®

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 27TH DAY OF SEPTEMBER, 2019

BEFORE

THE HON'BLE MR.JUSTICE P.B. BAJANTHRI

WRIT PETITION NO.1633 OF 2019 (GM-KEB)

BETWEEN:

HASSAN THERMAL POWER PVT. LTD.,
THRU ITS DIRECTOR
ADMINISTRATIVE OFFICE: S-327
GREATER KAILASH-II
NEW DELHI- 110 048 ... PETITIONER

(SRI.ANOOP GEORGE CHAUDHARI,
LEARNED SENIOR COUNSEL ALONG WITH
MRS.JUNE CHAUDARI, MR. R K MAROOLA,
MR.SUNIL MAREELA, MS.PRATHIBA SHARMA,
MS.ISHA THAKUR – ADVS for SRI K S BHEEMAIAH)

AND:

1. STATE OF KARNATAKA
THRU ADDITIONAL CHIEF SECRETARY
DEPARTMENT OF ENERGY
VIDHANA SOUDHA
BANGALORE-560 001

2. KARNATAKA POWER TRANSMISSION
CORPORATION LTD.,
THRU ITS FINANCIAL ADVISOR
(REGULATORY AFFAIRS)
REGD. OFFICE KAVERI BHAWAN
K.R.CIRCLE
BANGALORE-560 009 ... RESPONDENTS

(BY SRI V SREENIDHI, AGA FOR R.1,

SRI S S NAGANAND, SR. COUNSEL FOR
SRI S SRIRANGA FOR C/R.2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED ORDER DATED: 17.12.2018 PASSED BY THE KARNATAKA ELECTRICITY REGULATORY COMMISSION IN O.P.NO.91 OF 2018 WHICH IS AT ANNEXURE-A AND ETC.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED ON 27.08.2019 AND COMING ON FOR PRONOUNCEMENT OF ORDER THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

In the instant petition, petitioner has sought for the following reliefs:

(a) Issue a writ or order or direction in the nature certiorari quashing the impugned order dated 17.12.2018 passed by the Karnataka Electricity Regulatory Commission in OP No.91/2018, which is at Annexure-A.

(b) Allow the petitioner to proceed with the Arbitration proceedings initiated under the consent award dated: 05.08.2004 before the Arbitral Tribunal appointed by permanent Court of Arbitration under UNCITRAL Rules; and which is at Annexure-B (UNCITRAL Rules) and Annexure-C is (Consent award)

(c) Declare the communications dated: 29.06.2018, 11.09.2018 and 26.09.2018 of the permanent Court of Arbitration as a legal and valid and which is at part of Annexure-E.

(d) Declare that the KERC acted beyond its jurisdiction by entering upon adjudication under Section 86 (1) (f) of the Electricity Act, 2003 in taking up and deciding the petition filed by the Respondents and also in issuing interim injunctions in total contravention of Section 94 of the Electricity Act, and

(e) Pass such other and further orders as may be deemed just and proper in the interest of justice.

2. Brief facts of the case is that Government of Karnataka invited International competitive bids for setting up of 150 M W Barge Mounted Power Plant (BMPP) based on Low Sulphur Heavy Stock (LSHS) as fuel at Mulki near Mangaluru in the month of December 1995. Euro-India Power Canara (Private) Limited (EIPCL) was the highest bidder. Respondent No.1 (GOK) accepted the bid of EIPCL in the month of March 1996. Later on, respondent No.1 agreed to alter the project to 195 MW combined cycle plant with Naphtha as a fuel and EIPCL and erstwhile Karnataka Electricity Board (KEB) executed a Power Purchase Agreement on 22.04.1999 (Original PPA). Accordingly tariff was fixed at US$ 0.0389 + Rs.0.1685 (equivalent to Rs.1.95 @

Rs.46/ US$) per KWh due and variable charge as a pass through. Due to changed scenario, in view of the IPP Policy of respondent No.1 which discouraged Naphtha as a fuel and also BMMPs, on 22.05.2001, respondent no.1 accepted the proposal of EIPCL to change the location to Mandya, fuel to coal and capacity of 220 MW gross (200 MW Net) as an extended bid route project, the tariff and other terms of PPA to be negotiated by EIPCL and KPTCL
- the successor entity to KEB. Accordingly, various changes have been made from time to time like change of location to Hassan on 23.09.2006 so also rename the Company from EIPCL to that of M/s Hassan Thermal Power (Private) Limited (for short 'HTP(P)L'). Consequently, documents have been prepared in the name of HTP (P) L., Thereafter, the seller and buyers devolved Revised and Restated Power Purchase Agreement in terms of Article 16.1 of the Original PPA of 1999 as Revised and Restated Power Purchase Agreement (for short R and R PPA) was framed on 25.06.2007. In the meanwhile, petitioner on account of delay in concluding the PPA 1999 dated 22.04.1999 in

terms of arbitrary clause preferred arbitration while claiming recovery of loss and damages from the respondents for breach of PPA dated 22.04.1999 on 13.01.2003. During the pendency of the arbitral proceedings, joint application was filed under Section 32(2) of the Arbitration and Conciliation Act, 1996 (For short 'Act 1996'). The Arbitral Tribunal comprised of Mr.Justice S P Barucha (retd), Mr.Aravind Pandey and Mr.Justice K Shivshankar Bhat (retd) proceeded to draw minutes of the proceedings on 05.08.2004 in terms of the application filed by the parties, jointly made and signed by the parties and their counsel for termination of arbitral proceedings in terms of the application. Accordingly, arbitration proceedings stood terminated in terms of the application submitted by the parties.

3. The grievance of the petitioner could not attain finality. At this juncture, Revised and Restated Power Purchase Agreement was executed on 25.06.2007 among BESCOM, MESCOM, GESCOM, HESCOM and CESCOM i.e., buyer a,b,c,d and e and HTP(P)L as a

seller. The aforementioned was notified in the Gazette on 30.06.2007.

4. Petitioner filed Writ Petition Nos.30351-52/2015 in which petitioners have sought for implementation of the original PPA 1999 dated 22.04.1999 simultaneously invoking arbitral clauses before the Permanent Court of Arbitration (for short PCA), Hague at Netherlands. PCA issued a notice to the respondents on 29.06.2018. Respondents filed their reply on 13.08.2018. Petitioner clarified by way of reply to the respondent while communicating to PCA the factual aspects of the matter on 16.08.2018. Thereafter, certain correspondences was in vogue among the PCA, petitioner and respondent – Government and KPTCL. On 03.09.2018 PCA appoints Mr.Gourab Banerjee as a designated Appointing Authority. Further, on 11.09.2018, co-arbitrators were appointed viz., Ashok Kumar Shahi and Mr.Justice Amitava Roy (retd). Further, Mr.Justice S B Sinha was appointed as a Presiding Arbitrator on 26.09.2018.

5. The Karnataka Electricity Reforms Act, 1999 (for short Act 1999) was enacted under Karnataka Act No 25 of 1999 vide Gazette dated 21.8.1999 and The Electricity Act, 2003 (for short Act 2003) Act no. 36 of 2003 vide notification dated 10.6.2003.

6. Respondents filed a petition before the Karnataka Electricity Regulatory Commission (for short KERC) under Section 86(1)(f) read with Sections 142 and 149 of the Act, 2003 wherein respondents have sought for the following reliefs:

a. Declare that in keeping with the provisions of the Electricity Act 2003, this Hon'ble Commission alone is empowered to adjudicate upon disputes between Generating Companies and licesees.

b. Declare that the provisions of the Arbitration and Conciliation Act 1996 or any other provisions would not be applicable in matters pertaining to appointment of Arbitrators, in view of the pronouncements of the Hon'ble Supreme Court of India.

c. Declare that communications dated: 29.06.2018 (Annexure-C), 11.09.2018 (Annexure-K), and 26.09.2018 (Annexure-

M) appointing Respondent No. 4 to 6 as Arbitrators is illegal and opposed to the mandate of the Electricity Act 2003.

d. Punish Respondent No.1 to 3 for contravening the provisions of the Electricity Act 2003.

e. Pass necessary orders as deemed fit by the Hon'ble Commission.

7. Petitioners filed written submissions on 09.11.2018. KERC proceeded to frame issue and pass orders on the respondents Original Petition No.91/2018 on 17.12.2018. Extract of the issue and order dated 17.12.2018 reads as under respectively:

"ISSUE no.(1) - Should the subject matter of dispute said to have been involved in the arbitral proceedings between the 1ST respondent and the petitioners be exclusive triable by the Commission"-

a. It is declared that, the dispute, said to have been involved in PCA Case No.AA716, between the Hassan Thermal Power Private Limited (formerly known as Éuro India Power Transmission Corporation Limited Vs The Government of Karnataka and the Karnataka Power Transmission Corporation Limited) is exclusively triable by this Commission, under Section 86 (1) (f) of the Electricity Act, 2003, and not before any other Forum;

b. Consequently, it is declared that, the communications dated 29.06.2018 (Annexure-C), 11.09.2019 (Annexure-K) and 26.09.2018 (Annexure-m), appointing the Respondents 4 to 6 as Arbitrators, are illegal and opposed to the mandate of the Electricity Act, 2003 and

c. The Respondents 1 and 2 are restrained from proceeding with the above-mentioned arbitral case.

8. Thus, petitioner feeling aggrieved and dissatisfied with the order of the KERC dated 17.12.2018, presented this petition.

9. Learned Senior Counsel Sri Anoop George Chaudhari for the petitioner contended as follows:

(i) that even though petitioner has a remedy of Appeal under Section 111 of Act, 2003 against the order of the KERC dated 17.12.2018, petitioner has not chosen to invoke alternative remedy on the score that Original Petition No.91/2018 filed by the respondents is not maintainable before the KERC under Sections 86(1)(f), 142 and 149 of Act 2003.

(ii) It was further contended that in terms of PPA dated 22.04.1999, if any dispute among petitioner and respondents arises, only remedy is before the Arbitration in terms of Clause 14 of PPA 1999. On this issue, it was contended that in the joint application submitted before the Arbitral Tribunal on 05.08.2004 wherein liberty is reserved once again to approach the Arbitral Tribunal if any issue arises among the parties. Accordingly arbitration proceedings terminated in terms of the joint application and it has attained finality and it is binding among Petitioner and Respondent – KPTCL herein.

(iii) Learned counsel for the petitioner submitted that KERC framed following issue:

> "ISSUE no.(1) - Should the subject matter of dispute said to have been involved in the arbitral proceedings between the first respondent and the petitioners be exclusively triable by the Commission"-

In terms of Article 14 of the PPA 1999 dated 22.04.1999, if any dispute arise among the petitioners

and respondent-KPTCL, remedy is only arbitration. Respondents have not appraised relating to raising of dispute by the petitioner on 13.1.2003 before the arbitration and it was terminated by means of filing a Joint Application so also reserving liberty to file arbitration proceedings, vide consent award dated 5.8.2004.

(iv) Learned counsel for the petitioner further contended that respondents invoking the provisions of Act, 2003 to nullify the arbitration proceedings before PCA is not maintainable having regard to the PPA 1999 dated 22.04.1999 read with the commencement of the Act 2003 with effect from 10.06.2003. Consent Award dated 05.08.2004 has attained finality and it is binding on the petitioner as well as the respondents. The respondents have not raised any contention as on the date of consent award, that Act 2003 is applicable, since Act 2003 was in vogue as on the date of consent award dated 05.08.2004.

(v) It was further contended that Revised and Restated Power Purchase Agreement dated 25.06.2007 is not in supersession of PPA 1999 dated 22.04.1999. Clause (iv) (Recitals) of the Revised Agreement dated 25.06.2007 is crystal clear that self contained Revised and Restated Power Purchase Agreement in terms of Article 16.1 of the Original PPA of 1999. In terms of Article 14.3, if there is any dispute in respect of PPA 1999 dated 22.04.1999, remedy is only arbitration; Dispute Resolution - Article 14.3 which is rightly invoked prior to revised agreement and subsequent to revised agreement. Sub-clause (c) of Article 14.3 – Arbitration is relating to invoking provisions of Act 1996, Sub-clause (c) reads as under:

> (c) The parties agree that the arbitration shall be conducted in accordance with the UNCITRAL Rules (the "Rules") for the time being in force. For the avoidance of doubt, the Parties agree that the Indian Arbitration and Conciliation Act 1996 shall not apply to this Agreement or to any arbitration proceeding or award rendered pursuant to this Article or to any dispute arising out of or in connection with this Agreement except as stated in the following sentence. In relation to the enforcement of an award in India, the Parties agree that such award shall be

> treated as a foreign award and not a domestic award and further agree that enforcement of such an award shall be subject to the provisions of Part II of the Arbitration and Conciliation Act, 1996.

(vi) Learned counsel for the petitioner submitted that Original Petition No.91/2018 before KERC is not maintainable under Section 86(1)(f). Section 86(1)(f) reads as under:

> "Sec.86(1)(f): adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration".

Definition of "Generating Company" and "Licencee" reads as under:

> "Sec.2(28): "Generating Company" – means any company or body corporate or associated or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station".

> "Sec.2(39): "Licensee" – means a person who has been granted a licence under Section 14".

Having regard to the language employed in the definition read with Section 86(1)(f), petitioner do not fall under the definition of 'Generating Company' unless

and until petitioner's commence generating power. Further, State Government is not a licensee. In the absence of satisfaction of the aforesaid clauses, State Government and another invoking Sections 86(1)(f) read with 142 and 149 of the Act 2003 in presenting petition before KERC is not maintainable. The above issues have not been dealt by the KERC while passing the impugned order and so also issues were not framed appropriately.

(vii) Further, learned counsel for the petitioner submitted that written submissions filed before KERC has not been appraised and dealt. The very prayer in the Original Petition No.91/2018 by respondents, framing of issue cited supra and reliefs granted to the respondent in the declaratory form is without authority of law and jurisdiction. KERC has no authority to decide, "Whether petitioner and 1st respondent was required to invoke arbitration proceedings or not"

(viii) Further, learned counsel for the petitioner submitted that only Superior Courts are empowered to

grant declaratory relief or judicial review. Therefore, KERC exceeded its jurisdiction in entertaining Original Petition No.91/18 of the respondents. That apart, KERC proceeded to assign status to the petitioner as a 'prospective generating company'. Such adding of words by KERC is without authority of law. Even assuming that petitioner is 'a prospective generating company', the other clauses/criteria for invoking Section 86(1)(f) cited supra do not fall under the jurisdiction of KERC.

10. Learned Senior Counsel for the petitioner cited the following decisions:

> (1) State Bank of Patiala v. Vinesh Kumar Bhasin, (2010) 4 SCC 368 (Paras.5, 15, 17, 18 and 19)

> 5. The Deputy Chief Commissioner, New Delhi issued a show-cause notice dated 22- 11-2006 to the Bank stating that the Chief Commissioner had directed issue of a show-cause notice under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("the Disabilities Act", for short) calling upon the Bank to show cause why it should not be directed to accept the respondent's request

under the Exit Option Scheme, instead of being retired under Regulation 19, with a further direction that the decision of the Bank to retire the respondent from service should not be implemented until further orders.

15. The functions of the Chief Commissioner are set out in Sections 58 and 59 of the Act. Section 58 provides that the Chief Commissioner shall have the following functions:

"58. (*a*) coordinate the work of the Commissioners;

(b) monitor the utilisation of funds disbursed by the Central Government;

(c) take steps to safeguard the rights and facilities made available to persons with disabilities;

(d) submit reports to the Central Government on the implementation of the Act at such intervals as that Government may prescribe."

17. Section 63 provides that the Chief Commissioner and the Commissioners shall, for the purpose of discharging their functions under this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 while trying a suit, in regard to the following matters:

"63. (*a*) summoning and enforcing the attendance of witnesses;

(b) requiring the discovery and production of any document;

(c) requisitioning any public record or copy thereof from any court or office;

(d) receiving evidence on affidavits; and

(e) issuing commissions for the examination of witnesses or documents."

Rule 42 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996 lays down the procedure to be followed by the Chief Commissioner.

18. It is evident from the said provisions, that neither the Chief Commissioner nor any Commissioner functioning under the Disabilities Act has power to issue any mandatory or prohibitory injunction or other interim directions. The fact that the Disabilities Act clothes them with certain powers of a civil court for discharge of their functions (which include the power to look into complaints), does not enable them to assume the other powers of a civil court which are not vested in them by the provisions of the Disabilities Act. In *All India Indian Overseas Bank SC and ST Employees' Welfare Assn.* v. *Union of India* [(1996) 6 SCC 606] , this Court, dealing with Article 338(8) of the Constitution of India (similar to Section 63 of the Disabilities Act), observed as follows: (SCC pp. 609 & 611, paras 5 & 10)

"*5.* It can be seen from a plain reading of clause (8) that the Commission has the power of the civil court for the purpose of conducting an investigation contemplated in

> sub-clause (*a*) and an inquiry into a complaint referred to in sub-clause (*b*) of clause (5) of Article 338 of the Constitution.
> ***
> *10*. ... All the procedural powers of a civil court are given to the Commission for the purpose of investigating and inquiring into these matters and that too for that limited purpose only. The powers of a civil court of granting injunctions, temporary or permanent, do not inhere in the Commission nor can such a power be inferred or derived from a reading of clause (8) of Article 338 of the Constitution."
>
> 19. The order of the Chief Commissioner, not to implement the order of retirement was illegal and without jurisdiction.

11. Section 63 of The Persons with Disabilities (Equal opportunities, protection of rights and full participation) Act, 1995 is parametria to Section 94 of Electricity Act, 2003. Therefore, KERC's decision is beyond jurisdiction so as to add words of 'a Prospective Generating Company' and further ordering declaration.

12. In support of not availing the alternative remedy, learned counsel for the petitioner cited HARBANSLALSAHNIA AND ANOTHER Vs INDIAN OIL

CORPORATION LIMITED reported in AIR 2003 SC 2120, relevant Para.7 reads as under:

> 7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (*i*) where the writ petition seeks enforcement of any of the fundamental rights; (*ii*) where there is failure of principles of natural justice; or (*iii*) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See *Whirlpool Corpn.* v. *Registrar of Trade Marks* [(1998) 8 SCC 1] .) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings. (Emphasis supplied)

13. In M.P. STATE AGRO INDUSTRIES DEVELOPMENT CORPN. LTD. Vs. JAHAN KHAN,

reported in (2007) 10 SCC 88, relevant para.12 reads as under:

> 12. Before parting with the case, we may also deal with the submission of learned counsel for the appellants that a remedy by way of an appeal being available to the respondent, the High Court ought not to have entertained his petition filed under Articles 226/227 of the Constitution. There is no gainsaying that in a given case, the High Court may not entertain a writ petition under Article 226 of the Constitution on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. The rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of the availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely, (*I*) where the writ petition seeks enforcement of any of the fundamental rights; (*ii*) where there is failure of principles of natural justice; or (*iii*) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In these circumstances, an alternative remedy does not operate as a bar. (See *Whirlpool Corpn.* v. *Registrar of Trade Marks* [(1998) 8 SCC 1] , *Harbanslal Sahnia* v. *Indian Oil Corpn. Ltd.* [(2003) 2 SCC 107] , *State of H.P.* v. *Gujarat Ambuja Cement Ltd.* [(2005) 6 SCC 499] and *Sanjana M. Wig*v. *Hindustan Petroleum Corpn. Ltd.* [(2005) 8 SCC 242]) (Emphasis supplied)

14. In view of the aforesaid two decisions read with the definition of 'Generating Company' and 'Licensee', under Act,2003, further, declaratory power is not vested and only dispute is to be examined under Act, 2003. Consequently, petitioner need not avail alternative remedy of Appeal under section 111 under Act 2003 since, the matter would go to the root of matter relating to jurisdiction of KERC.

15. In support of the contention that KERC has no jurisdiction to read as 'a Prospective Generating Company', learned counsel for the petitioner relied on *RAGHUNATH RAI BAREJA AND ANOTHER V. PUNJAB NATIONAL BANK AND OTHERS*, reported in (2007) 2 SCC 230, relevant paras. 57 and 58 is extracted hereunder:

> 57. The literal rule of interpretation really means that there should be no interpretation. In other words, we should read the statute as it is, without distorting or twisting its language.
>
> 58. We may mention here that the literal rule of interpretation is not only followed by judges and lawyers, but it is also followed by

> the layman in his ordinary life. To give an illustration, if a person says "this is a pencil", then he means that it is a pencil; and it is not that when he says that the object is a pencil, he means that it is a horse, donkey or an elephant. In other words, the literal rule of interpretation simply means that we mean what we say and we say what we mean. If we do not follow the literal rule of interpretation, social life will become impossible, and we will not understand each other. If we say that a certain object is a book, then we mean it is a book. If we say it is a book, but we mean it is a horse, table or an elephant, then we will not be able to communicate with each other. Life will become impossible. Hence, the meaning of the literal rule of interpretation is simply that we mean what we say and we say what we mean.

16. Similarly, in the case of *COMMISSIONER OF INCOME TAX, KERALA V. TARA AGENCIES*, reported in (2007) 6 SCC 429, relevant paras. 57 and 58 reads as under:

> 57. The intention of the legislature has to be gathered from the language used in the statute which means that attention should be paid to what has been said as also to what has not been said.
>
> 58. In *Union of India* v. *Deoki Nandan Aggarwal* [1992 Supp (1) SCC 323 : 1992 SCC (L&S) 248 : (1992) 19 ATC 219] a three- Judge Bench of this Court held that it is not the duty of the court either to enlarge the

> scope of legislation or the intention of the legislature, when the language of the provision is plain. The court cannot rewrite the legislation for the reason that it had no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there.

17. In *AJUDH RAJ AND OTHERS V. MOTI S/O MUSSADI*, reported in (1991) 3 SCC 136, relevant para.5 reads as under:

> 5. The principle for deciding the question of limitation in a suit filed after an adverse order under a Special Act is well settled. If the order impugned in the suit is such that it has to be set aside before any relief can be granted to the plaintiff the provisions of Article 100 will be attracted and if no particular article of the Limitation Act is applicable the suit must be governed by the residuary Article 113, prescribing a period of three years. Therefore, in a suit for title to an immovable property which has been the subject matter of a proceeding under a Special Act if an adverse order comes in the way of the success of the plaintiff, he must get it cleared before proceeding further. On the other hand if the order has been passed without jurisdiction, the same can be ignored as nullity, that is, non-existent in the eye of law and it is not necessary to set it aside; and such a suit will be covered by Article 65. In the present case the controversial facts have been decided in favour of the plaintiff- appellant and the findings were not challenged before the High Court. The

> position, thus, is that the plaintiff was the owner in cultivating possession of the land and the defendant Moti was merely a labourer without any right of a tenant or a sub-tenant. The question is as to whether in this background it is necessary to set aside the order passed in favour of the respondent under Section 27(4) of the Act before the suit can be decreed or whether the plaintiff can get a decree ignoring the said order as void, in which case the suit undoubtedly will be governed by Article 65.

18. In *DWARKA PRASAD AGARWAL (D) BY LRS V. B.D. AGARWAL AND OTHERS* reported in (2003) 6 SCC 230, relevant para.37 reads as under:

> **37**. It is now well settled that an order passed by a court without jurisdiction is a nullity. Any order passed or action taken pursuant thereto or in furtherance thereof would also be nullities. In the instant case, as the High Court did not have any jurisdiction to record the compromise for the reasons stated hereinbefore and in particular as no writ was required to be issued having regard to the fact that public law remedy could not have been resorted to, the impugned orders must be held to be illegal and without jurisdiction and are liable to be set aside. All orders and actions taken pursuant to or in furtherance thereof must also be declared wholly illegal and without jurisdiction and consequently are liable to be set aside. They are declared as such.

19. Learned Counsel for the petitioner submitted that in terms of para.2 of the application under Section 32(2) of Act, 1996 dated 04.08.2004, it is evident that it is a consent award and both the parties agreed for a new Arbitral Proceeding, if and when invoked by either of the party, would need to be proceeded by the Grievance Redressal Procedure contemplated under the Power Purchase Agreement dated 22.04.1999.

20. In view of the consent award, principle of waiver is attracted. Learned counsel for the petitioner relied on KRISHNA BAHADUR Vs PURNA THEATRE AND ORS. Reported in (2004) 8 SCC 229, relevant paras.9 and 10 reads as under:

> 9. The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.
>
> 10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute

> subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.

21. Written statement filed by the petitioner in O.P.No.91/18 have not been considered by the KERC particularly in para.5, the following contentions were raised:

> "5. There is not dispute about the fact that a Power Purchase Agreement had been signed on 22.4.1999. It is also not in dispute that a restated agreement was initialed on 25.6.2007 and the same was placed for approval of this Hon'ble Commission. It is also not in dispute that there are various changes in the parameters of the project and also the clause pertaining to dispute resolution. In this background, it is submitted that there is novation of the contract between parties and therefore selectively relying on agreement dated 22.4.1999 to suit the convenience of Respondents 1 & 2 only to contend that the dispute is being raised in the said Agreement would not arise. Such a contention deserves rejection.
>
> 11. Respondents 1 & 2 have relied on the provisions of the PPA dated 22.4.1999 which was pertaining to construction of a barge mounted combined cycle power generation facility of 195 MW in the State of

Karnataka. It is contended that when the Agreement which contained Article 14.3(e) was signed, the Electricity Act 2003 was not in existence. It is further stated that on an earlier occasion, following the same procedure as contemplated under Clause 14 of the Agreement of 1999 was initiated by Award dated 5.8.2004 with the consent of the parties. It is contended that the PPA dated 25.6.2007 is a restatement of the PPA dated 22.4.1999. While Respondent No.1 & 2 admit the fact that the is restatement of the PPA, it is contended that the PPA dated 15.6.2007 was never approved by this Hon'ble Commission. It is further pointed out that the facility contemplated under the restated PPA is 462.5 MW generating unit. Based on these submissions, the Respondents contend that the facility has only remained as a proposal and the proposal has not been proceeded with because of the lack of approval of PPA by this Hon'ble Commission. It is also admitted that in the situation, the Company has not been able to achieve financial closure or commercial operation. In this background, the Respondents contend that it is not a generating Company as defined in Section 2(28) of the Electricity Act, 2003 and therefore the provisions of Section 86(1)(f) dealing with dispute resolution would not apply to the Respondent. It is on this premise that the Respondents contend that the present petition filed under Section 86(1))(f) is not maintainable."

22. Respondents have taken contradictory stand. On one hand, they admit Revised and Restated Agreement has not been approved by the KERC. Once, it

is evident that KERC has not approved Revised and Restated Agreement dated 25.06.2007 under Act 2003, then what remains is PPA 1999 dated 22.04.1999. That apart, Government is neither "generating Company', nor 'licensee' so as to entertain their Original Petition by the KERC.

23. Learned counsel for the petitioner relied on *GUJARAT URJA VIKAS NIGAM LTD. V. ESSAR POWER LTD.*, reported in (2008) 4 SCC 755 (para.35, 59 and 61) to contend that where a statute provides for a thing to be done in a particular manner, then it is to be in that manner and in no other manner. Section 86(1)(f) provides a special manner of making reference of an arbitrator in disputes between the 'licensee' and 'generating company'. Hence, by implementation all other methods are barred.

> 35. It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner [vide *Chandra Kishore Jha* v.*Mahavir Prasad* [(1999) 8 SCC 266 : AIR 1999 SC 3558] (SCC para 17 : AIR para 12),

Dhanajaya Reddy v. *State of Karnataka* [(2001) 4 SCC 9 : 2001 SCC (Cri) 652 : AIR 2001 SC 1512] (SCC para 23 : AIR para 22), etc.]. Section 86(1)(*f*) provides a special manner of making references to an arbitrator in disputes between a licensee and a generating company. Hence by implication all other methods are barred.

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 licensees 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 licensee 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).
>
> 61. We make it clear that it is only with regard to the authority which can adjudicate or arbitrate disputes that the Electricity Act, 2003 will prevail over Section 11 of the Arbitration and Conciliation Act, 1996. However, as regards the procedure to be followed by the State Commission (or the arbitrator nominated by it) and other matters related to arbitration (other than appointment of the arbitrator) the Arbitration and Conciliation Act, 1996 will apply (except if there is a conflicting provision in the Act of 2003). In other words, Section 86(1)(f) is only restricted to the authority which is to adjudicate or arbitrate between licensees and generating companies. Procedural and other matters relating to such proceedings will of course be governed by the Arbitration and Conciliation Act, 1996, unless there is a conflicting provision in the Act of 2003.

24. The Order of KERC dated 17.12.2018 are in the form of declaratory in nature which are without authority of law. Under Act, 2003 nowhere such power is vested with the KERC. In this regard, learned counsel for the petitioner relied on MOHINDER SINGH GILL AND ANR. Vs THE CHIEF ELECTION COMMISSIONER, NEW DELHI reported in (1978)1 SCC 405, relevant para.8 is extracted hereunder:

> "8. The Second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji.
>
> Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what be intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.
>
> Orders are not like old wine becoming better as they grow older."

25. In CHANDRA SINGH AND OTHERS vs STATE OF RAJASTHAN & ANOTHER reported in 2003 (6) SCC 545 para 37 extracted hereunder:-

> 37. This takes us to the question as to whether the action of the High Court in making the assessment of the performance of the appellants prior to 31-3-1999 stands the scrutiny of Rule 53 of the Rajasthan Civil

Services (Pension) Rules, 1996. In a given case, the said rule may be taken recourse to but the High Court never took any stand that its action was justified thereunder. Ex facie, the said rule is not applicable inasmuch as it has never been the contention of the respondents that the impugned order had been passed in public interest or other prerequisite therefor, namely, giving of three months' notice in writing to the government servant before the date on which he is required to retire in public interest or three months' pay and allowances in lieu thereof, had been complied with. Compliance with prerequisites of such a rule, it is well-settled, is mandatory and not directory. Such a plea has expressly been negatived by this Court. (See *Rajat Baran Roy case*[(1999) 4 SCC 235 : 1999 SCC (L&S) 852] , paras 13 to 16.) It is fairly well settled that the legality or otherwise of an order passed by a statutory authority must be judged on the face thereof as the reasons contained therein cannot be supplemented by an affidavit. (See *Mohinder Singh Gill* v. *Chief Election Commr.* [(1978) 1 SCC 405]) It may be true that mentioning of a wrong provision or omission to mention the correct provision would not invalidate an order so long as the power exists under any provision of law, as was submitted by Mr Rao. But the said principles cannot be applied in the instant case as the said provisions operate in two different fields requiring compliance with different prerequisites. It will bear repetition to state that in terms of Rule 53 of the Pension Rules, an order for compulsory retirement can be passed only in the event the same is in public interest and/or three months' notice or three months' pay in lieu thereof

had been given. Neither of the aforementioned conditions had been complied with.

26. Learned Senior Counsel Mr.Naganand appearing for respondent No.2/KPTCL submitted:-

(a) that present petition is liable to be rejected at threshold on the score that petitioner has not exhausted the remedy of statutory appeal provided under Section 111 of Act 2003 which provides for preferring appeal against any order. In the KERC order which is impugned herein, it would fall under the definition of "any order". In support of this contention, learned counsel for respondent No.2 relied on decision of this Court rendered in GRAPHITE INDIA LIMITED Vs KARNATAKA ELECTRICITY REGULATORY COMMISSION decided on 21.06.2018 in W.P.Nos.12576/2018 and connected matters (paras.28 to 30 and 35).

> 28. This Court while considering the provisions of Section 111 of the Electricity Act, 2003 in the case of *Chamundeshwari Electricity Supply Company Limited* made in *writ petition No.6033/2015* on

18.08.2015, has specifically held at Para Nos.8 and 9 as under:

"8. Section-111 of the Electricity Act'2003, (hereinafter referred to as 'Act') contemplates an appeal to the appellate authority wherein a person is aggrieved by an order made by an Adjudicating Officer or an order made by the Appropriate Commission under the Act. The impugned order herein is an order passed by the Electricity Regulatory Commission. Therefore, the said order is appealable under Section-111 of the Act. Therefore, the petitioner would have to avail the remedy of filing an appeal before the Tribunal.

9. His further contention that the Tribunal is not functional, is countered by the cause-list produced by the learned counsel for the respondent in terms of Annexure-R27. The same is for 13.08.2015 for various matters being listed thereon. To this, it is contended by the learned counsel appearing for the petitioner that the Members do not sit on regular basis. That Bench-I which is concerned with the present jurisdiction of the matters is not sitting. I' am of the considered view that the said contention cannot be accepted. The ground on which the interim order was granted and extended was because even though the Appellate Tribunal was constituted as per the Act, there were no Members. It is undisputed that Members have been appointed. The only ground urged is that the Members do not sit regularly. I'am of the considered view that such a contention cannot be accepted. Once a Tribunal is constituted and Members have been appointed, whether the Members sit on a particular day or not is

inconsequential. The remedy available is to file an appeal and obtain appropriate orders"

29. This Court while considering the provisions of Sections 111, 112 and 113 of the Electricity Act, 2003 in the case of *Karnataka Power Transmission Corporation Limited vs. R.K. Powergen Private Limited reported in 2005 Karnataka 5468,* has held that "*Whenever there is an alternative remedy provided under a special enactment a petition under Article 226 cannot be entertained*". Further, in the said decision at Para No.14 it is held as under:

"14. The next question which requires consideration is assuming that this Court can entertain the Writ Petition notwithstanding there being an alternate and efficacious remedy by way of an appeal before the Tribunal, the Courts are empowered or for that matter have enough machinery to deal with a situation like this. The Apex Court in the case of W.B.ELECTRICITY REGULATORY COMMISSION vs CESC LTD., (Supra) has observed as follows:

"The Commission constituted under Section 17 of the 1998 Act is an expert body and the determination of tariff which has to be made by the Commission involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. It would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that the various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first appellate stage also. The Central Electricity Regulatory Commission which has a

judicial member as also a number of other members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealings with this type of factual and technical matters. Therefore, it is recommended that the appellate power against an order of the State Commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body."

It is brought to my notice that a Appellate Tribunal as contemplated under Section 111 of the Act has already been formed and is functioning. A notification to that effect is also produced. It is also brought to my notice that all three members of the Appellate Tribunal have already been appointed and assumed the office on 13.05.2005. In the circumstances the question of entertaining this petition when there is an alternate and efficacious remedy for redressal of the petitioner's grievance is available there is no reason as to why this Court should exercise its powers under Articles 226 and 227 of the Constitution and deal with the technical matter. In my considered view the grievance of the petitioner should be decided by the Appellate Tribunal consisting of experts."

30. The Hon'ble Supreme Court while considering the provisions of Article 226 of Constitution of India in the case of *U.P. State Bride Corporation Ltd. and Others Vs. U.P. Rajya Setu Nigams. Karamchari Sangh* reported in *(2004) 4 SCC 268,* at Para No.12 has held as under:

> *"12. Although these observations were made in the context of the jurisdiction of the civil court to entertain the proceedings relating to an industrial dispute and may not be read as a limitation on the Court's powers under Article 226, nevertheless it would need a very strong case indeed for the High Court to deviate from the principle that where a specific remedy is given by the statute, the person who insists upon such remedy can avail of the process as provided in that statute and in no other manner."*
>
> 35. In view of the aforesaid reasons, the writ petitions are dismissed as not maintainable with liberty to the petitioners to avail an alternative remedy of preferring an appeal as contemplated under the provisions of Section 111 of the Karnataka Electricity Act within three weeks from the date of the receipt of a copy of this order.

(b) Learned Senior counsel for respondent No.2 in order to sustain the order of the KERC dated 17.12.2018, referred to PPA 1999 dated 22.04.1999 read with the Revised and Restated PPA 2007 dated 25.06.2007, he has relied on the provisions of the Act, 1999, its object, Section 17, Sub-section(2) of Section 27 read with Section 27 relates to 'Tariff'. Further, he has relied on Sections 10, sub-section (28) of Section 2 'Generating Company', Sub-section (39) of Section 2 –

'licence', Section 86(1)(f), Section 185 – Repeal and Savings of Act, 2003.

(c) Learned Sr. Counsel further submitted that even though Act, 1999 has come into force on 21.8.1999 similarly, Act, 2003 has come into effect from 10th June 2003 which are subsequent to PPA dated 22.04.1999, in effect, Act, 1999 and Act, 2003 will have a retrospectivity. In other words, if there is any dispute among the petitioners and respondents arising out of PPAs dated 22.04.1999 read with 25.06.2007, provisions of the Act, 1999 and Act, 2003 would spring into resolving the disputes. In this regard, Learned Senior counsel for respondent NO.2 cited the following decisions:

(i) *GUJARAT URJA VIKAS NIGAM LTD. Vs ESSAR POWER LTD.*, (2008) 4 SCC 755 (paras.26, 27 and 29).

(ii) Dr.INDRAMANI PYARELAL GUPTA AND OTHERS Vs W.R.NATU AND OTHERS

reported in AIR 1963 SC 274 (paras 27, 29 and 31)

27. Mr Pathak invited our attention to a passage in *Craies' Statute Law*, 5th Edn., p. 366 reading:

"Sometimes a statute, although not intended to be retrospective, will in fact have a retrospective operation. For instance, if two persons enter into a contract, and afterwards a statute is passed, which, as Cockburn, C.J. said in *Duke of Devonshire* v. *Barrow etc. Co.ltd* [(1877) 2 QBD 286, 289] 'engrafts an enactment upon existing contracts' and thus operates so as to produce a result which is something quite different from the original intention of the contracting parties, such a statute has, in effect a retrospective operation."

The bye-law insofar as it affects executory contracts requiring such contracts to be closed out on a day not originally contracted for and at a price fixed by law is in the above sense undoubtedly retrospective. The submission of learned counsel was that though a legislature which had plenary power in this regard could enact a statute having a retrospective operation, subordinate legislation, be it a rule, a bye- law or a notification, could not be made so as to have retrospective operation and that to that extent the rule, bye-law or notification would be ultra vires and would have to be struck down, relying for this position on the decision of the Mysore High Court reported in India Sugar and Refineries Ltd., vs State of Mysore AIR 1960 Mysore 326. We do not however consider it

necessary to canvass the correctness of this decision or the broad propositions laid down in it. It is clear law that a statute which could validly enact a law with retrospective effect could in express terms validly confer upon a rule-making authority a power to make a rule or frame a bye-law having retrospective operation and we would add that we did not understand Mr Pathak to dispute this position. If this were so the same result would follow where the power to enact a rule or a bye-law with "retrospective effect" so as to affect pending transactions, is conferred not by express words but where the necessary intendment of the Act confers such a power. If in the present case the power to make a bye-law so as to operate on contracts subsisting on the day the same was framed, would follow as a necessary implication from the terms of Section 11, it would not be necessary to discuss the larger question as to whether and the circumstances in which subordinate legislation with retrospective effect could be validly made.

29. We see no force in this argument. The fact that the Act itself makes provision for subsisting contracts being affected, would in our opinion far from supporting the appellants indicate that in the context of a crisis in forward trading the closing out of contracts was a necessary method of exercising control and was the mechanism by which the enactment contemplated that normalcy could be restored and healthy trading resumed.

31. There is one other aspect in which the same problem might be viewed and it is this: The contract entered into by the respondents

> (sic) purported to be one *under the bye-laws for the time being in force* and any change in the bye-laws therefore would seem to be contemplated and provided for by the contract itself, so that it might not be correct to speak of the new bye-law as affecting any accrued rights under a contract. For when those bye-laws were altered the changes would get incorporated into the contracts themselves, so as to afford no scope for the argument that there has been an infringement of a vested right. In the view however which we have taken about the validity of the bye-law on the ground that it was well within the terms of Sections 11 and 12 we do not consider it necessary to pursue this aspect further or to rest our decision on it.

(d) Learned Senior Counsel for respondent No.2 in order to overcome the definition of 'generating company' and Section 86(1)(f) of Act, 2003 contended, it is deemed that once the PPA is entered into between the parties, 'generating company' would fall under the definition of 'generating company' under Sub-section (28) of Section 2. On this issue, Learned Senior Counsel for respondent No.2 relied on Supreme Court decision reported in PRINTERS (MYSORE) LIMTED & ANR. Vs ASSTT. COMMERCIAL TAX OFFICER & ORS. reported in 1994(2) SCC 434 para.18 reads as under:

18. Now coming back to the amendment of the definition of "goods" in Section 2(*d*) of the Central Sales Tax Act, the said amendment, brought in with a view to bring the said definition in accord with the amendments brought in by the Constitution Sixth (Amendment) Act (referred to hereinbefore) was actuated by the very same concern, viz., to exempt the sale of newspapers from the levy of Central Sales Tax. The amendment was not intended to create a burden which was not there but to remove the burden, if any already existing on the newspapers — a policy evidenced by the enactment of the Taxes on Newspapers (Sales and Advertisements) Repeal Act, 1951. This concern must have to be borne in mind while understanding and interpreting the expression "goods" occurring in the second half of Section 8(3)(*b*). Now, the expression "goods" occurs on four occasions in Section 8(3)(*b*). On first three occasions, there is no doubt, it has to be understood in the sense it is defined in clause (*d*) of Section 2. Indeed, when Section 8(1)(*b*) speaks of goods, it is really referring to goods referred to in the first half of Section 8(3)(*b*), i.e., on first three occasions. It is only when Section 8(3)(*b*) uses the expression "goods" in the second half of the clause, i.e., on the fourth occasion that it does not and cannot be understood in the sense it is defined in Section 2(*d*). In other words, the "goods" referred in the first half of clause (*b*) in Section 8(3) refers to what may generally be referred to as raw material (in cases where they were purchased by a dealer for use in the manufacture of goods for sale) while the said word "goods" occurring for the fourth time (i.e., in the latter half) cannot obviously refer

to raw material. It refers to manufactured "goods", i.e., goods manufactured by such purchasing dealer — in this case, newspapers. If we attach the defined meaning to "goods" in the second half of Section 8(3)(*b*), it would place the newspapers in a more unfavorable position than they were prior to the amendment of the definition in Section 2(*d*). It should also be remembered that Section 2 which defines certain expressions occurring in the Act opens with the words: "In this Act, unless the context otherwise requires". This shows that wherever the word "goods" occurs in the enactment, it is not mandatory that one should mechanically attribute to the said expression the meaning assigned to it in clause (*d*). Ordinarily, that is so. But where the context does not permit or where the context requires otherwise, the meaning assigned to it in the said definition need not be applied. If we keep the above consideration in mind, it would be evident that the expression "goods" occurring in the second half of Section 8(3)(*b*) cannot be taken to exclude newspapers from its purview. The context does not permit it. It could never have been included by Parliament. Before the said amendment, the position was — the State could not levy tax on intra-State sale of newspapers; the Parliament could but it did not and Entry 92-A of List I bars the Parliament from imposing tax on inter-State sale of newspapers; as a result of the above provisions, while the newspapers were not paying any tax on their sale, they were enjoying the benefit of Section 8(3)(*b*) read with Section 8(1)(*b*) and paying tax only @ 4% on non-declared goods which they required for printing and publishing

> newspapers. Their position could not be worse after the amendment which would be the case if we accept the contention of the Revenue. If the contention of the Revenue is accepted, the newspapers would now become liable to pay tax @ 10% on non- declared goods as prescribed in Section 8(2). This would be the necessary consequence of the acceptance of Revenue's submission inasmuch as the newspapers would be deprived of the benefit of Section 8(3)(*b*) read with Section 8(1)(*b*). We do not think that such was the intention behind the amendment of definition of the expression "goods" by the 1958 (Amendment) Act. Even apart from the opening words in Section 2 referred to above, it is well settled that where the context does not permit or where it would lead to absurd or unintended result, the definition of an expression need not be mechanically applied. [Vide *T.M. Kanniyan* v. *ITO* [(1968) 2 SCR 103 : AIR 1968 SC 637 : 68 ITR 244] , *Pushpa Devi* v. *Milkhi Ram* [(1990) 2 SCC 134, 140] (para 14) and *CIT* v. *J.H. Gotla* [(1985) 4 SCC 343 : 1985 SCC (Tax) 670] .]

(e) Further submitted that reading of application filed under Section 32(2) of Arbitration and Conciliation Act, 1996 read with the order of Arbitral Tribunal, it is crystal clear that "Arbitration proceedings be terminated reserving liberty to either of the parties to initiate further arbitral proceedings against the other on the same cause of action" amounts to arbitration proceedings under Act,

2003 and it need not be in terms of the UNCITRAL Rules.

(f) Having regard to the later development relating to enactment of Karnataka Electricity Reform Act, 1999 and Electricity Act, 2003, Article 14 of PPA relates to Arbitration is parametria to Section 39 of Act, 1999. Further, Section 11(k) of Act, 1999 is identical to that of Section 86(1)(f) of Act, 2003. Irrespective of non- approval of Revised and Restated PPA dated 25.06.2007 by the KERC, still KERC is empowered to decide the disputes if any, among the petitioner and respondents pursuant to PPA dated 22.04.1999. Under Para.(VI) [Recitals] read with Article 16.1 of revised PPA, further Article 7.2 only remedy in respect of dispute before the KERC.

27. Learned Senior counsel for respondent No.2 relied on the Supreme Court decision in TATA POWER COMPANY Vs RELIANCE ENERGY LIMITED AND

OTHERS reported in 2009(16) SCC 659 (paras.105 to 110)

Section 86 — Functions of the Commission

105. Section 86 provides for the functions of the State Commission, clause (*a*) of sub-section (1) whereof empowers it to determine the tariff for generation, supply, transmission and wheeling of electricity. Clause (*b*) empowers it to regulate electricity purchase and procurement process of distribution licensees. Inevitably it speaks of PPA. PPA may provide for short-term plan, a mid-term plan or a long-term plan. Depending upon the tenure of the plan, the requirement of the distribution licensee vis- à-vis its consumers, the nature of supply and all other relevant considerations, approval thereof can be granted or refused. While exercising the said function necessarily the provisions of Section 23 may not be brought within its purview. While even exercising the said power the State Commission must be aware of the limitations thereto as also the purport and object of the 2003 Act. It has to take into consideration that PPA will have to be dealt with only in the manner provided therefor.

106. The scheme of the Act, namely, the generation of electricity is outside the licensing purview and subject to fulfilment of the conditions laid down under Section 42 of the Act a generating company may also supply directly to consumer wherefor no licence would be required, must be given due consideration. The said provision has to be read with Regulation 24. In regard to the

grant of approval of PPA the procedures laid down in Regulation 24 are required to be followed.

107. While exercising its power of "regulation" in relation to purchase of electricity and procurement process of distribution, it is not permissible for the Commission to direct allocation of electricity to different licensees keeping in view their own need. Section 86(1)(*b*) read with Section 23 if interpreted differently would empower the Commission to issue direction to the generating company to supply electricity to a licensee who had not entered into any PPA with it. We do not think that such a contingency was contemplated by Parliament.

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

109. A generating company has to make a huge investment and assurances given to it that subject to the provisions of the Act it would be free to generate electricity and

> supply the same to those who intend to enter into an agreement with it. Only in terms of the said statutory policy, it makes huge investment. If all its activities are subject to regulatory regime, it may not be interested in making investment. The business in regard to allocation of electricity at the hands of the generating company was the subject-matter of the licensing regime. While interpreting the statute it must be borne in mind that such a mechanism should not come back.
>
> 110. That, however, would not mean that the generating company is absolutely free from all regulations. Such regulations are permissible under the 2003 Act; one of them being fair dealing with the distributor. Thus, other types of regulations should not be brought in which were not contemplated under the statutory scheme. If it is exercising its dominant position, Section 60 would come into play. It is only in a situation where a generator may abuse or misuse its position the Commission would be entitled to issue a direction. The regulatory regime of the Commission, thus, can be enforced against a generating company if the condition precedent therefor becomes applicable.

(g) The aforesaid decisions supports the contention of respondent NO.2 that Waiver or Estoppel issue is required to be pleaded specifically. In the present petition, petitioner has not pleaded relating to Waiver and Estoppel

(h) Learned Counsel for respondent No.2 to meet the contention of the jurisdiction of the KERC raised by the petitioner relied on the following decisions:

> ALL INDIA POWER ENGINEER FEDERATION AND OTHERS Vs SASAN POWER LIMITED AND OTHERS reported in 2017(1) SCC 487 (paras. 20 to 26)
>
> 20. In *P. Dasa Muni Reddy* v. *P. Appa Rao* [*P. Dasa Muni Reddy* v. *P. Appa Rao*, (1974) 2 SCC 725] , this Court held: (SCC p. 729, para 13)
>
> "*13.* ... Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there

must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehension as to some facts which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the court in saying that there was no consent."

21. Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Contract Act, 1872 governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest. This is clear from a reading of the following authorities.

22. In *Lachoo Mal* v. *Radhey Shyam* [*Lachoo Mal* v. *Radhey Shyam*, (1971) 1 SCC 619] it was held: (SCC pp. 621-22, para 6)

"*6.* The general principle is that everyone has a right to waive and to agree to waive the

advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maxim which sanctions the non-observance of the statutory provision is *cuilibet licet juri pro se introducto renuntiare*. (See *Maxwell on Interpretation of Statutes*, Eleventh Edn., pp.
375 and 376.) If there is any express prohibition against contracting out of a statute in it then no question can arise of anyone entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy."

23. In *Indira Bai* v. *Nand Kishore* [*Indira Bai* v. *Nand Kishore*, (1990) 4 SCC 668] it was held: (SCC p. 672, para 5)

"*5.* ... The test to determine the nature of interest, namely, private or public is whether the right which is renunciated is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it may be difficult to put estoppel as a defence. But if it is right of party alone then it is capable of being abnegated either in writing or by conduct."

24. In *Krishna Bahadur* v. *Purna Theatre* [*Krishna Bahadur* v. *Purna Theatre*, (2004) 8 SCC 229 : 2004 SCC (L&S) 1086] it was held: (SCC p. 233, paras 9-10)

"*9.* The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that

whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."

25. It is thus clear that if there is any element of public interest involved, the court steps in to thwart any waiver which may be contrary to such public interest.

26. On the facts of this case, it is clear that the moment electricity tariff gets affected, the consumer interest comes in and public interest gets affected. This is in fact statutorily recognised by the Electricity Act in Sections 61 to 63 thereof. Under Section 61, the appropriate Commission, when it specifies terms and conditions for determination of tariff, is to be guided inter alia by the safeguarding of the consumer interest and the recovery of the cost of electricity in a reasonable manner. For this purpose, factors that encourage competition, efficiency and good performance are also to be heeded. Under Section 62 of the Act, the appropriate Commission is to determine such tariff in accordance with the principles

contained in Section 61. The present case, however, is covered by Section 63, which begins with a non obstante clause stating that notwithstanding anything contained in Section 62, the appropriate Commission shall adopt the tariff if such tariff has been determined through a transparent process of bidding in accordance with the Guidelines issued by the Central Government. The Guidelines dated 19-1-2005 issued by the Central Government under Section 63 make it clear that such Guidelines are framed with the following objectives in mind:

"These Guidelines have been framed under the above provisions of Section 63 of the Act. The specific objectives of these Guidelines are as follows:

(1) Promote competitive procurement of electricity by distribution licensees;

(2) Facilitate transparency and fairness in procurement processes;

(3) Facilitate reduction of information asymmetries for various bidders;

(4) Protect consumer interests by facilitating competitive conditions in procurement of electricity;

(5) Enhance standardisation and reduce ambiguity and hence time for materialisation of projects;

(6) Provide flexibility to suppliers on internal operations while ensuring certainty

on availability of power and tariffs for buyers.

Clause 2.3 of the said Guidelines reads as follows:

"2.3. Unless explicitly specified in these Guidelines, the provisions of these Guidelines shall be binding on the procurer. The process to be adopted in event of any deviation proposed from these Guidelines is specified later in these Guidelines under Para 5.16."

(i) VOLTAS LTD Vs STATE OF AP reported in 2004(11) SCC 569 (para.20)

20. Thus time for payment can be extended. But if such an extension is granted, a statutory liability to pay interest at the rate of 18% arises. This is a statutory liability. If a statutory liability has to be waived then there must be an express waiver of the same. The fact that the Scheme is silent about such waiver shows that there is no waiver. This becomes further clear from clause 13(*b*)(3) of the Scheme. That clause specifies that interests shall only be at the rate of 6%. Such a provision had to be made because otherwise the statutory liability would have been to pay interest at the rate of 18%. In clause 13(*b*)(4) there is no express waiver of or reduction in the rate of interest and the payment thereof.

(ii) RAJENDRA JHA Vs PRESIDING OFFICER, LABOUR COURT, BOKARO STEEL CITY, DISTRICT DHANBAD

AND ANOTHER reported in 1984 (Supp) SCC 520 (para.15).

15. In *Mathura Prasad Bajoo Jaiswal* v. *Dossibai N.B. Jeejeebhoy* [(1970) 1 SCC 613 : AIR 1971 SC 2355 : (1970) 3 SCR 830] this Court held that the question relating to the jurisdiction of a court cannot be deemed to have been finally determined by an erroneous decision of the court. If, by an erroneous decision, the court assumes jurisdiction which it does not possess, its decision cannot operate as res judicata between the parties. In this regard, the Court made a distinction between the decision of a question of fact and the decision of a question as regards the jurisdiction of the court. Insofar as questions of fact are concerned, the court is not concerned with the correctness or otherwise of the earlier judgment while determining the application of the rule of res judicata. Where, however, the question is purely of law and relates to the jurisdiction of the court or where the decision of the court sanctions something which is illegal, the party affected by that decision will not be precluded by the rule of res judicata from challenging the validity of the earlier decision. The reason is, that the rule of procedure cannot supersede the law of the land.

28. He relied on TRANSMISSION CORPORATION OF ANDHRA PRADESH LIMITED. Vs SAI RENEWABLE POWER PRIVATE LIMITED AND

OTHERS reported in (2011) 11 SCC 34 (paras 41 to 44) extracted hereunder:-

> 41. This Court in *Assn. of Industrial Electricity Users* v. *State of A.P.* [(2002) 3 SCC 711] while dealing with the provisions of tariff fixation in terms of the provisions of the Reform Act, 1998, observed that even where the Act did not envisage classification of consumers according to the purpose for which electricity is used, sub-section (9) of Section 26 of that Act does state that the tariff rate relatable to classification of consumers would be permissible, of course, depending upon various factors stipulated in Section 26(7) of the Act. The Court finally held as under: (SCC p. 717, para 11)
>
> "*11*. We also agree with the High Court that the judicial review in a matter with regard to fixation of tariff has not to be as that of an appellate authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the Commission has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law."
>
> 42. Similarly, in *W.B. Electricity Regulatory Commission* v. *CESC Ltd.* [(2002) 8 SCC 715] this Court was concerned with determination of tariff by the State

Commission, the applicability of principles of natural justice and the scope of interference by the High Court in distinction to the power exercisable by the appellate authority. Stating it to be a function in the nature of legislative power, the Court felt that the principles of natural justice were not attracted and the power of judicial review could hardly be invoked. The Court held as under: (SCC pp. 736 & 739, paras 39 & 44)

"*39*. Having considered the finding of the High Court, we are of the opinion that though generally it is true that the price fixation is in the nature of a legislative action and no rule of natural justice is applicable (see *Shri Sitaram Sugar Co. Ltd.* v. *Union of India* [(1990) 3 SCC 223] SCC p. 251, para
45), the said principle cannot be applied where the statute itself has provided a right of representation to the party concerned. Therefore, it will be our endeavour to find out whether, as contended by learned counsel for the appellants, the statute has provided such a right to the consumers or not.

44. Having held on merits that the Regulations are not arbitrary and are in conformity with the provisions of the Act, we will now consider whether the High Court could have gone into this issue at all in an appeal filed by the respondent Company. First of all, we notice that the High Court has proceeded to declare the Regulations contrary to the Act in a proceeding which was initiated before it in its appellate power under Section 27 of the Act. The appellate power of the High Court in the instant case is derived from the 1998 Act. The

Regulations framed by the Commission are under the authority of subordinate legislation conferred on the Commission in Section 58 of the 1998 Act. The Regulations so framed have been placed before the West Bengal Legislature, therefore they have become a part of the statute. That being so, in our opinion the High Court sitting as an appellate court under the 1998 Act could not have gone into the validity of the said Regulations in exercise of its appellate power."

43. In view of the above settled position of law we are of the considered opinion that the present case is one where this Court should examine determination of tariff on merits and particularly, in view of the directions that we propose to pass finally in this case.

44. The issue relating to jurisdiction, again, would have to be divided into two different parts. Firstly, whether the Regulatory Commission could exercise the powers for determination and/or refixing the price by resorting to tariff fixation powers under the Act and secondly, with regard to sale of generated electricity by the generators to parties other than the State transmission utility or the distribution company. In regard to first part of this issue the Tribunal in its order, while answering Issue B, held that the Regulatory Commission has no jurisdiction to refix the regulatory purchase price by resorting to tariff fixation methods specified under the provisions of law. Similarly, it also answered Issue A in the negative and against the Regulatory Commission. The primary reason recorded by the Tribunal is that the original fixation of purchase price for energy

> generated by NCE developers is in terms of the policy directions issued by the State and it was not within the jurisdiction and scope of the powers conferred upon the Regulatory Commission under the Reform Act, 1998.

29. Therefore, the ingredients contained in the definition 'Generating company' need not be fulfilled in entirety. It can file nil statement.

(i) Learned Senior counsel for the petitioner submitted that composition of KERC is not in terms of Section 84 of Act, 2003. That Chairman or anyone member should have been a Judicial Member. Similar contention was the subject matter before the Supreme Court in the case of *STATE OF GUJARAT V. UTILITY USERS' WELFARE ASSOCIATION*, Supra wherein it is held that the Chairman or member should be a Judicial Member. However, the Judgment of the Supreme Court would apply prospectively. Such observation has been made in Para 114(v). Thus, petitioner has not made out prima facie case so as to interfere with the KERC order.

30. Definition of 'generating company' read with Section 10 of Act, 2003 is required to be examined with reference to principle of harmonious construction. Such interpretation do not arise in the matter for the reasons while interpreting a particular statute there is no question of imposing provisions of some other provisions or a statute unless Act, 2003 specifically provides for such provision or clause. Act, 2003 'saving clause' – restrict to among other State statutes Karnataka Electricity Reforms Act, 1999.

31. Learned State Counsel for respondent No.1 submitted that he would adopt the arguments of learned Senior Counsel for respondent No.2.

32. Heard the counsel for the parties.

32. Before adverting to the merits of the case, it is necessary to take note of the following provisions:

(1) Electricity Supply Act, 1948:

Section 2 relates to Interpretation

Sub-Section (4-A) deals with "Generating Company" which reads as under:-

"Generating Company" means a company registered under the Companies Act, 1956 (1 of 1956) and which has among its objects the establishment operation and maintenance of generating stations.

Sub-section 5 deals with "Generating Station" which reads as under:

"Generating Station" or "Station" means any station for generating electricity, including any building and plant (with step-up transformer, switch-gear, cables or other appurtenant equipment, if any) used for that purpose and the site thereof, a site intended to be used for a generating station, and any buildings used for housing the operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any sub-station.

Sub-section 6 deals with "Licensee" reads as under:-

"Licensee" means a person licensed under Part II of the Indian Electricity Act, 1910 (9 of 1910) to supply energy or a person who has obtained sanction under Section 28 of that Act to engage in the business of supplying energy (but, the provisions of Section 26 of 26-A of this Act notwithstanding, does not include the Board or a Generating Company.

Section 76 of Arbitration and Conciliation Act, 1996

76. Termination of conciliation proceedings :- The conciliation proceedings shall be terminated-

a. by the signing of the settlement agreement by the parties, on the date of the agreement; or

b. by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

c. by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

d. by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

The Electricity Regulatory Commissions Act, 1998

Section 2 relates to Definitions:

Sub-section (f) defines "licensee" which reads as under:-

"licensee" means a person licensed under Part II of the Indian Electricity Act, 1910 (9 of 1910) to supply energy or a person who has obtained sanction under Section 28 of that Act to engage in the business of supplying energy (but does not include the Board or a Generating company).

Sub-section (j) defines "State Commission" which reads as under :-

"State Commission" means the State Electricity Regulatory Commission established under sub-section (1) of Section 17.

Sub-section (k) defines "transmission utility" which reads as under:-

"transmission utility" means any generating company, board, licensee or other person engaged in the transmission of energy.

Sub-section (l) defines "Utility" which reads as under:-

"utility" means any person or entity engaged in the generation, transmission, sale, distribution or supply, as the case may be, of energy.

Section 22 – Functions of the State commission.

Sub-section (n) reads as under:-

(n) to adjudicate upon the disputes and differences between the licensees and utilities and to refer the matter for arbitration.

Section 61 – Repeal and Savings

(1) The Electricity Regulatory Commissions Ordinance, 1998 (ord. 14 of 1998) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

Karnataka Electricity Reform Act, 1999

Section 2 relates to Definitions

Sub-section (e) deals with "Licence" as under:-

(e) "Licence" means a license granted under Section 19.

(f) "Licensee" or "Licence holder" means any person licensed under this Act.

Section 10 relates to Powers of the Commission

Section 11 deals with "Functions of the Commission" reads as under:-

(k) to arbitrate or to nominate arbitrator (s) in matters of disputes and difference between licensees in accordance with the provisions of this Act.

Section 59 deals with "Savings" reads as under:-

(1) Notwithstanding anything contained in this Act, the powers, rights and functions of the Regional Electricity Board, the Central Electricity Authority, the Central Government and Authorities other than the State Electricity Board and the State Government under the Indian Electricity Act, 1910 or the Electricity (Supply) Act, 1948 or rules framed thereunder shall remain unaffected and shall continue to be in force.

(2) Nothing contained in this Act will apply to the Power Grid Corporation of India Limited, or other bodies or licensees in relating to the

inter-State transmission of the electricity or generating companies owned or controlled by the Central Government or undertaking owned by the Central Government.

Section 60 deals with "Repeal and Savings" reads as under:-

1. The Karnataka Electricity Reform Ordinance, 1999 (Karnataka Ordinance 3 of 1999) is hereby repealed.
2. Notwithstanding such repeal anything done or action taken under the said Ordinance shall be deemed to have been done or taken under this Act.

Electricity Act, 2003

Section 2 relates to definitions

Sub-Section 28 defines 'Generating Company' which reads as under:-

"Generating Company" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station.

Sub-section 38 defines 'Licence' which reads as under:-

"Licence" means a licence granted under Section 14.

Sub-section 39 defines "Licensee" which reads as under:-

"Licensee" means a person who has been granted a licence under Section 14.

Sub-section 64 defines "State Commission" which reads as under:-

"State Commission" means the State Electricity Regulatory Commission constituted under sub-section (1) of Section 82 and includes a Joint Commission constituted under sub-section (1) of Section 83.

Section 10 defines "Duties of the Generating Companies" which reads as under:-

(1) Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made thereunder.

(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.

(3) Every generating company shall:-

(a) submit technical details regarding its generating stations to the Appropriate Commission and the Authority.

(b) Co-ordinate with the Central Transmission Utility of the State Transmission Utility, as the case may be, for transmission of the electricity generated by it.

Section 14 defines "Grant of licence" which reads as under:-

The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person –

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(Provided that the Developer of a Special Economic Zone notified under sub-section (1) of Section 4 of the Special Economic Zones Act, 2005, shall be deemed to be a licensee for the purpose of this clause, with effect from the date of notification of such Special Economic Zone.)

(c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence

Provided that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission

and thereafter the provisions of this Act shall apply to such business:

Provided further that the Central Transmission Utility or the State Transmission Utility shall be deemed to be a transmission licensee under this Act:

Provided also that in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of this Act, such Government shall be deemed to be a licensee under this Act, but shall not be required to obtain a licence under this Act:

Provided also that the Damodar Valley Corporation, established under sub-section (1) of section 3 of the Damodar Valley Corporation Act, 1948 (14 of 1948), shall be deemed to be a licensee under this Act but shall not be required to obtain a licence under this Act and the provisions of the Damodar Valley Corporation Act, 1948 (14 of 1948), in so far as they are not inconsistent with the provisions of this Act, shall continue to apply to that Corporation:

Provided also that the Government company or the company referred to in sub-section (2) of section 131 of this Act and the company or companies created in pursuance of the Acts specified in the Schedule, shall be deemed to be a licensee under this Act:

Provided also that the Appropriate Commission may grant a licence to two or more persons for distribution of electricity

through their own distribution system within the same area, subject to the conditions that the applicant for grant of licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements [relating to the capital adequacy, credit-worthiness, or code of conduct] as may be prescribed by the Central Government, and no such applicant, who complies with all the requirements for grant of licence, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose:

Provided also that in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in his area of supply:

Provided also that where a person intends to generate and distribute electricity in a rural area to be notified by the State Government, such person shall not require any licence for such generation and distribution of electricity, but he shall comply with the measures which may be specified by the Authority under section 53:

Provided also that a distribution licensee shall not require a licence to undertake trading in electricity.

Section 82 – (Constitution of State Commission) xxx

Section 86 defines "Functions of the State Commission"

Sub-section (i) reads as under:-

Specify or enforce standards with respect to quality, continuity and reliability of service by licensees.

Sub-section (f) reads as under:-

Adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration.

Section 111 defines "Appeal to Appellate Tribunal" which is reads as under:-

(1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:

Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal , deposit the amount of such penalty:

Provided further that wherein any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such de

posit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned adjudicating officer or the Appropriate Commission, as the case may be.

(5) The appeal filed before the Appellate Tribunal under sub section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one

hundred and eighty days from the date of receipt of the appeal:

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.

Section 142 defines "Punishment for non-compliance of directions by Appropriate commission" reads as under:-

In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person as contravened any of the provisions of this Act or the rules or regulations made there under, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing

failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.

Section 149 defines "Offences by companies".

Section 185 – Repeal and Savings. Sub clause (3) reads hereunder:-

1.....

2....

3. The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.

(5) Karnataka Electricity Reforms Act, 1999 (Karnataka Act, 25 of 1999)

PPA DATED 22.04.1999

14.3 Arbitration

(a) Notwithstanding the above, if any dispute is unable to be resolved by the Parties under Section 14.1 or Section 14.2 within one hundred (100) Days after such dispute arises (or such shorter period provided in Article 9, then such dispute shall be settled exclusively and finally by arbitration. It is specifically understood and agreed that any dispute that cannot be resolved between the Parties, including any

matter of law or fact relating to the interpretation of this Agreement, shall be submitted to arbitration irrespective of the magnitude thereof, the amount in dispute or whether such dispute would otherwise be considered justiciable or ripe for resolution by any other court or arbitral tribunal.

(b) Save as expressly otherwise provided in this Agreement, all disputes arising out of or connection with this Agreement shall be settled exclusively and finally by arbitration. It is understood and agreed that any dispute which cannot be resolved between the Parties including any matter of law or fact relating to the interpretation of this Agreement shall be submitted to arbitration irrespective of its size or the amount in dispute. This Agreement and the rights and obligations of the parties shall remain in full force and effect pending the award in such arbitration.

(c) The parties agree that the arbitration shall be conducted in accordance with the UNCITRAL Rules (the "Rules") for the time being in force. For the avoidance of doubt, the Parties agree that the Indian Arbitration and Conciliation Act 1996 shall not apply to this Agreement or to any arbitration proceeding or award rendered pursuant to this Article or to any dispute arising out of or in connection with this Agreement except as stated in the following sentence. In relation to the enforcement of an award in India, the Parties agree that such award shall be treated as a foreign award and not a domestic award and further agree that enforcement of such an award shall be subject to the provisions of Part II of the Arbitration and Conciliation Act, 1996.

(d) ……

(e) ……

(f) ……

(g) …..

16.1. Amendments. This Agreement, including the appendices and schedules thereto, may be amended only by the written agreement of the Parties.

REVISED AND RESTATED PPA DATED 25.06.2007

RECITALS

(iv) In terms of the said GOK order dated 23rd September 2006, detailed negotiations have been held. During these negotiations, it was desired that the base year tariff for the power project be linked to that of 1 x 500 MW power plat of KPCL at Bellary. EIPCL, accepted the suggestions and subsequently GOK vide its order dated: 19th April 2007 approved the proposal of the Buyers and the Seller to enhance the gross capacity of the power plant to 1 x 500 MW at the same site, subject to the condition that the tariff shall not be higher than the tariff of Bellary Thermal Power Station (KPCL) I Stage.

Article 1.1 Definitions

Xxxxx

"Agreement" means this Revised and Restated Power Purchase Agreement dated as of the date hereof including the Annexures hereto, as amended, supplemented or modified from time to time in accordance with the terms and conditions herein contained.

(1.3) Governing Law:- This Agreement shall be governed by the Laws at India including Contract Law, Electricity Act 2003 Environmental Law and other applicable Laws as amended from time to time.

Article 7 – Dispute Resolution

(7.2) Formal Dispute Resolution

(a) All disputes or differences between the Parties arising out of or in connection with this Agreement shall be first tried to be settled through mutual negotiation in terms of Article 7.1.

(b) In the event that such differences or Disputes between the Parties are not settled through mutual negotiations within ninety (90) days after such Dispute arises, then it shall be resolved in accordance with The Electricity Act 2003 as modified from time to time.

(c) Notwithstanding the existence of any disputes referred to adjudication, the Parties shall continue to perform their respective obligations under this Agreement and the Parties shall not withhold, for any reasons whatsoever, when any adjudication proceeding are pending, payment of any undisputed amount that has become due under this Agreement.

33. In the case of *UNION OF INDIA V/S DEOKI NANDAN AGGARWAL* reported in *1992 AIR 96,* Supreme Court held that the Courts cannot correct or make up deficiency, defect or omission in the legislation in the following words:-

> *"It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the Legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the Legislature, the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what is should be. The Court, of course, adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislature judgment is subversive of the constitutional harmony and comity of instrumentalities. Modifying and altering the scheme and applying it to others who are not otherwise entitled to under the scheme will not also come under the principle of affirmative action adopted by the Courts sometimes in order to avoid discrimination.*

34. The statutory authority like State Commission is required to determine or decide a claim or dispute either by itself or by referring to Arbitration only in accordance with law.

35. In the case of *GUJARAT URJA VIKAS NIGAM LTD. V. SOLAR SEMICONDUCTOR POWER CO. (India) (P) Ltd.*, & ANR. reported in (2017) 16 SCC 498 (para.65), it is held that "Terms of PPA are binding on both the parties equally". Para.65 is extracted hereunder:

> *Sanctity of power purchase agreement*
>
> 65. It is contended that Section 86(1)(*b*) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees and the terms and conditions of the PPA cannot be set to be inviolable. Merely because in PPA, tariff rate as per Tariff Order, 2010 is incorporated that does not empower the Commission to vary the terms of the contract to the disadvantage of the consumers whose interest the Commission is bound to safeguard. Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the

advantage of the generating company, Respondent 1 and disadvantage of the appellant. Terms of PPA are binding on both the parties equally.

In para.68 it is held that, State Commission was not right in exercising its inherent jurisdiction by extending the First Control Board beyond its due date thereby substituting its view in the PPA, it is essentially a matter of contract between parties.

68. In exercise of its statutory power, under Section 62 of the Electricity Act, the Commission has fixed the tariff rate. The word "tariff" has not been defined in the Act. Tariff means a schedule of standard/prices or charges provided to the category or categories for procurement by the licensee from the generating company, wholesale or bulk or retail/various categories of consumers. After taking into consideration the factors in Sections 61(a) to (i), the State Commission determined the tariff rate for various categories including solar power PV project and the same is applied uniformly throughout the State. When the said tariff rate as determined by the Tariff Order, 2010 is incorporated in the PPA between the parties, it is a matter of contract between the parties. In my view, Respondent 1 is bound by the terms and conditions of PPA entered into between Respondent 1 and the appellant by mutual consent and that the State Commission was not right in exercising its inherent jurisdiction by extending the first control period beyond its due date and

thereby substituting its view in the PPA, which is essentially a matter of contract between the parties.

36. Therefore, in the case on hand prima facie State Commission has exceeded its jurisdiction in O.P.No.91/2018 wherein the following issues have been framed which reads as under:

1. Should the subject-matter of the dispute, said to have been involved in the arbitral proceedings between the 1st respondent and the petitioners, be exclusively triable by this Commission?

2. What Order?

The order of the KERC (State Commission) reads as under:-

ORDER

(a) It is declared that, the dispute, said to have been involved in PCA Case no.AA716, between the Hassan Thermal Power Private Limited (formerly known as Euro India Power Canara Private Limited') – Vs- The Government of Karnataka and the Karnataka Power Transmission Corporation Limited, is exclusively triable by this Commissioner, under Section 86(1)(f) of the Electricity

Act, 2003, and not before any other Forum;

(b) Consequently, it is declared that, the communications dated 29.06.2018 (ANNEXURE – C), 11.09.2018 (ANNEXURE – K) and 26.09.2018 (ANNEXURE – M), appointing the Respondents 4 to 6 as Arbitrators, are illegal opposed to the mandate of the Electricity Act, 2003" and

(c) The Respondents 1 and 2 are restrained from proceeding with the above-mentioned arbitral case.

37. The aforesaid declaration rendered by the State Commission is in terms of the prayer made by the respondents in O.P.No.91/18. The scope of State Commission under Section 86(1)(f) is limited to the extent, 'Adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration. (The words used 'adjudicate upon the dispute') 'refer any dispute for arbitration' should have been or' since, the State Commission cannot decide dispute as well as referring the matter to arbitration. This has been clarified by the Apex Court in

the case of *GUJARAT URJA* VIKAS *NIGAM LTD.'s case supra* (para.27) extracted hereunder.

> 27. In our opinion in Section 86(1)(*f*) of the Electricity Act, 2003 the word "and" between the words "generating companies" and the words "refer any dispute" means "or", otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some arbitrator. Hence the word "and" in Section 86(1)(*f*) means "or".

38. For adjudication of dispute, ingredients stated in Sub-section (1)(f) of Section 86 of Act, 2003 and definition of 'Generating Company' and 'licensee' under Sub-sections 28 and 29 of Section 2 of Act, 2003. In respect of scope of State Commission, to invoke Section 86(1)(f) of Act, 2003, Supreme Court had an occasion to consider in the case of A.P. POWER CO-ORDINATION COMMITTEE vs LANCO KONDAPALLI POWER LIMITED AND OTHERS reported in (2016) 3 SCC 468 (para No.9).

39. Petitioners counsel contended that the State Commission has no jurisdiction to consider the prayer of

the respondent in respect of declaration in terms of ground Nos. 5 and 11 (supra). It was further contended that composition of State Commission is not in terms of Section 84 of the Act, 2003. No-doubt, composition of State Commission is not consisting of any Judicial Member or having knowledge of law. On this issue, Apex Court has considered elaborately in the case of *STATE OF GUJARAT AND OTHERS VS. UTILITY USERS' WELFARE ASSOCIATION AND OTHERS* reported in 2018 SCC Online SC 368 case supra and para.116 of the said order reads as under:

> 116. In the context of the question which we are now dealing with, if we were to take the proposition as "no member having knowledge of law is required to be a member of the Commission" then we have a problem at hand. This is so because while interpreting Section 86 of the said Act, it has been expressed that the Commission has the "trappings of the court", an aspect we have agreed to hereinbefore. Once it has the "trappings of the court" and performs judicial functions, albeit limited ones in the context of the overall functioning of the Commission, still while performing such judicial functions which may be of far- reaching effect, the presence of a member having knowledge of law would become necessary. The absence of a member having knowledge of law would make the

composition of the State Commission such as would make it incapable of performing the functions under Section 86(1)(*f*) of the said Act.

(V) THIS JUDGMENT WILL APPLY PROPSECTIVELY AND WOULD NOT AFFECT THE ORDERS ALREADY PASSED BY THE COMMISSION FROM TIME TO TIME.

40. In the case of NANDAKISHORE GANESH JOSHI Vs. COMMISSIONER, MUNICIPAL CORPORATION OF KALYAN AND DOMBIVALI reported in AIR 2005 SC 34 held as under:

> *A statute, as is well known must be construed in such a manner whereby the intent and object of the Act can be given effect to. A literal meaning should also be avoided if it results in absurdity.*

41. The KERC has committed an error in entertaining respondent's O.P. No.91/2018 in the absence of satisfying the ingredients stated in Section 86(1)(f) of the Act 2003 like Government-1st petitioner who is not licensee nor generating company, petitioner herein is not a generating company so as to ingredients stated in the aforesaid provision. On the other hand,

petitioner's company yet to commence generating power. Further, scope of the aforesaid provision is to decide disputes, if any, among the generating company and licensee. In the absence of ingredients stated in the aforesaid provision, prima-facie KERC has exceeded its jurisdiction that too passing a declaratory order. It is to be noticed that petitioner raised a dispute before PCA under The United Nations Commission on International Trade Law (UNCITRAL) Rules holding that such arbitration proceedings is impermissible pursuant to the PPA dated 22.04.1999 r/w revised restated agreement dated 25.6.2007. Thus, KERC has exceeded its jurisdiction in entertaining the 1st respondent's petition and also passing a declaratory orders. Such action is without authority of law and contrary to Section 86(1) (f) of Act, 2003.

42. *N. SARADA MANI V. G. ALEXANDER* AND ANOTHER reported in *AIR 1998 AP 157* held that it is well settled law that when the language is plain and unambiguous, the Court must give effect to it whatever

may be consequences. The words of the statutes speak the intention of the Legislature. The inconvenience and hardship are not relevant considerations. It is the function of the Court to interpret the law and not to legislate it. If the Court finds any deficiency in the statute, it is duty of the Legislature to fill-up and it is no part of the duty of the Court to supply the deficiency if any. However, a careless omission made by the Legislature may be supplied in order to give the legislation an effective meaning and to prevent it from becoming devoid of effect. The construction which would lead to an anomalous result should not be accepted. But, however, it is the duty of the Court to give coherence to the statutory provisions set within the bounds imposed by a fair reading of a legislation.

43. Maxwell in Interpretation of Statutes 12th edition pp. 105-106 has stated as under:

> *"If the language (of a statute) is capable of more than one interpretation, we ought to discard the more natural meaning, if it leads to an unreasonable result and adopt that*

interpretation which leads to a reasonably practical result."

44. Supreme Court in the case of *SACHIDA NAND SINGH & ANOTHER V. STATE OF BIHAR* AND ANOTHER reported in *(1998) 2 SCC 493* held as under:

It is a settled proposition that if the language of a legislation is capable of more than one interpretation, the one which is capable of causing mischievous consequences should be averted. The natural meaning leading to mischievous consequences is to be avoided when an alternative construction is available.

45. Supreme Court in the case of *AJAY PRADHAN (DR.)* V. *STATE OF MADHYA PRADESH* reported in *AIR 1998 SC 1875* held as under:

If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense and give them full effect. The argument of inconvenience and hardship is a dangerous one and is only admissible in construction where the meaning of the statute is obscure and there are alternative methods of constructions. Where the language is explicit its consequences are for the Parliament, and not for the Courts to consider.

46. This Court is of the view that it is settled law that in the absence of specific provisions, the Act cannot be given retrospective application, thereby affecting or extinguishing rights that was vested. Nowhere in the Act, 1999/Act 2003, is there even the faintest glitter of any intention on the part of the Legislature to affect or extinguish existed or vested rights or for that matter to apply Act 1948 or Act 1999 or Act 2003 retrospectively. Such a conclusion is impermissible by implication and it would therefore necessarily follow that the applicability is not retrospective but prospective. Supreme Court in the case of CIT Vs ESSAR TELEHOLDINGS LTD. Reported in (2018)3 SCC 253, para.26 is extracted hereunder:

> 26. A two-Judge Bench, speaking through one of us, Dr A.K. Sikri, J. in *Jayam & Co.* v. *CVAT* [*Jayam & Co.* v. *CVAT*, (2016) 15 SCC 125] , again reiterated the broad legal principles while testing a retrospective statute in paras 14 and 18 which is to the following effect: (SCC pp. 137, 139 & 140)
>
> "*14.* With this, let us advert to the issue on retrospectivity. No doubt, when it comes to fiscal legislation, the legislature has power to make the provision retrospectively. In *R.C. Tobacco (P) Ltd.* v. *Union of India* [*R.C.*

Tobacco (P) Ltd. v. *Union of India*, (2005) 7 SCC 725] , this Court stated broad legal principles while testing a retrospective statute, in the following manner: (SCC pp. 737-38 & 740, paras 21-22 & 28)

'(*i*) A law cannot be held to be unreasonable merely because it operates retrospectively;

(ii) The unreasonability must lie in some other additional factors;

(iii) The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be unreasonable as to violate constitutional norms;

(iv) Where taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of tax or that is confiscatory, courts will be justified in striking down the impugned statute as unconstitutional;

(v) The other factors being period of retrospectivity and degree of unforeseen or unforeseeable financial burden imposed for the past period;

(vi) Length of time is not by itself decisive to affect retrospectivity.' (*Jayam & Co. case* [*Jayam & Co.* v. *CVAT*, 2013 SCC OnLine Mad 2051] , SCC OnLine Mad para 85)

18. The entire gamut of retrospective operation of fiscal statutes was revisited by this Court in a Constitution Bench judgment in *CIT* v. *Vatika Township (P)*

Ltd. [*CIT* v. *Vatika Township (P) Ltd.*, (2015) 1 SCC 1] in the following manner: (SCC p. 24, paras 33-35)

'*33*. A Constitution Bench of this Court in *Keshavlal Jethalal Shah* v. *Mohanlal Bhagwandas* [*Keshavlal Jethalal Shah* v. *Mohanlal Bhagwandas*, AIR 1968 SC 1336], while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows: (AIR p. 1339, para 8)

"*8*. ... The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from Section 115 of the Code of Civil Procedure, and the legislature has by the amending Act not attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act."

34. It would also be pertinent to mention that assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. (See *CED* v. *M.A. Merchant* [*CED* v. *M.A. Merchant*, 1989 Supp (1) SCC 499 : 1989 SCC (Tax) 404] .)

35. We would also like to reproduce hereunder the following observations made by this Court in *Govind Das* v. *CIT* [*Govind Das* v. *CIT*, (1976) 1 SCC 906 : 1976 SCC (Tax) 133] , while holding Section 171(6) of the Income Tax Act to be prospective and inapplicable for any assessment year prior to 1-4-1962, the date on which the Income Tax Act came into force: (SCC p. 914, para 11)

"*11*. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the *Laws of England* (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that

'all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. [Ed.: The matter between two asterisks has been emphasised in *Vatika Township case*, (2015) 1 SCC 1.] *If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only*' [Ed.: The matter between two asterisks has been emphasised in *Vatika Township case*, (2015) 1 SCC 1.] .

47. The validity of arbitration proceedings under UNICITRAL is vested only before the Court exercising judicial review, whereas the commission may decide upon the dispute involving dispute read with interpretation of a regulation, for which an appeal lies under Section 111 of Act 2003 and it would be maintainable, no appeal lie before the Tribunal in respect of an issue relating to validity of jurisdiction of arbitration under UNCITRAL. The Supreme Court had an occasion to examine identical issue in the HIMACHAL PRADESH STATE ELECTRICITY REGULATORY COMMISSION AND ANOTHER Vs HIMACHAL PRADESH STATE ELECTRICAL BOARD reported in (2014) 5 SCC 219 paras.6, 7, 10.1, 10.2, 11, 25 to 28 is extracted hereunder:-

> 6. During the pendency of the appeal, the 1998 Act was repealed and the Electricity Act, 2003 (for short "the 2003 Act") came into force. The 2003 Act was brought in to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting

interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

7. At this juncture, it is apt to state that when the batch of appeals was taken up for hearing by the learned Single Judge, the learned counsel for the respondent Commission raised a preliminary objection about the maintainability of the appeals. It was contended that as under Section 110 of the 2003 Act the Appellate Tribunal has already been established and an appeal would lie to the Appellate Tribunal as contemplated under Section 111 of the said Act, the High Court had lost its jurisdiction to hear the appeals. The learned Single Judge took note of the fact that the appeals were preferred under Section 27 of the 1998 Act and at that stage an appeal was maintainable before the High Court. The High Court referred to the repealed Act and the language employed under Section 185 of the 2003 Act and Section 6 of the General Clauses Act, 1897 and analysing the gamut of the provisions came to hold that the appeal preferred under the 1998 Act could be heard by the High Court even after coming into force of the 2003 Act.

10.1. The conclusion arrived at by the High Court that the appeal can be heard despite repeal of the 1998 Act and introduction of the 2003 Act on the basis of Section 6 of the General Clauses Act, 1897 and the provision

contained in Section 185(5) of the 2003 Act cannot be found fault with, for there is no express provision to take away the vested right of appeal and no contrary intention can be gathered from any of the provisions of the new enactment.

10.2. The right of appeal before the High Court was a vested right and the same has not been taken away by the 2003 Act and, therefore, the opinion expressed by the High Court being impregnable deserves to be concurred with by this Court. The right of forum as regards an appeal is also a vested right unless abolished or altered by subsequent law and in the case at hand the 2003 Act does not extinguish the said vested right and hence, the judgment and order passed by the High Court are impeccable.

11. First, we shall proceed to deal with the jurisdiction of the High Court to hear the appeal after coming into force of the 2003 Act. The Board, as is manifest, was grieved by the order imposing penalty. The relevant part of the order of the Commission reads as follows:

"The instant matter is one of the first incidents of the contravention of the Commission's orders/directions attributable to the conduct of respondents/objectors. The Commission has determined the quantum of fine to be imposed after considering the nature and extent of non-compliance and other relevant factors as per Regulation 51(*iii*) of HPERC's Conduct of Business Regulations, 2001 under the overall provision of Section 45 of the ERC Act, 1998. Penalty of Rs 5000 only is hereby imposed upon Respondent 7 H.P. SEB. The penalty be deposited with the Secretary of the

Commission within a period of 30 days from today. Additional penalty for continuing failure @ Rs 300 only per day is further imposed on H.P. SEB and shall be ipso facto recoverable immediately after 15-1-2002 until the date of compliance to the Commission's satisfaction to be so notified by the Commission. The Board shall submit the status/action-taken reports on the fifteenth day of every month until compliance is made."

25. At this stage, we may state with profit that it is a well-settled proposition of law that enactments dealing with substantive rights are primarily prospective unless they are expressly or by necessary intention or implication given retrospectivity. The aforesaid principle has full play when vested rights are affected. In the absence of any unequivocal expose, the piece of legislation must exposit adequate intendment of legislature to make the provision retrospective. As has been stated in various authorities referred to hereinabove, a right of appeal as well as forum is a vested right unless the said right is taken away by the legislature by an express provision in the statute by necessary intention.

26. Mr Gupta has endeavoured hard to highlight on Section 111 of the 2003 Act to sustain the stand that there is an intention for change of forum. It is the admitted position that legislature by expressed stipulation in the new legislation has not provided for transfer of the pending cases as was done by Parliament in respect of service matters and suits by financial institutions/banks by enactment of the Administrative Tribunals Act, 1985 and the

Recovery of Debts Due to Banks and Financial Institutions Act, 1993. No doubt right to appeal can be divested but this requires either a direct legislative mandate or sufficient proof or reason to show and hold that the said right to appeal stands withdrawn and the pending proceedings stand transferred to different or new appellate forum. Creation of a different or a new appellate forum by itself is not sufficient to accept the argument/contention of an implied transfer. Something more substantial or affirmative is required which is not perceptible from the scheme of the 2003 Act.

27. It is urged by Mr Gupta that Section 6 of the General Clauses Act would not save the vested right of forum in view of the language employed in Section 185(2) of the 2003 Act. In this context, we may usefully refer to *Ambalal Sarabhai Enterprises Ltd.* v. *Amrit Lal & Co.* [(2001) 8 SCC 397] wherein the learned Judges referred to the opinion expressed in *Kolhapur Canesugar Works Ltd.* v. *Union of India* [(2000) 2 SCC 536] and distinguishing the same observed as follows: (*Ambalal Sarabhai Enterprises Ltd. case* [(2001) 8 SCC 397] , SCC p. 407, paras 18-19)

"*18.* In *Kolhapur Canesugar Works Ltd.* v. *Union of India* [(2000) 2 SCC 536] , this Court held: (SCC p. 551, para 37)

'*37.* The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute-book as completely as if it had never been passed, and the statute must be considered as a law that never existed.'

19. Relying on this the submission for the tenant is, if the repealing statute deletes the provisions, it would mean they never existed hence pending proceedings under the Rent Act cannot continue. This submission has no merit. This is not a case under the Rent Act, also not a case where Section 6 of the General Clauses Act is applicable. This is a case where repeal of rules under the Central Excise Rules was under consideration. This would have no bearing on the question we are considering, whether a tenant has any vested right or not under a Rent Act."

28. We have referred to the aforesaid paragraphs as Mr Gupta has contended that when there is repeal of an enactment and substitution of new law, ordinarily the vested right of a forum has to perish. On reading of Section 185 of the 2003 Act in entirety, it is difficult to accept the submission that even if Section 6 of the General Clauses Act would apply, then also the same does not save the forum of appeal. We do not perceive any contrary intention that Section 6 of the General Clauses Act would not be applicable. It is also to be kept in mind that the distinction between what is and what is not a right by the provisions of Section 6 of the General Clauses Act is often one of great fitness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere hope, or expectation of, or liberty to apply for, acquiring right (see *M.S. Shivananda* v. *Karnataka SRTC* [(1980) 1 SCC 149 : 1980 SCC (L&S) 131]).

48. Learned counsel for respondent No.2 further contended that effect of Section 185 of Act 2003 – Repeal

and Saving would Save the Act 1998 which has come into effect on 02.07.1998. Even in the absence of any clauses under PPA 1999, Act 1948 read with Act, 2003 will prevail. In terms of Article 14.1 read with 7.1 of PPA 1999 and Revised and Restated PPA 2007. For the purpose of examining "Generating Company" and "Generating Station", the definitions under Section 4- A(5) relates to 'Generating Company' and 'Generating Station' under Act 1948 holds good. Therefore, petitioner's contention that definition relating to 'generating company' and 'licensee' under Act 2003 even though apply for definition under Act 1948 holds the field. In support of the aforesaid contention, learned counsel for respondent No.2 relied on the following decisions:

(1) ASHAPURA MINE-CHEM LIMITED VS. GUJARAT MINERAL DEVELOPMENT CORPORATION reported in (2015) 8 SCC 193, relevant paras.17, 25 and 29 is extracted hereunder:

> 17. Having heard the submissions of the respective counsel, we find that the sum and substance of the submission of Mr. Dushyant Dave was that the arbitration Clause contained in Clause 27 of the MoU

was an independent arbitration agreement and, therefore, even if respondent chose to terminate the MoU dated 17.8.2007, the Arbitration agreement would continue to remain and consequently the parties are entitled to invoke the said Clause 27 and exercise their option for appointment of an Arbitrator and seek for concurrence of the other party. The learned senior counsel contended that since the respondent expressed its decision to terminate the MoU, the appellant after exhausting its attempt for an amicable settlement at bilateral level as between the appellant and the respondent by invoking Clause 26 had no other option but to invoke Clause 27 and opt for the appointment of a retired Judge Hon'ble Mr. Justice B.N. Mehta as an Arbitrator and sought for the concurrence of the respondent. The learned Senior Counsel submitted that when the respondent refused to concur with the appointment of the said learned Judge as an arbitrator, the appellant was well justified in approaching the High Court under Section 11 for the appointment of an Arbitrator. The learned senior counsel, therefore, contended that the rejection of the said application filed under Section 11 of the Act by the impugned order is liable to be set aside and an Arbitrator has to be appointed.

25. We are not inclined to entertain the said submission, as we find that we are not concerned with the said issue as to whether what was held in paragraph 13 of Today Homes and Infrastructure Pvt. Ltd. (supra) judgment was correct or not when it makes reference to the Seven Judge Bench decision in Patel Engineering Ltd.(supra). We are only concerned with the question whether an Arbitration Clause contained in the MoU is a

stand alone agreement or not. For that purpose, what has been stated in Today Homes and Infrastructure Pvt. Ltd. (supra) in paragraph 14 is only relevant and we find the legal position stated therein in tune with the ratio decidendi laid down consistently by this Court in very many decisions.

29. Having thus ascertained the legal position regarding the stand alone agreement relating to arbitration with particular reference to arbitration agreement in a legal transaction between the parties, when we refer to Clause 27 of the MoU, we wish to find out whether the said Clause satisfies the principles set down and applicable to a stand-alone arbitration agreement. When we refer to Clause 27, we find that in the event of failure of an amicable settlement at the bilateral level relating to a dispute or difference arising between the appellant and the respondent to be reached as contained in Clause 26 of the MoU, then such unresolved dispute or difference concerning or arising from the MoU, its implementation breach or termination whatsoever including any difference or dispute as to the interpretation of any of the terms of the MoU is referable to the sole arbitrator appointed by the appellant and the respondent. Therefore, irrespective of the question or as to the fact whether the MoU fructified into a full-fledged agreement, having regard to the non-fulfilment of any of the conditions or failure of compliance of any requirement by either of the parties stipulated in the other clauses of MoU, specific agreement has been entered into by the appellant and the respondent under Clause 27 to refer such controversies as between the parties to the sole arbitrator

by consensus. Therefore, when consensus was not reached at between the parties for making the reference, eventually it will be open for either of the parties to invoke Section 11 of the Act and seek for reference of the dispute for arbitration.

(2) Writ Petition Nos.30351-52/15

(3) ENERCON (INDIA) LIMITED AND OTHERS

VS. ENERCON GMBH AND ANOTHER

reported in (2014) 5 SCC 1 (pars.146 to

152) (Issue VII)

Issue (vii) Re: Anti-suit injunction

146. Having held that the courts in England would have concurrent jurisdiction, the Bombay High Court on the basis thereof concludes as follows: (*Enercon GmbH case* [*Enercon (India) Ltd.* v. *Enercon GmbH*, (2012) 6 Bom LR 3414] , Bom LR p. 3477, para 53)

"*53*. ... In view of the conclusion that this Court has reached, namely, that the English courts would have concurrent jurisdiction to act in support of arbitration, the case of the appellants for an anti-suit injunction does not stand to scrutiny. However, insofar as the aspect of forum non-conveniens is concerned, in my view, since the appellants have agreed to London as the *venue* for arbitration, they cannot be heard to complain that the courts at London are forum non-conveniens for them. The appellants have appeared before

the said courts, and therefore, the case of forum non-conveniens is bereft of any merit." (emphasis supplied)

147. The aforesaid conclusion again ignores the principle laid down by this Court in *Oil and Natural Gas Commission* v. *Western Co. of North America* [(1987) 1 SCC 496 : (1987) 1 SCR 1024] , wherein it is held as follows: (SCC pp. 506-07, para 12)

"*12*. ... while as per the contract, parties are governed by the Indian Arbitration Act and the Indian courts have the exclusive jurisdiction to affirm or set aside the award under the said Act, the [respondent] is seeking to violate the very arbitration clause on the basis of which the award has been obtained by seeking confirmation of the award in the New York court under the American law. Will it not amount to an improper use of the forum in America in violation of the stipulation to be governed by the Indian law, which by necessary implication means a stipulation to exclude the US court to seek an affirmation and to seek it only under the Indian Arbitration Act from an Indian court? If the restraint order is not granted, serious prejudice would be occasioned and a party violating the very arbitration clause on the basis of which the award has come into existence will have secured an order enforcing the order from a foreign court in violation of that very clause."

148. Again in *Modi Entertainment Network* [*Modi Entertainment Network* v. *W.S.G. Cricket Pte. Ltd.*, (2003) 4 SCC 341] , it was held that: (SCC p. 360, para 24)

"*24.* (*1*) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:

(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;

(b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity—respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained—must be borne in mind."

In para 24(2) of the same decision, this Court further observed that: (*Modi Entertainment Network case* [*Modi Entertainment Network* v. *W.S.G. Cricket Pte. Ltd.*, (2003) 4 SCC 341] , SCC p. 360)

"*24. (2)* In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens."

149. Examining these aspects, Eder, J. in fact also came to the conclusion that the anti-suit injunction granted by the English court needed at least to be stayed during the pendency of proceedings in India. The reasons given by Eder, J. in support of the conclusions are as under:

"*48*. Bearing these general principles in mind and recognising the permissive nature of CPR Part 62.5, the important point, in my view, is that the claimants did not pursue their applications in the original proceedings that they issued in this Court in March 2008. On the contrary, they engaged fully (albeit perhaps reluctantly) in the Indian proceedings before the Daman Court. When they lost at first instance before Judge Shinde, they appealed to the DCC with the result indicated above. That is the choice they made. Having made that choice and now some years down the line, it seems to me that the English court should at least be extremely cautious to intervene at this stage and, in Mr Edey QC's words, to 'wrest' back the proceedings to England. To do so at this stage when those proceedings are, in effect, still pending would give rise to the 'recipe for confusion and injustice' which Lord Diplock specifically warned against in *Abidin Daver* [1984 AC 398 : (1984) 2 WLR 196 : (1984) 1 All ER 470 (HL)] as referred to in the passage of the judgment of Hobhouse, J. which I have quoted above. For that reason alone, I have decided somewhat reluctantly that I should follow the course suggested by Mr Edey QC i.e. that these proceedings should be stayed at least for the time being pending resolution of the writ petitions currently before the BHC...."

150. It must be noticed that Respondent 1 was initially having 51% shareholding of Appellant 1 Company, which was subsequently increased to 56%. This would be an indicator that Respondent 1 is actively carrying on business at Daman. This Court considered the expression "carries on business" as it occurs in Section 20 of the

Civil Procedure Code in *Dhodha House* v. *S.K. Maingi* [(2006) 9 SCC 41] and observed as follows: (SCC p. 54, para 46)

"*46*. The expression 'carries on business' and the expression 'personally works for gain' connote two different meanings. For the purpose of carrying on business only presence of a man at a place is not necessary. Such business may be carried on at a place through an agent or a manager or through a servant. The owner may not even visit that place. The phrase 'carries on business' at a certain place would, therefore, mean having an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control thereover. The expression is much wider than what the expression in normal parlance connotes, because of the ambit of a civil action within the meaning of Section 9 of the Code."

151. The fact that the Daman Trial Court has jurisdiction over the matter is supported by the judgment of this Court in *Harshad Chiman Lal Modi* [(2005) 7 SCC 791] , which was relied upon by Mr Nariman. The following excerpt makes it very clear: (SCC pp. 800-01, para 16)

"*16*. ... The proviso to Section 16, no doubt, states that though the court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in rem still it can entertain a suit where relief sought can be obtained through the personal obedience of the defendant. ... The principle on which the maxim was based was that the courts could grant relief in suits respecting immovable property situate abroad by enforcing their

judgments by process in personam i.e. by arrest of the defendant or by attachment of his property."

152. This apart, we have earlier noticed that the main contract, the IPLA is to be performed in India. The governing law of the contract is the law of India. Neither party is English. One party is Indian, the other is German. The enforcement of the award will be in India. Any interim measures which are to be sought against the assets of Appellant 1 ought to be in India as the assets are situated in India. We have also earlier noticed that Respondent 1 has not only participated in the proceedings in the Daman courts and the Bombay High Court, but also filed independent proceedings under the Companies Act at Madras and Delhi. All these factors would indicate that Respondent 1 does not even consider the Indian courts as *forum non conveniens*. In view of the above, we are of the considered opinion that the objection raised by the appellants to the continuance of the parallel proceedings in England is not wholly without justification. The only single factor which prompted Respondent 1 to pursue the action in England was that the *venue* of the arbitration has been fixed in London. The considerations for designating a convenient *venue* for arbitration cannot be understood as conferring *concurrent jurisdiction* on the English courts over the arbitration proceedings or disputes in general. Keeping in view the aforesaid, we are inclined to restore the anti-suit injunction granted by the Daman Trial Court.

49. Learned counsel for the petitioner in reply submitted that in the absence of Saving Clause under Act 2003, the contention of the learned counsel for the respondent that definitions under the Act, 1948 cannot be taken into consideration. Reading of Section 185 of Act 2003 relates to 'Repeal and Savings'. What has been saved is only Karnataka Electricity Reforms Act, 1999 under Schedule (III) of Section 185 of the Act 2003. Thus the aforesaid contention of 2nd Respondent is not tenable.

50. The contention of the learned counsel for the respondent that Commission has plenary power vested with the commission is not supported by any law. In the absence of any statutory provision under Act 2003, respondents contention that Commission has plenary power read with the jurisdiction of the Commission to examine, "Whether arbitration proceedings under UNCITRAL is without any source of power". Commission has framed issue as is evident from the issue, it is between the petitioner and 1st respondent. 1st

respondent is Government and not licensee and there is no dispute between the petitioner and the Government. On the other hand, dispute is between the petitioner and respondent No.2 – KPTCL. Therefore, framing of issue by Commission itself is without and authority of law application of mind.

51. Article 23 of UNCITRAL Rules is parametria of Section 16(1) – Competence of Arbitral Tribunal to rule on its jurisdiction of Arbitration Act, 1996. Both the statement of objections and reasons. That apart, under Section 39 of Act 1999 specially provides for arbitration by the Commission.

52. Learned counsel for the respondent contended that the Commission's decision is an anti- suit. Such anti-suit could be exercised only by High Courts and not by Commission and Commission has not been empowered under any provision of law. Petition before the Commission under Section 86(1)(f) itself is not maintainable by the 1st respondent since there is no

dispute between 1st respondent and the petitioner. The ingredients under Section 86(1)(f) are not forth coming so as to entertain the petition of the 1st respondent before the Commission.

53. Respondent relied on the decision of GRAPHITE supra to oust the writ petition on the score that petitioner has an alternative remedy. GRAPHITE decision is *Per incurium* in view of MAHARASHTRA CHESS ASSOCIATION vs UNION OF INDIA (UOI) AND ORS. Decided in Civil Appeal No.5654 of 2019, Dtd: 29.07.2019 (Paras.12, 18 and 21).

> 12. The role of the High Court under the Constitution is crucial to ensuring the rule of law throughout its territorial jurisdiction. In order to achieve these transcendental goals, the powers of the High Court under its writ jurisdiction are necessarily broad. They are conferred in aid of justice. This Court has repeatedly held that no limitation can be placed on the powers of the High Court in exercise of its writ jurisdiction. In A V Venkateswaran, Collector of Customs, Bombay v Ramchand Sobhraj Wadhwani8 a Constitution Bench of this Court held that

the nature of power exercised by the High Court under its writ jurisdiction is inherently dependent on the threat to the rule of law arising in the case before it:

"10...We need only add that the broad lines of the general principles on which the court should act having been clearly 6 James Bagg's Case (1572) 77 ER 1271 7 (2008) 2
SCC 41 8 (1962) 1 SCR 753 laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible Rules which should be applied with rigidity in every case which comes up before the court."

The powers of the High Court in exercise of its writ jurisdiction cannot be circumscribed by strict legal principles so as to hobble the High Court in fulfilling its mandate to uphold the rule of law.

18. This argument of the second Respondent is misconceived. The existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case.

> 21. The mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors. Thus, the mere fact that the High Court at Madras is capable of granting adequate relief to the Appellant does not create a legal bar on the Bombay High Court exercising its writ jurisdiction in the present matter.

54. On factual aspects of the present matter, GRAPHITE decision is distinguishable for the reason that in the present case, the commission's jurisdiction to entertain petition on behalf of the 1st respondent is the subject matter which will go to the root of the matter.

55. Section 185 – Repeal of Act 2003 – what has been saved is State Act 1999 and not Central Act 1948. Under Act 1999, there is no definition of 'Generating Company'. Further Part XI Section 39 relates to arbitration.

56. Supreme Court had an occasion to examine identical provision of Section 86(1)(f) to that of Section

94 of Act 2003 read with Article 338 of the Constitution. The decision of the Supreme Court is reported in 2010(4) SCC 368 (supra). Therefore, commission has no jurisdiction to examine whether arbitration proceedings under UNCITRAL is permissible or not. Consequently, commission cannot go beyond Sub-section (i)(a to g) of Section 94 and Section 86(1)(f) of Act 2003.

57. Learned counsel for the petitioner submitted that when a statute prescribes a particular manner for doing a particular act, that act must be done in the manner alone. In this regard, he has cited the decision of the Supreme Court in KUNVERPAL SINGH Vs STATE OF UTTAR PRADESH AND OTHERS reported in (2007) 5 SCC 85 the relevant para 16 reads as under:-

> 16. Section 6(2), on a plain reading, deals with the various modes of publication and they are: (*a*) publication in the Official Gazette, (*b*) publication in two daily newspapers circulating in the locality in which the land is situate of which at least one shall be in the regional language, and (*c*) causing public notice of the substance of such declaration to be given at convenient places in the said locality. There is no option left with anyone to give up or waive any mode

> and all such modes have to be strictly resorted to. The principle is well settled that where any statutory provision provides a particular manner for doing a particular act, then, that thing or act must be done in accordance with the manner prescribed therefor in the Act.

Perusal of records and legal provisions viz., Section 86(1)(f) of Act 2003, KERC has not adhered to the ingredients and the above cited decision aptly applies to the case on hand.

58. Learned counsel for respondent No.2 raised a preliminary issue that Writ Petition is not maintainable against KERC decision dated 17/12/2018, since petitioner has a statutory remedy under Section 111 of Act 2003. On this issue, learned counsel for the petitioner submitted that when the KERC has lack of jurisdiction to interfere with the PCA proceeding. And that 1st respondent – Government has filed a petition No.91/18 before KERC. In terms of Section 86(1)(f) of Act 2003, ingredients of 'Generating Company' and 'Licensee' , either of the party can invoke Section 86(1)(f) of Act 2003 whereas the Government – 1st respondent is

neither 'Generating Company' or 'licensee' so also the petitioner is yet to enter into the definition of 'Generating Company'. Therefore question of importing definition from Act, 1948 do not arise. Consequently, KERC entertaining Petition No.91/18 is without authority of law and lack of jurisdiction. In such circumstances, Courts have time and again held that under Article 226 , writ is maintainable. Even though remedy of appeal is available against an order.

59. Learned counsel for the petitioner distinguished the GRAPHITE decision supra cited by the 2nd respondent contending that decision is *per incurium* in view of HARBANSLALSAHNIA AND ANR. VS. INDIAN OIL CORPN. LTD., AND OTHERS case supra (para.7) wherein Supreme Court has laid down principles, atleast 3 contingencies attracted to entertain Writ petition. One of the condition is that, "Whether orders or proceedings are wholly without jurisdiction or the vires of Act and is challenged?" This is with reference to WHIRLPOOL CORPORATION case supra. It was

further contended that KERC has no jurisdiction to decide the validity of PCA proceedings. On this issue, learned counsel for the petitioner cited decision in STATE BANK OF PATIALA (para.17) supra wherein Section 63 of the Persons with Disabilities (Equal opportunities, protection of rights and full participation) Act, 1995 which provides that Chief Commissioner and the Commissioners shall, for the purpose of discharging their functions under the aforesaid Act have powers as are vested in a Court under the Code of Civil Procedure, 1908 while trying a suit. Section 63 of Act 1995 is extracted hereunder:

> Section 63:- Authorities and officers to have certain powers of civil court- xxxx
>
> a. summoning and enforcing the attendance of witnesses;
> b. requiring the discovery and production of any document;
> c. requisitioning any public record or copy thereof from any court or office;
> d. receiving evidence on affidavits; and
> e. issuing commissions for the examination of witnesses or documents.

Similarly, provision under Act 2003, Section 94 – Powers of Appropriate Commission reads as under:

Section 94. (Powers of Appropriate Commission): --- (1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) discovery and production of any document or other material object producible as evidence;

(c) receiving evidence on affidavits;

(d) requisitioning of any public record;

(e) issuing commission for the examination of witnesses;

(f) reviewing its decisions, directions and orders;

(g) any other matter which may be prescribed.

(2) The Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate.

(3) The Appropriate Commission may authorise any person, as it deems fit, to represent the interest of the consumers in the proceedings before it.

Hence KERC is not empowered to interfere with PCA Proceedings. Supreme Court in paras.17 and 18 of the STATE BANK OF PATIALA supra held that order of the Chief Commissioner not to implement the order of retirement was illegal and without jurisdiction. In the present case also, KERC has no jurisdiction to interfere with the proceedings of PCA.

60. Respondent No.2 contended that KERC has ample power under the Act 2003 read with Repeal and Saving Clause under Section 185. The cited decision on behalf of the petitioner has no application having regard to the language employed under Section 86(1)(f) of Act, 2003 read with Section 63 of Act, 1995 and decision in STATE BANK OF PATIALA cited supra aptly applies to the present case. KERC's decision dated. 17.12.2018 in O.P.91/18 is liable to be set-aside.

61. Jurisdiction of Courts- Challenge to void decree in execution or collateral proceedings. – In Balvant N. Viswamitra V. Yadav Sadashiv Mule (Dead)

through L.Rs., reported in (2004)8 SCC 706, wherein the Supreme Court has opined that a void decree can be challenged even in execution or a collateral proceeding holding and it is held as under:

> "The main question which arises for our consideration is whether the decree passed by the trial Court can be said to be "null" and "void". In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in accordance with law cannot be overlooked or ignored. Where a Court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such Court would be without jurisdiction, non est and void ab initio. A defect of jurisdiction of the Court goes to the root of the matter and strikes at the very authority of the Court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a Court or an authority having no jurisdiction is a nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings."

62. Judgment delivered by a Court "not competent" to deliver it is void – Distinction between total want of jurisdiction and erroneous exercise of jurisdiction . – It is a fundamental principle well

established that a decree passed by a Court without jurisdiction is a nullity, and that invalidity could be set up whenever and by whoever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties.

63. The words "not competent' in Section 44 of Evidence Act refer to a Court acting without jurisdiction. The section refers to the lack of inherent jurisdiction in the Court and not to its territorial jurisdiction. In Article 46 of Sir James Stephen's Digest of the Law of Evidence, the corresponding rule of English law is stated to be that whenever a judgment is offered as evidence, the party against whom it is so offered may prove that the Court which gave it had no jurisdiction. The "competency" of a Court and its "jurisdiction" are thus synonymous terms. A judgment or decree passed

without jurisdiction is a nullity; and when a decree is void and a nullity, it is the duty not only of the Court which passed it to ignore it but of every Court to which it is presented. There must, however, be a manifest lack of jurisdiction in the Court to render its decree or judgment void.

64. Jurisdiction may be defined to be power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. Such jurisdiction naturally divides itself under three broad heads, namely, with reference to:

(i) the subject- matter

(ii) the parties, and

(iii) the particular question which calls for decision.

65. Question of jurisdiction may consequently arise in one of three ways, that is, either in relation to the subject-matter, or in relation to the parties, or in relation to the question submitted for the decision of the Court. This classification into territorial jurisdiction,

pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction, for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction.

66. The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction, and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. The distinction between cases where jurisdiction is assumed by a Court where there is a absolute want of it and those where the Court in the exercise of its jurisdiction acts wrongly is of fundamental importance. In the former case the decision is void and a nullity, whereas in the latter case it is merely voidable, and has due effect, unless set aside by appropriate proceedings. It cannot be said that wherever a decision is wrong in

law or violates a rule of procedure, the Court must be held incompetent to deliver it. It has never been and could not be held that a Court which erroneously decreed a suit which it should have dismissed as time barred or as barred by the rule of *res judicata* acts without jurisdiction and is not competent to deliver its decree. Even the concept of pending proceedings is taken into consideration under act, 1999 or Act, 2003 do not provide for transfer of pending proceedings like arbitration proceedings which was pending till 5.8.2004 like a provision in the Administration Tribunal Act, 1985, where Government employees litigations were pending before High Court were transferred to respective Administrative Tribunals as and when Tribunal was constituted.

67. Learned counsel for respondent NO.2 vehemently contended that PPA 1999, Revised and Restated PPA 2007, Act 1948, Act 1999, Act 2003 combined reading of various provisions like definition, “Generating Company”, “Licensee”, “Repeal and Saving”

clauses would result in power is vested with the KERC under Section 86(1)(f) to entertain 1st respondent's O.P.91/18 against PCA Proceedings on the other hand, learned counsel for the petitioner submitted that under 'Repeal and Savings' of the Act 1998 and 2003, it is to be noted nothing has been saved under Act 1998 and what has been saved under the Act 2003 is only Schedule No. V relates to the Karnataka Electricity Reforms Act, 1999. As on 22.04.1999 – the date on which PPA 1999 was entered into between the petitioner and the respondent, neither Act 1999 nor Act 2003 was in vogue. Petitioner and respondents were already before the Arbitrator at the behest of the petitioner claiming loss and damages from the respondents. On 05.08.2004, on a joint application consent award was passed while reserving liberty to either of the party to invoke arbitration clause. Thus, petitioner or respondents if there is any dispute, remedy is only arbitration. Rightly, petitioner has invoked PCA jurisdiction in terms of UNCITRAL Rules. 1st respondent – Government is not a 'licensee' so as to entertain

O.P.91/18 by KERC. Moreover, Act 1999 or Act 2003 has no retrospectivity so as invoke any provision nor resolve the dispute among the petitioner and respondent in terms of PPA 1999 read with Revised and Restated PPA 2007. Even it was pointed out that Part XI of Section 39 – dispute could be entertained with reference to "Licensee" only. It was further contended that KERC has framed an issue. As is evident from the issue as if dispute is between the petitioner and the Government – 1st respondent. In other words, issue has not been framed in respect of dispute relating to petitioner and respondent No.2 – KPTCL. Thus, there is a total non- application of mind in deciding O.P.91/18 by KERC. It was also contended that 1st respondent cannot maintain O.P.91/18 before KERC, since 1st respondent – Government do not fit into the "Generating Company" nor "Licensee" and further, seeking for declaration against PCA is without authority of law. Petitioner has made out prima facie case that the order of the KERC in O.P.91/18 is without authority of law.

68. Respondents 1 and 2 have not appraised this Court as to which is the relevant statutory provision by which KERC can entertain O.P.91/18 of 1st respondent. Further, source of power has not been pointed out to interfere with the PCA proceedings which were initiated at the behest of the petitioner under UNCITRAL against the respondents. Thus, respondents have not made out a case that KERC has powers to interfere with the PCA proceedings so also to pass declaratory orders.

69. Learned counsel for respondent No.2 contended that consent award dated 05.08.2004, no-doubt parties have resolved to settle their score, in the event of any dispute, liberty has been reserved to either of the party to invoke arbitration. In view of later development of law like Act 1999 and Act 2003 read with the provisions of definitions and Saving Clauses would change the jurisdiction to resolve any dispute between the petitioner and respondents only under Act 2003. Even though, consent award has attained finality among

the parties, in view of changed circumstances that certain laws have been introduced, consequently, its effect is to invoke later laws. Thus, 1st respondent has rightly invoked Section 86(1)(f) of Act 2003. Learned counsel for the petitioner submitted that consent award is binding among the parties and it has attained finality. Therefore, no question of invoking Act 2003 or Saving Clauses so as to invoke any definitions under Act 1948 or Act 1998 or State Act of 1999. On this issue counsel for the petitioner cited the following decision:

(a) A.AYYASAMY AND A.PARAMASIVAM AND OTHERS

IN (2016) 10 SCC 386, para.12.2 reads as under:-

> 12.2. When arbitration proceedings are triggered by one of the parties because of the existence of an arbitration agreement between them, Section 5 of the Act, by a non obstante clause, provides a clear message that there should not be any judicial intervention at that stage scuttling the arbitration proceedings. Even if the other party has objection to initiation of such arbitration proceedings on the ground that there is no arbitration agreement or validity of the arbitration clause or the competence of the Arbitral Tribunal is challenged, Section 16, in clear terms, stipulates that such objections are to be raised before the Arbitral

> Tribunal itself which is to decide, in the first instance, whether there is any substance in questioning the validity of the arbitration proceedings on any of the aforesaid grounds. It follows that the party is not allowed to rush to the court for an adjudication. Even after the Arbitral Tribunal rules on its jurisdiction and decides that arbitration clause is valid or the Arbitral Tribunal is legally constituted, the aggrieved party has to wait till the final award is pronounced and only at that stage the aggrieved party is allowed to raise such objection before the court in proceedings under Section 34 of the Act while challenging the arbitral award.

In view of the aforesaid Supreme Court decision, respondent No.2 has not made out a case to appreciate the consent award dated 05.08.2004, could be ignored and application of Act 2003 is in order.

70. Undisputed facts are that Revised and Restated PPA dated 25.06.2007 has not been approved by the KERC as required under Act 2003. Section 39 of Act 1999 is attracted which is parametria of Article 14 of PPA 1999 read with Article 16.1 and Para.(IV) of Recitals of Article 7.2.

71. Learned counsel for respondent No.2 submitted that 'wavier' issue urged on behalf of the petitioner has not been pleaded. Consequently, such plea cannot be entertained in view of the decision in TATA POWER (supra). The question of 'waiver' need not be appreciated in the present case, since KERC has no jurisdiction to entertain 1st respondent – Government petition for want of lack of jurisdiction so also 1st respondent – Government has no locus to file the petition under Section 86(1)(f), the locus to file petition is available only to a "Generating Company" or "Licensee". Government is neither of them. Thus, matter would go to the root.

72. Learned counsel for second respondent tried to interpret Section 111 of Act 2003 with the words "Any order". Consequently, petitioner has remedy under Section 111. "Any Order" is required to be examined only if such order is passed with competency/jurisdiction to the concerned authority. In the absence of source of power to interfere with the PCA

proceedings and further Locus of the 1st respondent to file O.P.91/18, respondent No.2 contention that statutory appeal is provided under Section 111 of Act 2003 against "Any order" is not appreciable.

73. Respondent No.2 cited two decisions viz., GUJARAT URJA VIKAS NIGAM LIMITED and DR.INDRAMANI's case cited supra to contend that provision of Act 1948, Act 1999 and Act 2003 would spring into action in respect of any dispute arising out of PPA dated 22.04.1999 read with 25.06.2007. Article 14 of the PPA Rules and consent award dated 05.08.2004 which relates to arbitration clause cannot be ignored unless and until parties resolve or make necessary amendment to PPA 1999 and Revised and Restated PPA 2007. Therefore, the cited decisions has no application to the present case.

74. To overcome the definition of 'Generating Company' under Act 2003, learned counsel for

respondent No.2 relied on THE PRINTERS (MYSORE) LIMITED case (supra) has no assistance to the second respondent contention in view of the definition under the Act 2003, one cannot read beyond what has been defined under the Act 2003. Further, Court cannot re- read or add any words in respect of words in a statute. Moreover, KERC proceeded to hold that petitioner is a 'prospective Generating Company'. Therefore, KERC is of the view that petitioner has not entered into the shoe of 'Generating Company' as on the date of deciding O.P.91/18, since Revised and restored agreement of 2007 is admittedly not approved or confirmed under Act, 2003. Therefore, the aforesaid contention of respondent No.2 is not tenable.

75. Learned counsel for respondent No.2 in order to meet the contention of the jurisdiction of the KERC cited ALL INDIA POWER ENGINEER FEDERATION vs SASAN POWER LTD. (supra), VOLTAS LTD. Vs STATE OF AP (Supra) and RAJENDRA JHA vs PRESIDING OFFICER (supra) and also principle of harmonious

construction is to be invoked. When the Act 2003 do not vest power in KERC insofar as any interference of PCA proceedings and 1st respondent – Government has no locus to invoke Section 86(1)(f) of Act 2003, the aforesaid cited decisions has no assistance to respondent no.2's contention that KERC had jurisdiction and principle of harmonious construction is attracted.

76. During the course of argument, learned counsel for the petitioner contended that composition of the KERC is not in terms of the provisions of Act 2003 to the extent that neither Chairman nor Members were from judiciary. On this issue, learned counsel for respondent No.2 relied on STATE OF GUJARAT vs UTILITY USERS' WELFARE ASSOCIATION AND ORS. Supra. By a reading of para.114(v) it is crystal clear that appointments of Chairman and Members for State Commission or a Central Commission are saved, in view of the aforesaid decision, the contention of the petitioner that composition of KERC is not in accordance with law has no merit.

77. One of the issue in the present matter is 'whether KERC can interfere with the permanent arbitration proceedings pursuant to the petitioner's grievance pending before the PCA?' Reading of complete provisions Act, 2003 none of the provision empowers KERC to examine proceedings of PAC. Examination of PAC proceedings lies with the superior Courts while exercising power of judicial review the constitutional Courts alone are competent and it is their primary constitutional duty to exercise power of judicial review to pronounce upon the constitutionality Act, Rules and orders. Judicial review therefore is the basic feature upon which hinges the checks and balances blended with hind sight in the Constitution as a people's sovereign power for their protection and establishment of egalitarian social order under rule of law. The judicial review therefore is an integral part of the Constitution as its basic structure. The object of judicial review is to maintain constitutionalism and to uphold the constitutionality of the legislative Acts, administrative actions and quasi-legislative orders within the confines

of the Constitution. It is basically directed against the actions of the State or it its instrumentalities. Judicial review is not concerned with the decision but with the decision making process. In other words, judicial review is not an appeal from a decision but only a review of the manner in which the decision was made. When the order is *ex-facie* illegal and outside the ambit of the power, the power of judicial review of the Court under Article 226 of the Constitution is not taken away. The power of judicial review conferred on the high court is in a way wider in scope. The High Courts are authorized under Article 226 of the Constitution to issue directions, orders or writs to any person or authority including any government to enforce fundamental rights and for any other purpose.

78. Even assuming that petitioner has alternative remedy under Section 111 of the Act, still there is no where a petition which seeks interpretation of intricate question of law or an interpretation of provisions of Act

2003 and a petition which raises an issue of jurisdiction is directly maintainable before the Court.

79. Whether KERC has a jurisdiction to entertain respondent's petition in the absence of statutory power vested in it under Act 2003, in such circumstances, decision of the KERC can be examined under Article 226 of the Constitution, if the KERC decision is not within four corners of the statute. The appeal provision would be exclusively applicable only when it is found the decision has been render in proper and appropriate exercise of statutory power and jurisdiction, the availability of alternative remedy is not a bar or obstacle for the Court to exercise power under Article 226 of the Constitution. There are atleast two well recognized exceptions to the doctrine with regard to exhaustion of statutory remedies. In the first place, it is well settled where proceedings are taken before the Tribunal under the provision of law which is ultravires it is open to a

party aggrieved hereby to move the High Court under Article 226 for issuing appropriate writs.

80. In the second place, the doctrine has no application in a case where impugned order has been made in violation of principle of natural justice. If order is perverse without jurisdiction/without alternative would not be a bar in entertaining the writ petition. In the case of STATE OF *M.P. AND OTHERS Vs. SANJAY NAGAYACH AND OTHERS* reported in *(2013) 7 SCC 25* (paras 33 to 35 and 41) it is held that the alternative remedy of appeal would not be a bar in exercising the writ jurisdiction of High Court where the order passed by the statutory authority was arbitrary and in clear violation of statute.

> 33. In such circumstances, we direct the Joint Registrar, Cooperative Societies, Sagar to put the Board of Directors back in office so as to complete the period during which they were out of office.
>
> 34. The High Court, in our view, has therefore rightly exercised its jurisdiction under Article 226 of the Constitution and the alternative remedy of appeal is not a bar in exercising that jurisdiction, since the order passed by the Joint Registrar was arbitrary

and in clear violation of the second proviso to Section 53(1) of the Act.

35. We are of the view that this situation has been created by the Joint Registrar and there is sufficient evidence to conclude that he was acting under extraneous influence and under dictation. A legally elected Board of Directors cannot be put out of the office in this manner by an illegal order. If the charges levelled against the Board of Directors, in the instant case, were serious, then the Joint Registrar would not have taken two-and-half years to pass the order of supersession. The State of Madhya Pradesh did not show the grace to accept the judgment [*Sanjay Nagayach* v. *State of M.P.*, (2012) 112 AIC 575 (MP)] of the Division Bench of the High Court and has brought this litigation to this Court spending a huge amount of public money, a practice we strongly deprecate.

41. In such circumstances of the case, we are inclined to dismiss both the appeals with costs directing reinstatement of the first respondent Board of Directors back in office forthwith and be allowed to continue for the period they were put out of office by the impugned order which has been quashed. We also direct the State of Madhya Pradesh to pay an amount of Rs 1,00,000 to the Madhya Pradesh Legal Services Authority within a period of one month by way of costs and also impose costs of Rs 10,000 as against the Joint Registrar, Cooperative Societies, Sagar, the officer who passed the order, which will be deducted from his salary and be deposited in the Panna DCB within a period of two months from today. Ordered accordingly.

81. As regards the alternative remedy, it is not a bar for invoking writ jurisdiction as is clear from the following rulings:-

1. *WHIRLPOOL CORPN.* V. *REGISTRAR OF TRADE MARKS, MUMBAI AND OTHERS reported in* (1998) 8 SCC 1 paras 15, 19, 20 and 21 extracted hereunder:-

> 15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.
>
> *19.* Another Constitution Bench decision in *Calcutta Discount Co. Ltd.* v. *ITO,*

Companies Distt. I [AIR 1961 SC 372 : (1961) 41 ITR 191] laid down:

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against the Income Tax Officer acting without jurisdiction under Section 34, Income Tax Act."

20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

21. That being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show-cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the "Tribunal".

2. RAM AND SHYAM COMPANY VS. STATE OF HARYANA AND OTHERS reported in (1985) 3 SCC 267 para 9 extracted hereunder:-

> "9. Before we deal with the larger issue, let me put out of the way the contention that found favour with the High Court in rejecting the writ petition. The learned Single Judge as well as the Division Bench recalling the observations of this Court in *Assistant Collector of Central Excise*v. *Jainson Hosiery Industries* [(1979) 4 SCC 22 : 1979 SCC (Cri) 896] rejected the writ petition observing that "the petitioner who invokes the extraordinary jurisdiction of the court under Article 226 of the Constitution must have exhausted the normal statutory remedies available to him". We remain unimpressed. Ordinarily it is true that the court has imposed a restraint in its own wisdom on its exercise of jurisdiction under Article 226 where the party invoking the jurisdiction has an effective, adequate alternative remedy. More often, it has been expressly stated that the rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion rather than rule of law. At any rate it does not oust the jurisdiction of the Court. In fact in the very decision relied upon by the High Court in *State of U.P.* v. *Mohammad Nooh* [AIR 1958 SC 86 : 1958 SCR 595 : 1958 SCJ 242] it is observed "that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy". It should be made specifically clear that where the order complained against is alleged to be illegal or invalid as being contrary to law, a petition at the instance of person adversely

affected by it, would lie to the High Court under Article 226 and such a petition cannot be rejected on the ground that an appeal lies to the higher officer or the State Government. An appeal in all cases cannot be said to provide in all situations an alternative effective remedy keeping aside the nice distinction between jurisdiction and merits. Look at the fact situation in this case. Power was exercised formally by the authority set up under the Rules to grant contract but effectively and for all practical purposes by the Chief Minister of the State. To whom do you appeal in a State administration against the decision of the Chief Minister? The clitch of appeal from Caesar to Caesar's wife can only be bettered by appeal from one's own order to oneself. Therefore this is a case in which the High Court was not at all justified in throwing out the petition on the untenable ground that the appellant had an effective alternative remedy. The High Court did not pose to itself the question, who would grant relief when the impugned order is passed at the instance of the Chief Minister of the State. To whom did the High Court want the appeal to be filed over the decision of the Chief Minister. There was no answer and that by itself without anything more would be sufficient to set aside the judgment of the High Court".

3. UNION OF INDIA AND OTHERS VS. TANTIA CONSTRUCTION PRIVATE LIMITED reported in (2011) 5 SCC 697 paras 33 and 34 extracted hereunder:-

"33. Apart from the above, even on the question of maintainability of the writ

> petition on account of the arbitration clause included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.
>
> 34. We endorse the view of the High Court that notwithstanding the provisions relating to the arbitration clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the writ petition filed on behalf of the respondent Company. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the writ petition and also on its merits.

4. ABB INDIA LTD., VS. THE DEPUTY COMMISSIONER OF COMMERCIAL TAXES reported in W.A. NO. 957-966/2015 (T-RES) paras 2, 3, 6 and 7 extracted hereunder:-

> 2. The dispute in the present appeals relate to the Assessment year 2013-14 under the

Karnataka Value Added Tax Act, 2003 (for short 'KVAT Act'). The relevant facts of this case are that after the assessee-appellant had filed its objections to the show cause notice, a written notice dated: 10.02.2015 was issued by the respondent-Assessing Officer fixing 12.02.2015 as the date fixed for personal hearing of the appellant. On the said date, an adjournement was sought by the appellant, which was refused without assigning any reason for not granting the adjournment. On the same date, the hearing is said to have been concluded, without the appellant participating in the hearing and on the very next date i.e. 13.02.2015, Assessment/Re-assessment order was passed by the respondent-assessing authority imposing a tax liability, including interest and penalty, of over Rs.18 Crores. Challenging the order of the respondent assessing authority, the appellant-assessee filed a W.P. Nos.8701-8710/2015, which has been dismissed by the learned Single Judge but the appellant has been permitted to file an appeal against the order dated: 13.02.2015 before the first appellate authority, which was directed to be decided and disposed of within a period of four weeks from the date of filing of appeal. The writ Court has also directed that the appellant shall be permitted to deposit only 30% of the demand raised by the Assessment Order dated: 13.02.2015 and on deposit of such amount, the appeal shall be decided on merits and in accordance with law. While considering the question of alternate remedy, the learned Single Judge, after relying on the decision of the Apex Court in the case of Whirlpool Corporation- Vs- Registrar of Trade Marks, Mumbai and Ors. Reported in (1998) 8 SCC 1, has considered that the

availability of alternate remedy would not be a bar in case where there is violation of principles of natural justice but holding that by notice dated: 10.02.2015, opportunity of personal hearing was given by the assessing authority, the learned Single Judge held that the same was sufficient compliance of principles of natural justice. Aggrieved by the said judgment of the writ Court, this intra Court appeal has been filed.

3. Having heard Sri K.P.Kumar, Learned Senior Counsel along with Sri T.Suryanarayana, learned counsel appearing on behalf of the appellant as well as Sri.K.M.Shivayogiswamy, learned AGA appearing on behalf of the respondent at length, we are of the view that in the present cases, the appellant was not given sufficient opportunity of hearing and as such, there is a clear violation of principles of natural justice. We are, thus, also of the opinion that the writ petitions ought not to have been dismissed on the ground of availability of alternate remedy.

6. In fact, it has been noticed by the writ Court that the first appellate authority had decided the appeals of the appellant/assessee for the previous assessment years vide order dated: 19.02.2015 and set aside the demand raised by the Assessing Officer. After noticing the same, even though the writ Court observed that "In all fairness it could have awaited the decision of the appellate authority for some reasonable time", yet it refused to interfere with the order of the Assessing Officer. We agree with the finding recorded by the Writ Court that the Assessing Officer ought to have awaited the decision of the appellate

> authority for some reasonable time. We are also of the opinion that the Assessing Officer proceeded to decide the matter in an undue haste without affording the appellant adequate opportunity of hearing before passing the order dated: 13.02.2015, which would amount to violation of principles of natural justice. We are thus of the view that dismissal of the writ petitions on the ground of availability of alternative remedy was not justified.
>
> 7. As such, we set aside the order dated: 13.02.2015 passed by the Assessing Officer and allow the Writ petitions as well as these appeals. The matter is remitted back to the assessing officer for passing fresh orders in accordance with law, after giving adequate opportunity of hearing to the appellant.

In view of the principle laid down in the aforesaid decisions contention of 2nd Respondent that petitioner has not availed remedy of appeal under Section 111 of Act, 2003 has no substance. Validity of UNCITRAL Arbitration can be tested only before the Court exercising judicial review and while the Commission may decide upon a dispute involving the interpretation of a regulation, for which an appeal under Section 111 of Act, 2003 would be maintainable, no appeal lie before the

Tribunal on the validity of jurisdiction of Arbitration under UNCITRAL.

82. In that view of the matter following order is passed:-

ORDER

i) Writ Petition stands allowed.

ii) Karnataka Electricity Regulatory Commission has no jurisdiction to interfere, "Whether Permanent Court of Arbitration proceedings is in order or not" under Section 86(1)(f) of Act, 2003.

iii) Order dated: 17.12.2018 passed by the Karnataka Electricity Regulatory Commission in O.P. No. 91/2018 vide Annexure 'A' is set aside.

iv) Permanent Court of Arbitration Proceedings is in terms of Power Purchase Agreement dated 22.04.1999, consent award dated 05.08.2004 read with Restated and Revised Power Purchase

Agreement dated 25.06.2007, Act 1948, Act 1999 and Act 2003 would not be hurdle in respect of Permanent Court of Arbitration proceedings.

v) Rule is made absolute in the preceding terms. No costs.

vi) In view of the disposal of the main matter, I.A.2/2019 does not survive for consideration.

Sd/-
JUDGE

Brn/bs