet to be produced and, therefore, Section 10 of the SGA applied and consequently, PPA was held to be void. Relying on the decision in ***Kumbakonam Electric Supply Corporation Limited v. Joint Commercial Tax Officer AIR 1964 Mad 477***, which was approved in ***Commissioner of Sales Tax, Madhya Pradesh, Indore v. Madhya Pradesh Electricity Board, Jabalpur (1969) 1 SCC 200*** and in ***State of A.P. v. National Thermal Power Corporation Limited (2002) 5 SCC 203,*** it was submitted that electricity was movable property and fell within the definition of the goods under the SGA and, therefore, Section 10 SGA was applicable to the facts of the present case. Lastly, it was submitted that the contract for sale under Section 4(1) of the SGA had to be for a price and, if no provision relating to price remained, then the contract itself had to fail. Therefore, Article 15.10 of the PPA which provided for severability would not rescue the validity of the PPA as such.

***Issues for consideration***

35. On the basis of the above submissions, the following issues arise

for consideration:

(i) Is it open to the Petitioner to raise an objection as to the jurisdiction of the Tribunal for the first time in this Court, without raising it first before the Tribunal?

(ii) Whether the dispute which was the subject matter of the impugned Award could be adjudicated by CERC alone or was it an arbitrable dispute that could be examined by the Tribunal?

(iii) Whether the decision of the majority of the Tribunal that CERC had no power to determine the tariff for electricity supplied by a generating company to a trading licencee suffered from a patent illegality or was otherwise opposed to the public policy of India calling for interference under Section 34 of the Act?

***Maintainability of the objection as to jurisdiction of the Tribunal***

36. The facts of the case show that the parties consciously inserted an arbitration clause in the PPA under which they agreed to refer their *inter se* disputes for arbitration by a Tribunal. The Petitioner also understood that the Tribunal had jurisdiction to adjudicate the disputes and in anticipation thereof first invoked the jurisdiction of this Court under Section 9 of the Act for interim relief. At that stage the Petitioner proceeded on the footing that the Tribunal had jurisdiction to adjudicate the disputes between the parties.

37. The Petitioner sought to explain its stand in this regard by referring to the decisions of the APTEL in ***Gajendra Haldea*** and ***Lanco-I*** which held that CERC did not have jurisdiction to fix tariff for a supply of electricity by a generating company to a trading

licencee. While that may be a possible explanation, by the time the disputes were examined and heard by the Tribunal, the decision dated 9th April 2009 of the Supreme Court setting aside the decision of the ATE in ***Gajendra Haldea*** was available. Therefore, even before the Tribunal the Petitioner was aware that the decision of the APTEL in ***Gajendra Haldea*** was not good in law. It could have easily raised the issue concerning lack of jurisdiction of the Tribunal to decide the dispute before the Tribunal itself. However, admittedly no such plea was raised before the Tribunal by filing any petition under Section 16 of the Act.

38. Under Section 4 of the Act, if a party knowing that a certain provision of the Act has not been complied with, proceeds in the arbitration without stating its objection, then such party shall be deemed to have waived its right to do so. Further, under Section 16(2) of the Act, the objection as to the jurisdiction of the Tribunal has to be raised "not later than the submission of the statement of defence". It can be raised even by the party which has invoked the arbitration clause. However, under Section 16(3) "it should be raised as soon as the matter, alleged to be beyond the scope of its authority, is raised during the arbitral proceedings." An appeal is also provided under Section 37(2) (a) whereby the Tribunal accepts such plea. It was for this reason that in ***Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy*** the Supreme Court did not permit the Jal Nigam to raise the contention as to want of jurisdiction of the Tribunal after participating in the proceedings before the Tribunal without raising such objection. In ***Gas Authority of India Ltd. v. Keti Construction (I) Ltd.*** it was explained by the Supreme Court that given the object of the Act to secure expeditious disposal of disputes, the plea of lack of

jurisdiction ought to be raised at the threshold before the Arbitral Tribunal so that "remedial measures may be immediately taken and time and expense involved in hearing of the matter before the arbitral tribunal which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceedings for setting aside the award, may be avoided." A Division Bench of this Court reiterated the above legal position in ***S.N. Malhotra & Sons v. Airport Authority of India***.

39. In the present case, the objection as to the jurisdiction of the Tribunal was raised, for the first time, only in the rejoinder which was filed on 25th January 2012. Although it is sought to be contended by the Petitioner that it had raised an objection as to the jurisdiction of the Tribunal in grounds 'C' and 'D' of the petition under Section 34, a perusal of the said two grounds shows that the Petitioner raised an objection to the Award in regard to the scope of the powers of CERC under Section 79(1)(a) and (b) read with Section 62 of the EA. There is no challenge in those grounds to the jurisdiction of the Tribunal.

40. Reliance was placed by the Petitioner on the decision of the Supreme Court in ***State of Maharashtra v. Hindustan Construction Company Limited (2010) 4 SCC 518*** to contend that the rejoinder being part of the petition, the plea of limitation under Section 34(3) cannot be applied to defeat the plea under Section 34 as to jurisdiction. A perusal of the said judgment shows that it dealt with a situation where an appeal under Section 37 of the Act from an order refusing to set aside the award by losing party i.e. the State of Maharashtra was dismissed since it was found that the grounds sought to be added in the memorandum of arbitration by way of amendment

were absolutely new grounds for which there was no foundation in the application for setting aside the Award. It was held "obviously such new grounds containing new materials/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the Award." Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 of the Act either before the Court concerned or at the appellate stage. Therefore, contrary to the contention of the Petitioner that the rejoinder was to be treated as an amendment to the main petition under Section 34 of the Act, the above decision appears to indicate that unless a specific amendment is sought to the main petition itself under Section 34 of the Act and which again should not be based on new materials/facts being introduced for the first time, the question of permitting a new ground to be raised for the first time by way of the rejoinder, does not arise. The observations in Paras 29 and 30 of the judgment have to be read in the context of Para 36 of the judgment in order to spell out the ratio of the judgment. With there being no amendment application in the present case, the said decision cannot come to the help of the Petitioner.

41. The decision in ***Karnataka Power Transmission Corporation v. Ashok Iron Works Private Limited (2009) 3 SCC 240*** which states that a jurisdictional issue, if wrongly decided, would not attract the principle of *res judicata,* was obviously not in the context of the Act. In ***Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd. (2006) 11 SCC 245*** the question that arose concerned the enforcement of a foreign award on the ground of lack of jurisdiction of the Arbitrator. A perusal of the said judgment shows that the two Judges

who heard the case differed in their views and the case was ultimately placed before a larger Bench for consideration. Consequently, the said judgment cannot assist the Petitioner.

42. It was contended by the Petitioner that Section 4 of the Act would apply only in respect of a non-derogatory provision in an arbitration agreement and where non-compliance alleged is not in Part-I of the Act but a mandatory provision relating to the jurisdiction under the EA. Reliance was placed on the observations made in ***Inder Sain Mittal v. Housing Board, Haryana (2002) 3 SCC 175*** wherein it was held that where a ground was based upon the breach of a mandatory provision of law, a party would be estopped from raising the same in the objection to the Award even after participating in the arbitration proceedings in view of the well settled maxim that there is no estoppel against statute. While it is true that parties perhaps can raise such a ground even after participating in the proceedings, clearly it has to be raised in good time i.e. within the period of limitation provided under Section 34(3) of the Act. Otherwise, the party would be precluded from raising the objection as to the jurisdiction under Section 34 of the Act.

43. For the afore-mentioned reasons, this Court decides Issue (i) by holding that the Petitioner cannot challenge jurisdiction of the Tribunal to decide the dispute between the parties referred to it since the Petitioner failed to raise such objection before the Tribunal itself. Issue (i) is decided against the Petitioner.

***Arbitrability of the dispute and Jurisdiction of the Tribunal***

44. The central issue involved in the present petition concerns the powers and jurisdiction of the CERC and SERC under Section 62 read

with Section 79(1)(f) and Section 86(1)(f) of the EA to fix tariff when electricity is supplied by a generating company to a trading licencee. There are two aspects to this matter. One is whether the Tribunal could have determined the question referred to it by the parties at all i.e. whether the dispute referred to it was an arbitrable dispute. The second aspect is whether the Tribunal decided the dispute referred to it correctly. The second aspect leads to the third issue, whether the impugned Award suffers from any patent illegality or is opposed to the public policy of India. Issue (ii) is confined to examining the very nature of the dispute that was examined by the Tribunal. The Tribunal was asked to determine if the PPA was void because one essential feature, viz., fixation of tariff that required approval of the CERC, was not legally capable of being performed. Interpreting the provisions of the EA, the Tribunal answered that question in the affirmative. It therefore proceeded on the basis that the issue before it was an arbitrable one, although it involved determination of rights *in rem*.

45. What is an issue involving determination of rights *in rem* and the apparent non-arbitrability of such dispute was discussed by the Supreme Court in ***Booz Allen and Hamilton Inc. v. SBI Home Finance***. It was explained in Para 35 of the said decision:

> "35. The Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the

> legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes."

46. Thereafter in paras 36 to 39 the Supreme Court explained the distinction between rights *in personem* and rights *in rem*. It held:

> "36. The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.
>
> 37. It may be noticed that the cases referred to above relate to actions *in rem*. A right *in rem* is a right exercisable against the world at large, as contrasted from a right *in personam* which is an interest protected solely against specific individuals. Actions *in personam* refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions *in rem* refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment *in personam*

> refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment *in rem* refers to a judgment that determines the status or condition of property which operates directly on the property itself. (*Vide: Black's Law Dictionary*).
>
> 38. Generally and traditionally all disputes relating to rights *in personam* are considered to be amenable to arbitration; and all disputes relating to rights *in rem* are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights *in personam* arising from rights *in rem* have always been considered to be arbitrable.
>
> 39. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force."

47. It was contended by the Respondent that Article 15.2 of the PPA states that the agreement was solely for the benefit of the parties and their successors and was not to be construed as creating any “duty, standard of care or any liability towards any third person”. However, with the goods in question being electricity which is not meant for consumption by the purchaser of the electricity but for onward sale by the trading licencee to distribution companies and ultimately to the consumers, the above interpretation that Article 15.2 does not create rights *in rem* is not correct.

48. Under Section 79(1)(f) it is possible for CERC while discharging its functions “to refer any dispute for arbitration”. In other words, it is

the CERC which will decide which dispute, if any, involving a generating company has to be referred to arbitration. That is the prerogative of CERC. The Petitioner could have validly raised an objection to the Tribunal examining the question whether the PPA was void since the jurisdiction to decide such issue was solely within the purview of CERC. The Tribunal has in by the impugned Award decided a dispute which was "not capable of settlement by arbitration" and therefore liable to be set aside under Section 34 (2) (b) (i) of the Act. The question raised in Issue No. (ii) is therefore answered in the affirmative.

49. However, such an objection not having been raised at the relevant stage before the Tribunal, this Court does not wish to permit the Petitioner to raise this issue in the present proceedings. In other words, this Court does not permit the Petitioner to assail the impugned Award on the ground of lack of jurisdiction of the Tribunal. However, this does not mean that in an appropriate case such a challenge would not be entertained by the Court if properly raised by way of ground under Section 34 of the Act. Issue No.(ii) is decided accordingly.

***Powers of the CERC, SERCs and the validity of the Award***

50. The issue whether the Tribunal was justified in holding that the PPA was void requires this Court to examine whether CERC has power to determine the tariff when electricity is supplied by a generating company to a trading licencee. The Tribunal has in the impugned Award held that the CERC does not. Issue (iii) concerns the legal tenability of that conclusion.

51. As has been noticed earlier, the decisions of the APTEL in ***Gajendra Haldea*** and ***Lanco I*** were to the effect that CERC did not

have jurisdiction to regulate the tariff applicable to the supply of electricity by a generating company to a trading licencee. The interpretation placed by the APTEL on the SOR to the EA and the provisions of the EA in coming to the above conclusion has undergone change in the subsequent decisions of the APTEL, in light of the decisions of the Supreme Court which will be discussed hereafter.

52. In order to examine the above issue, first the relevant portion of the SOR to the EA requires to be referred to. Paras 4(ix) and (x) of the SOR acknowledge that under the EA, trading in electricity was for the first time being recognized as a distinct activity. The said clauses read as under:

> "(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary.
>
> (x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only transmission and wheeling charges with surcharge would be regulated."

53. A careful reading of Clause 4(x) of the SOR shows that it talks of direct commercial relationship between (i) a consumer and a generating company; (ii) a consumer and a trader. In the chain of supply of electricity, it is possible that a generating company makes a direct supply to a consumer. Sometimes, a trader could also be an intermediary in the supply by the generating company to the consumer. Such supplies would not be regulated by the appropriate Commission. Where there is a direct transfer of electricity from either the generating company to the consumer or from a trader to the

consumer then the tariff would not be subject to regulation. However, where a trader or trading licencee sells electricity to a distribution licencee which in turn supplies to the consumer, the tariff would be subject to regulation.

54. Next the relevant provisions of the EA have to be examined. Sections 62, 79 and 86 read under:

> "62. (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for–
>
> (a) supply of electricity by a generating company to a distribution licencee:
>
> 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 licencee or between licencees, 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 licencees, the Appropriate Commission may, for promoting competition among distribution licencees, fix only maximum ceiling of tariff for retail sale of electricity.
>
> (2) The Appropriate Commission may require a licencee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licencee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licencee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licencee."

**79 - Functions of Central Commission**. (1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licences to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

(g) to levy fees for the purposes of this Act;

(h) to specify Grid Code having regard to Grid Standards;

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

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

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

(2) to (4)…

**86 - Functions of State Commission**. (1) The State Commission shall discharge the following functions, namely:-

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

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges

and surcharge thereon, if any, for the said category of consumers;

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

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

(d) to (e)….

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

(g) and (h)…

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

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

(2) to (4)……."

55. The words "supply of electricity by a generating company to a distribution licencee" occurring in Section 62 would, in the above context, envisage apart from a direct supply from a generating company to a distribution licencee, also a supply from a generating company to a trading licencee who in turn sells to a distribution licencee. The trader could intervene either in the supply by a generating company to a consumer or he could intervene in the supply by a generating company to the distribution licencee. The latter transaction would certainly form the subject matter of regulation by the appropriate Commission within the meaning of Section 62 read

with Para 4(x) of the SOR.

56. It appears inconceivable that where a trading licencee is selling to a distribution licencee and not directly to a consumer, the tariff for such a supply by the generating company to the trading licencee would not be amenable to the regulatory jurisdiction of CERC or SERC under Section 62 of the EA. An interpretation to the contrary would defeat the rights of the consumers which are intended to be protected by the CERC and SERCs. The only freedom was given to the direct commercial relationship between a generating company and consumer where presumably there would be bulk consumption by such consumer. However, in cases like the present one where the trader is selling electricity to a distribution licencee who is eventually selling or supplying electricity to the consumer, the tariff would necessarily have to be regulated. Otherwise, every generating company would route the sale of electricity through a trading licencee to evade the applicability of the regulatory framework EA.

57. The argument that wherever there is surplus power which might be unutilized and there is a big consumer requiring such supply it can get it by entering into an agreement with the trader, does not really answer the situation where such trader has entered into an agreement with a distribution company for supply to the consumer. Where a trader has a direct supply to the consumer then again there may be a situation where such a transaction may be unregulated within the scope of Section 62. But in a situation where a trader is selling such electricity to a distribution company through PSAs then Section 62 would apply. Fixation of trading margin by itself may not completely ensure that electricity is available to the consumers at a reasonable

price.

58. The decision in the ***GUVNL case*** emphasizes that the EA is indeed a complete code meant to adjudicate all disputes arising under the purview of the EA. The Supreme Court held that in respect of all disputes between licencees and a generating company, the Central CERC or an SERC or an arbitrator appointed by them will have the jurisdiction. It was held (SCC, p.772):

> "59. In the present case we have already noted that there is an implied conflict between Section 86(1)(f) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation Act, 1996 since under Section 86(1)(f) the dispute between licencees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under Section 11 of the Arbitration and Conciliation Act, 1996, the court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licencee and the generating companies only the State Commission or the Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(f) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail).
>
> 60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30-5-1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come in force w.e.f. 10-6-2003, after this date all adjudication of disputes

between licencees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10-6-2003 there can be no adjudication of dispute between licencees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licencee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute."

59. The Respondent relies on paras 83 and 84 of the decision of the Supreme Court in ***Tata Power Company Limited v. Reliance Energy Limited***, to contend that in view of the above two paras of the SOR, the supply of electricity by a generating company to a trading licencee is not intended to be subject to any kind of regulation either by the CERC or the SERCs. Paras 83 and 84 as under (SCC, P.686):

> "83. The primary object, therefore, was to free the generating companies from the shackles of licensing regime. The 2003 Act encourages free generation and more and more competition amongst the generating companies and the other licencees so as to achieve customer satisfaction and equitable distribution of electricity. The generating company, thus, exercise freedom in respect of choice of site and investment of the generation unit; choice of counter-party buyer; freedom from tariff regulation when the generation company supplies to a trader or directly to the consumer.
>
> 84. If delicensing of the generation is the prime object of the Act, the courts while interpreting the provisions of the statute must guard itself from doing so in such a manner which would defeat the purpose thereof. It must bear in mind that licensing provisions are not brought back through the side-door of regulations."

60. The Supreme Court in the above case was concerned with the

issue whether an SERC could disregard the PPAs entered into by a generating company with two distribution licencees and direct the generating company to allocate the power amongst all the distribution licencees, including those who had not entered into PPAs with it. The case did not involve a trading licencee. The question whether the supply to a trading licencee was amenable to regulation under the EA did not arise for consideration. The above observations of the Supreme Court have to be understood in the above factual background. While the supply of electricity by a generating company directly to a consumer may be outside the purview of regulation, in a case where a trading licencee sells electricity to the distribution licencee or eventual supply to the consumer, the tariff for such supply cannot be outside the purview of regulation.

61. The APTEL's decision in ***Lanco III*** is instructive  The facts in brief were that Lanco was a generating company which entered into a PPA with Power Trading Corporation (PTC) for sale of 273 MW electricity from its Korba thermal power project in Chhattisgarh. The Haryana Power Generation Corporation Ltd. (HPGCL) approached the Haryana Electricity Regulatory Commission (HERC) for approval of purchase of power from Lanco's plant. An in-principle approval was granted by the HERC for purchase of power from Lanco's plant through PTC. A power Sale Agreement (PSA) was entered into between PTC and HPGCL for sale of the power purchased from Lanco. HPGCL approached the HERC for approval of the PSA. The HERC granted approval. Later PTC filed a petition before the HERC seeking a direction to HPGCL to purchase electricity at the tariff calculated in accordance with the CERC Regulations and the PSA to regulate the tariff. Among the objections raised by Lanco was that

HERC lacked the jurisdiction to approve the tariff for purchase of electricity by PTC, an inter-state trading licencee, from Lanco which had its plant in Chhattisgarh. The decision of the HERC, negativing the said objection, was challenged by Lanco before the APTEL. While upholding the said part of the order of the HERC, the APTEL observed:

> "So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licencee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.
>
> 61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licencee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created.
>
> 62. In other words, while interpreting the provisions of the Act, the entire Act will have to be looked into totality as one integral whole and not in an isolated manner. That is why; the Act itself does not seek to look at the electricity industry and the consumer interest on a segmented or fragmented basis but as cohesive whole. It is for this reason that the Act has been given in Section 174 overriding effect over all the other legislations which are inconsistent with the provisions of the Act."

62. CERC has the power to regulate tariff of generating companies under Section 79 (1) (b) of the EA. A generating company could sell in bulk to a consumer in one state, to a trading licencee in another and to one or more distribution licencees in other states. Sections 79 (1) (a) and (b) enable the CERC to fix or approve the tariff for the sale of electricity by the generating company in any of the above situations by taking into account the capital expenditure incurred for setting up the generating plant and a fixed margin of profit. If there is an intra-State trading licencee supplying to many States, then it is possible that each SERC may want to fix appropriate tariffs keeping in view the burden on the ultimate consumer. There is no absurdity in four SERCs fixing these tariffs to benefit ultimate consumers in their respective states. Even as of today a consumer of electricity in Maharashtra for instance is not paying the same tariff as a consumer in Delhi or elsewhere. This is one of the purposes of establishing different SERCs with one CERC. Where it is inter-State supply, the various factors will be accounted for by the CERC. Where it is an intra-State supply, the SERC would have the jurisdiction and where it is an inter-State supply, the CERC would have jurisdiction.

63. Indeed, as has been observed by the APTEL in the ***Pune Power case***, the nature of the licencee i.e. inter-State or intra-State, is not of relevance for the purpose of exercise of jurisdiction by the appropriate Commission. Under Section 86(1)(f) all disputes relating to the regulatory jurisdiction of the SERC which involve a distributing licencee or a trading licencee or a transmission licencee has to be adjudicated exclusively by SERC. Under Section 2(39) of the EA a 'licencee' means a person who has been granted a licence under Section 14. It only depends on whether the transaction of sale of

electricity has taken place and if it is within the jurisdiction of a SERC, then that SERC would have jurisdiction to entertain the dispute. In ***Adani Power Limited v. Gujarat Electricity Regulatory Commission***, the APTEL was deciding a case involving supply by a generating company to a trading licencee. Relying upon the ***GUVNL case***, it was held that all such disputes and differences had to be decided only by the SERC and not by an arbitral Tribunal chosen by the parties under the PPA.

64. The Tribunal in the present case did not discuss the changed legal position as a result of the decisions of the APTEL subsequent to ***Gajendra Haldea*** and ***Lanco I*** in light of the altered decisions of the Supreme Court including the one in the ***GUVNL case***. It went by only a literal and not a purposive and contextual interpretation of Section 62 EA. The majority of the Tribunal was, therefore, in error in holding that the transaction involving supply by a generating company to a trading licencee was outside the purview of regulation by the CERC under Section 79(1)(f) read with Section 62 of the Act.

65. It is not possible to accept the submission of Mr. Bhushan, the learned Senior counsel for JPVL that the above finding of the majority of the Tribunal was not opposed to the public policy of India. The SOR of the EA explains the object of empowering the appropriate Commission to regulate the tariffs for supply of electricity at various stages. The legislative intent as evident from a collective reading of the SOR and the provisions of the EA in the manner explained hereinabove is to bring the transactions involving the supply of electricity by a generating company to a distribution company for further supply to consumers within the ambit of the regulatory powers

of the CERC and the SERCs as the case may be. Any Award that adopts an interpretation of the provisions of the EA that runs counter to the legislative intent would doubtless be in conflict with the legislative and therefore the public policy of India within the meaning of Section 34 (2) (b) (ii) of the Act.

66. In view of the above determination, the further questions whether it is Section 9 or Section 10 of the SGA that would apply to the present case and whether the clause concerning approval of the tariff by the CERC is severable, need not be answered. Since it is the CERC that has the jurisdiction to determine the tariff for supply of electricity by JPVL to the Petitioner, the question of impossibility of compliance with the essential condition of the PPA between them does not arise. As rightly pointed out by the Petitioner, the earlier order of the CERC rejecting the application by Jaypee Karcham for an advance ruling as to the capital cost was only because it was premature and not because the CERC lacked the jurisdiction to approve the tariff. If Jaypee Karcham had filed an application for fixation of tariff six months prior to the COD, the CERC would have had to necessarily to deal with it on merits. The decision dated 26th October 2009 of the CERC rejecting Jaypee Karcham's application for approval of capital cost could not have formed a valid basis for Jaypee Karcham to conclude that the PPA was rendered void. The decision of Jaypee Karcham as communicated by its letter dated 17th December 2009 declaring the PPA void is contrary to the provisions of the EA and, therefore, unsustainable in law.

***Conclusion***

67. As a consequence, the majority Award dated 28th April 2011 is

hereby set aside. The view of the dissenting member of the Tribunal on the above aspect is, therefore, held to be correct and is approved. The parties are now to work out the respective rights and obligations under the PPA in accordance with law. JPVL will approach the CERC for fixation of the tariff for supply of electricity to the Petitioner within a period of four weeks from today.

68. The petition is, accordingly, allowed with costs of Rs.30,000 which will be paid by JPVL to the Petitioner within four weeks.

**S. MURALIDHAR, J.**

**MAY 15, 2012**
s.pal