**IN THE HIGH COURT OF ANDHRA PRADESH: AMARAVATI**

**HON'BLE Mr. JUSTICE PRASHANT KUMAR MISHRA, CHIEF JUSTICE**
**&**
**HON'BLE Mr. JUSTICE NINALA JAYASURYA**

**W.A.Nos.383, 384, 388, 392, 393, 394, 396, 401, 423, 424, 433, 435, 436, 440, 441, 443, 444, 445, 446, 447, 452, 463, 470 and 477 of 2019; 6, 70, 75, 105, 110, 114, 138, 143, 156, 168, 172, 174, 175, 176, 190 and 191 of 2020; W.P.No.11461 of 2021 and W.A.Nos.880, 909, 910, 935 and 936 of 2021**

**COMMON JUDGMENT**

**Date: 15.03.2022**

***(Prashant Kumar Mishra, CJ)***

This batch of writ appeals has been argued analogously. However, for convenience, the writ appeals have been divided into four groups, viz. Group-A, Group-B, Group-C and Group-D.

2. The issues falling for consideration in this batch of writ appeals/group of cases involve similar/overlapping background facts and the law applicable. Therefore, they are decided by this common judgment albeit group-wise.

3. Heard Mr. C.S. Vaidyanathan, Mr. D. Prakash Reddy, Mr. Sanjay Sen, Mr. P. Sri Raghuram, Mr. Sajan Poovayya, Mr. Basava Prabhu Patil, Mr. V.V.S. Murthy, learned senior counsels, duly assisted by Mr. Kilaru Nithin Krishna, Mr. Challa Gunaranjan, Ms. Mazag Andrabi, Mr. Aniket Prasoon, Mr. Avinash Desai, Mr. Vishrov Mukerjee, Mr. Sai Sanjay Suraneni, Mr. Srinivas Mantha, Mr. T.V.P. Sai Vihari, Mr. C. Prakash Reddy, for the appellants/power generators, Mr. Puneet

Jain, learned counsel assisted by Mr. Y. Nagi Reddy, for the appellants-SLDC in the respective appeals.

4. Also heard Mr. S. Sriram, learned Advocate General, for the State and the DISCOM, Mr. N. Harinath, learned Assistant Solicitor General for the Union of India, Mr. Puneet Jain, learned counsel assisted by Mr. Y. Nagi Reddy, for the SLDC, Mr. S. Sathish Kumar, learned Government Pleader for Energy and Mr. Metta Chandrasekhar Rao, for the respondents in the respective appeals.

5. Also heard Mr. Deepak Chowdhury, learned counsel for the petitioner, Mr. S. Sathish Kumar, learned Government Pleader for Energy, Mr. Y. Nagi Reddy, Mr. P. Srinivasa Rao and Mr. A. Vivekananda, learned counsel for the respondents in W.P.No.11461 of 2021.

**GROUP-A MATTERS**

6. The writ appeals in Group-A, i.e. W.A.Nos.383, 384, 393, 424, 433, 435, 436, 440, 441, 447, 463, 477 of 2019, W.A.Nos.6, 70, 75, 138 of 2020 and W.A.Nos.880, 910, 935 and 936 of 2021 have been preferred by wind and solar power generators challenging the said part of the common order dated 29.04.2019 passed by the learned single Judge under the head **"payment due and the financial quagmire"**, wherein, despite allowing the writ petitions, the learned single Judge has directed the respondents/DISCOMs to honour the bills of the wind power generators and solar power generators and to pay the same at the reduced **"interim rate"** of Rs.2.44p for solar power and Rs.2.43p for wind power.

7. In the writ petitions preferred by this class of generators, prayer was made for issuance of a Writ of Certiorari to quash G.O.Rt.No.63, Energy (Power-II) dated 01.07.2019 as well as all proceedings and consequential orders, letters dated 12.07.2019 passed by the 2nd respondent, i.e. Southern Power Distribution Company of Andhra Pradesh Limited (in short, "DISCOM") with a further prayer to make payment of total amounts due to the petitioners towards principal amount for the monthly energy bills raised by them in accordance with the Power Purchase Agreements (PPAs) along with late payment surcharge levied as per the terms of the PPAs and direct the DISCOM to abide by the terms of the PPAs executed with the petitioners and make timely payments therein.

8. In the impugned order, the learned single Judge would hold that a third party to the contract (Govt. of A.P.) cannot give directions to modify the contract; State cannot use its Executive power to pass any order which would trench upon or occupy and intrude when the subject matter is governed by law, particularly, a central law. Consequently, the learned single Judge had quashed G.O.Rt.No.63 of 2019 dated 01.07.2019 issued by the Government of Andhra Pradesh and letter dated 12.07.2019 issued by the DISCOM and all related/consequential actions.

**THE BACKGROUND FACTS AS PROJECTED BEFORE THE WRIT COURT**

8.1 Due to heavy reliance on fossil fuels and inefficient and outdated coal-fired power plants contributing to global greenhouse gas emissions and resultant global warming, India became a party to the UN Framework

Convention on Climate Change in the year 1992, which requires the parties to the Convention to undertake ambitious efforts to combat climate change and stabilize greenhouse gas concentrations. The parties to the covenant through the Kyoto Protocol and the Paris Agreement undertook to take measures to move away from conventional generation and towards development of renewable energy. In 2003, the Parliament enacted the Electricity Act (in short, "the 2003 Act"), de-regulating the generation sector providing measures that would mitigate regulatory uncertainty; to attract private investment in the electricity industry and promote generation of electricity through renewable sources. Section 61(h) of the 2003 Act, inter alia, directs the State Commissions to frame tariff regulations in such a manner that generation of electricity from renewable sources of energy receives the requisite fillip. In February 2005, the Ministry of Power, Government of India notified the National Electricity Policy (in short, "NEP"), inter alia, providing for development of power system based on optimal utilization of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy. Para 5.12 of the NEP under the caption "Generation and Non-conventional Energy Sources", focuses on urgent need to promote generation of electricity through Non-conventional and renewable sources of energy. Para 5.12.2 of the NEP specifically provides that co-generation and generation of electricity from non-conventional sources would be promoted by the SERCs by providing suitable measures for connectivity with grid and sale of electricity to any person and also by specifying for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a

distribution licencee. Such percentage for purchase of power from non-conventional sources should be made applicable for the tariffs to be determined by the State Electricity Regulatory Commissions (in short, "SERCs") at the earliest. Progressively, the share of electricity from non-conventional sources would need to be increased as prescribed by the SERCs. Such purchase by distribution companies shall be through competitive bidding process.

8.2 In tune with the provisions of the 2003 Act and the NEP, the Government of Andhra Pradesh issued Solar Policy in the year 2012 and Wind Policy in the year 2014, demonstrating its commitment to promote non-polluting sources of energy. After bifurcation of the erstwhile combined State of Andhra Pradesh in June 2014, the successor State of Andhra Pradesh issued its own Solar Power Policy in the year 2015, which was later revised in the year 2018. On 14.08.2014, the DISCOM issued Request for Selection (RfS) for inviting bids in terms of Section 63 of the 2003 Act for selection of developers for 500 MW of grid connected Solar Photo Voltaic Projects in Andhra Pradesh. It is not in dispute that the petitioners took part in the competitive bid process and being successful, entered PPAs with the DISCOM on different dates. On 21.02.2015, the APERC approved the PPAs executed between some of the petitioners (solar generators) and the DISCOM and further adopted the tariff as agreed in the PPAs. The tariff adopted by APERC in accordance with the PPAs was Rs.5.99p per kWh for the first year.

8.3 After substantial period from commencement of commercial operation of different solar and wind power units of the petitioners, on 26.06.2019, a review meeting of the Energy Department was held by the Government of Andhra Pradesh resolving to:

i. Issue recovery notice to all wind and power PPAs for the loss caused to the DISCOMS and the Government;

ii. The must run obligation in the solar regulation of APERC should be challenged;

iii. File a petition before the ERC to reduce and refix the wind fit after considering the must run and other incentives;

iv. Cancel Government decisions to enter into PPAs for all the in-pipeline projects;

v. Cancel all the wind, hybrid and experimental PPAs which are in pipeline – either not entered or not cleared by APERC;

vi. Keep thermal plants/other sources in standby if wind/solar is stopped during/after negotiations;

vii. Explore possibility of offloading the high cost wind and solar to other purchasers in the country.

8.4 On the above basis, the petitioners contend that the Government of Andhra Pradesh pre-judged the issues between the DISCOM and solar/wind developers deciding unilateral and arbitrary reduction of tariff even though the same is determined/adopted by APERC in compliance of Section 62 (for wind developers) and Section 63 (for solar developers) of the 2003 Act. The Government of Andhra Pradesh issued directions to the DISCOM

including directions to keep thermal plants or other sources on standby if wind/solar plant is stopped during/after negotiations. The Energy Department of Government of Andhra Pradesh thereafter constituted a High Level Negotiation Committee (HLNC) to review, negotiate and bring down the high wind and solar energy purchase prices on the ground that the DISCOM is in a financial crisis with huge power purchase dues.

8.5 Taking cognizance of the action of the Government of Andhra Pradesh, the Central Government and the Ministry of Power and New and Renewable Energy issued a letter on 09.07.2019 urging the Government of Andhra Pradesh to act in a manner which was fair, transparent and in accordance with law. It was specifically mentioned that PPAs are contracts binding on all signatories and if the same are not honoured, investment will stop and that it is wrong and against law to cancel all the PPAs. However, despite the above letter of the Government of India, the DISCOM proceeded with issuing the impugned letters on 12.07.2019 to the petitioners seeking reduction in tariff, failing which PPAs were threatened to be terminated. Responding to these letters, the petitioners represented the DISCOM rejecting all of its contentions. However, payment of energy bills since May 2018 continued to be neglected and kept pending. The petitioners, therefore, challenged the impugned letters on the following grounds:

## GROUNDS OF CHALLENGE IN THE WRIT PETITIONS

1. The impugned order and the impugned letters are in violation of the principles enshrined under Articles 14(1) and 19(1)(g) as also Articles 301 and 302 of the of the Constitution of India;

2. The tariff decided and adopted through a bidding process under Section 63 (for solar power) cannot be altered/interfered with;

3. The tariff determined by APERC (under Section 62 of the 2003 Act) cannot be amended by the State Government;

4. Constituting a HLNC for negotiation of tariff is not permissible in law;

5. The impugned order and impugned letters are violative of the Doctrine of Promissory Estoppel and Legitimate Expectation;

6. The scope of the impugned order and the action of the Government of Andhra Pradesh and the DISCOM is outside the four corners of the 2003 Act and regulatory framework and that the role of the Government is limited under the 2003 Act;

7. The impugned order will have grave and adverse consequences and inconsequent impact on DISCOM in continuous performance of its obligations from solar PPAs;

8. The impugned order violates the provisions of Contract Act, 1872 and the basic principles of contract law and is in violation of the vested rights of the petitioners.

## RESPONDENTS' STAND IN COUNTER

9. The respondents defended the impugned orders/letters/actions, inter alia, contending that:

i. the writ petitions are not maintainable because the issues relating to tariff are to be determined by the Regulatory Commission;

ii. The State Government is competent in exercise of power given to it under Article 162 of the Constitution of India;

iii. By constituting the Committee, the State has participated in the activity of power generation to protect its interest as well as that of the consumers;

iv. The DISCOMS are in financial crisis; therefore, the DISCOM has issued the impugned letter dated 12.07.2019 only after negotiation to bring down the tariff by mutual consent of both parties, which is permissible under law and also permissible as per the terms of the PPAs;

v. The Government of Andhra Pradesh is not a stranger to the affairs of Electric Supply Companies and their PPAs, as it has powers under Sections 11, 65 and 108 to give directions to APERC; however, Government is not set to determine or to modify the tariff unilaterally;

vi. Subject PPAs have been entered for purchase of power at an unreasonably high prices, which needs to be reduced in the interest of consumers;

vii. The bidding process undertaken by the respondents at the relevant time did not discover the real market price, which has reflected drastic reduction of tariff realized by various states from 2015 onwards;

viii. The bidding process by the DISCOMS in 2014 was not conducted as per Section 63 of the 2003 Act, because revised guidelines were issued by the Government of India in the year 2017; therefore, in the absence of guidelines, the bidding

process was not as is required under Section 63 of the 2003 Act;

ix. Revision of tariff is permissible in law because assessment of tariff is a continuous process and the same can be revised in public interest as Distribution Company is required to discharge its function on commercial principles in terms of Section 61 of the 2003 Act.

x. The impugned letter dated 12.07.2019 does not violate sanctity of PPAs and neither the Government is using its dominant position to interfere in the affairs of DISCOMS. Any modification of terms of PPAs would come into force only after approval by the APERC. The DISCOMS do not propose to unilaterally cancel the PPAs and only propose to seek further remedies under the 2003 Act in regard to the tariff, continuation of the PPAs etc. in supplementation of the already filed O.P.No.17 of 2019 before the APERC for revision/reduction of tariff.

10. The Union of India appearing through the learned Assistant Solicitor General, supported the case of the petitioners, inter alia, contending that cancellation of the contracts (PPAs) is not at all warranted, because once contracts are concluded, the State cannot unilaterally ask for its amendment in the absence of allegation of fraud etc. being established.

**DECISIONS/FINDINGS BY LEARNED SINGLE JUDGE**

11. While determining the issues, the learned single Judge observed that investments in this case are also made by foreign pension funds as is clear from the Union Minister's letter dated 09.07.2019 and further that

institutional investors like LIC of India, Unit Trust of India and others have also invested in these solar/wind projects. It is also held that terms of the contract do not permit unilateral alteration or at the behest of a third party. Referring to the argument of the learned Advocate General, learned single Judge would hold that the provisions relied upon by the State deriving source of power under Sections 11, 65 and 108 of the 2003 Act to issue directions to the DISCOMs, are not applicable. Similarly, it is also held that once there is a law governing the field, particularly, a Central law, the State Government in exercise of its Executive power under Article 162 of the Constitution of India, cannot pass any order which would trench upon or occupy and intrude into the area occupied by the APERC. *Ex consequenti,* the learned single Judge allowed the writ petitions quashing both the instructions, i.e. G.O.Ms.No.63 dated 01.07.2019 issued by the Government of Andhra Pradesh and the letter dated 12.07.2019 issued by the A.P.S.P.D.C.L. and all related and consequential actions taken pursuant thereto. However, the learned single Judge proceeded further to deal with the issue on the caption **"payments due and the financial quagmire"** and eventually directed the DISCOMs to honour the bills raised by the petitioners and to pay the same at the **"interim rate"** of Rs.2.44p for solar power and Rs.2.43p for wind power, with a further observation that all the pending and future bills of all the petitioners should be paid at this interim rate till the dispute is resolved by the APERC in O.P.No.17 of 2019 and O.P.No.67 of 2019. It is appropriate to mention here that maintainability of O.P.No.17 of 2019 and O.P.No.67 of 2019 has been challenged in other batch of writ petitions, which too have been disallowed by the learned

single Judge and the said order is under challenge in writ appeals, which have been heard analogously as Group-B matters.

12. In the impugned order, the learned single Judge has also dealt with the issue regarding curtailment order passed by the A.P. State Load Despatch Center (APSLDC). The curtailment order was called in question by way of interim application in some of the writ petitions, whereas the same have also been made part of main relief in some other writ petitions. Be that as it may, the learned single Judge has allowed the prayer of the petitioners holding that the terms of the contract have to be honoured and the State cannot issue directions to the DISCOMs or to the generators on the ground that tariff in the PPAs is high. Curtailment of power for any reason whatsoever has been disapproved holding that the generators are entitled to a notice before any action is taken except in a very grave and sudden emergency. The respondents were then directed not to take any coercive steps of any nature including curtailing production, stopping evacuation (for power) or the like except after giving due notice to the generators and as per the PPAs; the Regulation and the 2003 Act. This part of order dealing with curtailment issue is subject matter of challenge in Group-C matters, which are writ appeals filed by APSLDC.

**SUBMISSIONS OF APPELLANTS IN GROUP-A MATTERS**

The learned senior counsel and other counsels vehemently argued that:

i. The interim rate/interim arrangement fixed by the learned single Judge goes against the principles of policy certainty, regulatory certainty and sanctity of concluded contracts.

ii. The projects which are established under Section 62 of the 2003 Act wherein a valid tariff has been made applicable for a period of 25 years cannot be subjected to interim tariff during currency of the PPAs, as the same amounts to alteration of the terms of contract binding between the parties.

iii. The tariff envisaged under the PPAs is a vested right of the parties and the same cannot be taken away by any of the party or by interim arrangement of the Court.

iv. The interim arrangement ordered by the learned single Judge has in effect granted final relief to the DISCOM/Govt. of A.P., by erroneously interlinking the present proceedings with O.P.No.17 of 2019 and/or O.P.No.67 of 2019.

v. Buttressing the submission, it is contended that tariff determined by the APERC under Section 62 of the 2003 Act having never been questioned/assailed by DISCOM, the same has attained finality. Therefore, the learned single Judge could not have directed payment at the interim rate.

vi. Writ court exercising power under Article 226 of the Constitution of India, cannot grant relief of an interim nature adverse to the interest of the petitioners after allowing the writ petition. By doing so, the learned single Judge has committed an error of jurisdiction.

vii. The learned single Judge has erroneously fixed the interim rate though there is no such prayer of the DISCOM before the APERC in O.P.No.17 of 2019.

viii. The plea of financial difficulty taken by the DISCOM is a misnomer and such plea has been turned down by the Hon'ble Supreme Court in ***Energy Watch Dog v. CERC & ors.***[1] and order dated 08.11.2021 in Civil Appeal No.1843 of 2021 in the case of ***Maharashtra State Electricity Distribution Company Limited vs. MERC and ors***.

ix. The rate fixed by the learned single Judge would cause irreparable loss to the appellants.

x. Tariff once adopted by the APERC in due exercise of statutory scheme under Section 63 of the 2003 Act, after bidding process for a period of 25 years, cannot be interfered with or altered.

xi. On behalf of solar power generators, it is argued that O.P.No.17 of 2019 and related proceedings have no correlation with the solar power generators and subsequent petition, i.e. O.P.No.67 of 2019 was filed before the APERC pursuant to the impugned order; therefore, on the date of the impugned order, no O.P. was pending in respect of solar power generators.

xii. There being no prayer/submission by either of the parties for fixing any interim rate/interim tariff, learned single Judge ought not to have entered into the said arena.

xiii. Learned single Judge did not appreciate the fact that the writ petitions challenging the proceedings of O.P.No.17 of 2019 is a different issue than the one arising in Group-A matters, which were preferred challenging G.O.Rt.No.63 dated 01.07.2019; thus, learned single Judge has wrongly joined the two issues for applying the interim tariff.

xiv. It is put forth that DISCOM had earlier preferred the appeal against the order passed by the learned single Judge quashing G.O.Rt.No.63 dated 01.07.2019 and letter dated 12.07.2019.

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[1] **(2017) 14 SCC 80**

However, the DISCOM having withdrawn the appeals at a later point of time, the order passed by the learned single Judge quashing G.O.Rt.No.63 dated 01.07.2019 has attained finality. Therefore, there was absolutely no occasion or justification to direct payment of bills under the interim tariff.

xv. On behalf of solar power generators, it is argued that APERC being an expert body is an appropriate Commission exercising its statutory function under Section 63 of the 2003 Act, which has a tariff adoption process based on competitive bidding mechanism; therefore, the same cannot be altered or repealed at a later point of time.

xvi. Government having already recovered energy charges from consumers, there is no equity in favour of the DISCOM.

**SUBMISSIONS OF RESPONDENTS IN GROUP-A MATTERS**

i. Interim tariff/interim rate fixed by the learned single Judge is only an interim arrangement.

ii. Writ Court can mould the relief on the basis of obtaining facts and circumstances of the case.

iii. Writ Court is entitled to balance equities by keeping in view interest of both the parties.

iv. Learned Advocate General referred to the law laid down by the Hon'ble Supreme Court in ***Ramesh Chandra Sankla and ors. v. Vikram Cement and others*** [2] and ***Ghaziabad Development Authority v. Delhi Auto & General Finance Pvt. Ltd. and ors.*** [3]

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[2] **(2008) 14 SCC 58**
[3] **(1994) 4 SCC 42**

## DISCUSSION AND FINDING IN GROUP-A MATTERS

13. Before entering discussion on the issue of validity or justification of interim rate/interim tariff fixed by the learned single Judge, it would be appropriate to bear that after quashment of G.O.Rt.No.63 dated 01.07.2019 and letter dated 12.07.2019, DISCOM preferred writ appeals which were later on withdrawn. This part of the judgment has thus attained finality. The only issue that remains for consideration is whether, after allowing the writ petitions, the learned single Judge is justified in making interim arrangement and, that too, when none of the parties to the proceedings have prayed for any such relief. In the impugned judgment, the learned single Judge has noted the submissions of the learned counsel for the petitioners and that of the learned Advocate General. It is nowhere mentioned in that part of the judgment that any of the parties to the writ proceedings have ever made any prayer inviting the Court to fix interim tariff or interim rate. This part of the discussion in the impugned judgment under the caption "payment due and the financial quagmire" starts after the learned single Judge would allow the writ petitions by quashing G.O.Rt.No.63 dated 01.07.2019 and letter dated 12.07.2019 and all related/consequential actions.

14. It is settled law that jurisdiction under Article 226 of the Constitution of India ought not to be exercised only for granting interim relief and, that too, in favour of the respondents after allowing the writ petition. Balancing equity would not mean nor would it clothe jurisdiction on the Court to re-write the terms of the contract.

15. In ***Kalabharati Advertising v. Hemant Vimalnath Narichania and ors.*** [4], the Hon'ble Supreme Court has held that forum of writ court cannot be used for the purpose of giving interim relief as the only and the final relief to any litigant. If the court comes to the conclusion that the matter requires adjudication by some other appropriate forum and relegates the party to that forum, it should not grant any interim relief in favour of such a litigant for an interregnum period till the said party approaches alternative forum and obtains interim relief.

16. In ***State of Orissa v. Madan Gopal Rungta*** [5], the Hon'ble Supreme Court observed thus:

> "…In our opinion, article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application as the High Court has purported to do. The directions have been given here only to circumvent the provisions of section 80 of the Civil Procedure Code, and in our opinion that is not within the scope of article 226. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of *mandamus* or any other directions of a like nature; and pending such determination it might have made a suitable interim order for maintaining the *status quo ante*. But

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**[4] (2010) 9 SCC 437**
**[5] AIR 1952 SC 12**

> when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under article 226 of the Constitution. In our opinion, the language of article 226 does not permit such an action. On that short ground the judgment of the Orissa High Court under appeal cannot be upheld."

17. The above stands reiterated in ***Amarjit Singh Etc. v. State of Punjab***[6]***, State of Orissa v. Ram Chandra Dev***[7]***, State of Bihar v. Rambalak Singh and ors.*** [8] *and* ***Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke of Bombay and others***[9]**.**

18. It seems, learned single Judge was swayed by the financial difficulty of the DISCOM and having felt that allowing the writ petitions would require full payment as per PPA rate to the petitioners, went on to fix interim rate for payment of pending and future bills.

19. Whether financial difficulty of a party to the contract could be a ground for allowing the party to wriggle out of the terms of the contract, was dealt with by the Hon'ble Supreme Court in the case of ***Maharashtra State Electricity Distribution Company Limited vs. MERC and ors***. (order dated 08.11.2021 in Civil Appeal No.1843 of 2021) wherein it has been held that inability or financial difficulty of DISCOMs cannot be a ground to avoid payment of dues of generating companies.

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[6] **AIR 1962 SC 1305**
[7] **AIR 1964 SC 685**
[8] **AIR 1966 SC 1441**
[9] **AIR 1975 SC 2238**

20. While the law remaining settled in the above-stated terms, it is also to be seen that APSPDCL being distribution licencee within the meaning of Section 14 of the 2003 Act, it recovers actual cost of energy from its consumers. Thus, having recovered the energy charges from the consumers, it is not open for the DISCOM to raise the plea of financial difficulty. In course of hearing of the writ appeals in Group-A, it was never stated by the learned counsel for the DISCOM that they are not recovering charges from the consumers.

21. It has been argued before us and it has convinced us that when the initial action is not in consonance with law and the Court having quashed the impugned G.O./action, it ought not to have fixed interim rate, which, in fact, is at the same rate which the DISCOM is seeking as final relief in O.P.No.17 of 2019 pending before the APERC.

22. In ***Coal India Ltd. v. Ananta Saha*** [10], the Hon'ble Supreme Court, in paragraph 32, observed that it is a settled legal proposition that if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In such a fact situation, the legal maxim *sublato fundamento cadit opus* is applicable, meaning thereby, in case a foundation is removed, the superstructure falls.

23. It is also settled by the Hon'ble Supreme Court in ***Gujarat Urja Vikas Nigam Limited v. Solar Semi-Conductor Power Co (India) P. Limited*** [11], that terms and provisions of the PPA executed between the

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[10] **(2011) 5 SCC 142**
[11] **(2017) 16 SCC 498**

parties cannot be re-written or amended by Court or the adjudicating authorities. Paragraphs 60, 65 and 68 read thus:

> "60. In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between GUVNL and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs 15 per unit for twelve years, the first respondent should commission the solar PV power project before 31-12-2011. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, the Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers."

> "65. …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."

> "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."

24. Based on the above discussion, it clearly emerges that Writ Court has no jurisdiction to allow a writ petition or issue direction only for the purpose of interim relief. Similarly, the terms of PPAs cannot be altered either by the parties or by the Court and, further, financial difficulty of Government or DISCOM is no ground to permit avoiding the contract or reducing the tariff. Whether or not DISCOM would succeed in O.P.No.17 of 2019 pending before the APERC or in O.P.No.67 of 2019 which was filed after judgment was rendered by the learned single Judge, cannot be pre-judged at this stage. In any case, writ petitioners have challenged the jurisdiction of the APERC to entertain the O.P. for revision/review of the tariff for which PPA has already been executed for a period of 25 years, which is subject matter of challenge in Group-B matters. Thus, the order passed by the learned single Judge fixing the interim rate or interim tariff of Rs.2.44p for solar power and Rs.2.43p for wind power for payment of all

pending and future bills does not appear to be proper and in accordance with law. Therefore, we set aside the said part of the order and allow the writ appeals forming part of Group-A.

## GROUP-B MATTERS

25. W.A.Nos.388, 392, 394, 396, 401, 423, 443, 444, 445, 446, 452, 470 of 2019, W.A.No.105 of 2020 and W.A.No.909 of 2021 falling under Group-B, have called in question the order passed by the learned single Judge disposing of the writ petitions preferred by solar and wind power generators challenging the maintainability of O.P.No.17 of 2019 and O.P.No.67 of 2019, preferred by the DISCOMs before the APERC. The learned single Judge has refused to enter into the merits of the matter and disposed of the writ petitions with a direction to the APERC to determine the issues raised in O.P.No.17 of 2019, reserving liberty in favour of the writ petitioners to raise all the permissible defences before the Commission.

## FACTS AGITATED IN THE WRIT PETITIONS

26. The appellants/writ petitioners are wind power generators having established their wind power generation units in the State of Andhra Pradesh. The Indian Wind Power Association is also one of the writ petitioners. The Government of Andhra Pradesh announced The Andhra Pradesh Wind Power Policy, 2015 on 13.02.2015 stating that considering the good wind power potential existing in the State and to achieve 4000 MW capacity addition through wind power during the next 5 years period, there is a need to bring about comprehensive wind power policy. The

APERC (for short, "the Commission" passed Regulation No.1 of 2015 dated 31.07.2015 in exercise of powers conferred upon it under Sections 61 and 86 read with Section 181 of the 2003 Act, stating that the terms and conditions for determination of tariff for wind power projects to be commissioned during the period FY 2015-16 to FY 2019-20. The Commission, thereafter, passed orders on 01.08.2015 determining the tariff applicable for wind power projects to be commissioned during the period 01.08.2015 to 31.03.2016 at Rs.4.83 per unit without Accelerated Depreciation (AD) and Rs.4.25 per unit with AD. The Commission, thereafter, passed an order on 26.03.2016 notifying the generic preferential tariff for wind power based on certain parameters and considering the useful life of the wind power project as 25 years. The levellised generic preferential tariff determined was Rs.4.84 per unit without AD and Rs.4.25 per unit with AD. Needless to say, the tariff orders were issued by the Commission after detailed public hearings and deliberations with all the objectors including the DISCOMs. On the strength of the tariff determined by the Commission and favourable policy scenario of the Government of Andhra Pradesh, huge investments were made in wind power projects to the tune of Rs.30,000 crores. Out of around 4000 MW of wind power capacity, around 2200 MW was added during the relevant period, i.e. FY 2016-17. The wind power projects have life of 25 years and investments are made with a long term financial planning perspective, as claimed in the writ petitions.

27. Subsequently, the DISCOMs filed O.P.No.5 of 2017 before the Commission on 06.03.2017 under Regulations 55(1) & (2) of the APERC Business Regulations 2 of 1999 read with Articles 23, 24, 25 and 26 of the APERC Regulation No.1 of 2015 dated 31.07.2015 seeking curtailment of the control period of the Regulation only upto 31.03.2017, instead of 31.03.2020. The Commission was also prayed to determine the tariff for FY 2017-18 considering emerged facts in the petition and market discovered price and formulating appropriate parameters in view of the orders stated in the petition and also the precarious financial position of the DISCOMs. This O.P.No.5 of 2017 was decided on 13.07.2018 curtailing the validity of the Regulation only upto 31.03.2017.

28. The tariff determined by the Commission was based on certain parameters, details of which are mentioned in the writ petition. In the final order passed by the Commission in O.P.No.5 of 2017, the validity period of the Regulation was curtailed upto 31.03.2017 and, at the same time, mentioning that this Regulation continues to apply for the wind energy generators with whom DISCOMs of Andhra Pradesh have entered into PPAs upto 31.03.2017. DISCOMs did not prefer any appeal against this part of the order. It is also stated in the writ petition that APSPDCL preferred a petition before the Commission against consenting of 41 PPAs executed with various developers on the ground that due to change in parameters and the reduced tariff discovered in the Solar Energy Corporation of India Limited (in short, "SECI Ltd.") auction, the Commission cannot grant sanction to the said 41 PPAs and grant

permission to the DISCOMs to renegotiate the tariff of the 41 PPAs executed with the developers. PPAs with these 41 developers were on the basis of generic tariff issued by the Commission under Regulation No.1 of 2015. The Commission granted sanction to all the 41 PPAs vide its order dated 13.12.2017 clearly mentioning that the terms and conditions indicated in the PPAs shall be subjected to any modification in the manner provided by the PPAs themselves. Where the interests of the public or consumers or for that matter any stakeholders is involved, it is open to the Commission to revisit the terms and conditions of the PPAs including determination of the tariff with further observation that the relations between the parties are governed by contractual obligations and rights arising out of consensus ad idem, any change in the same is equally permissible and acceptable in law through the same process of agreement between the parties.

29. According to the petitioners, in defiance of the order passed by the Commission, the DISCOM preferred O.P.No.17 of 2019 on the pretext of discovery of reduced tariff during competitive bidding undertaken by SECI as also under the pretext of the protection of the consumer interest. In O.P.No.17 of 2019, the DISCOM sought amendment of the parameters laid down under Regulation No.1 of 2015, reopening of the tariff order issued between FY 2015-16 to FY 2017-18 and the orders to effect the reduced tariff in the PPAs executed during this period. The Commission having entertained the petition and proceeded to hold public hearing, the writ petitions were preferred before the learned single Judge.

**GROUNDS RAISED BEFORE THE LEARNED SINGLE JUDGE**

1. The Commission lacks jurisdiction to entertain O.P.No.17 of 2019 as the same seeks to revise Regulation No.1 of 2015, which has already worked itself out and is no longer in existence being an expired Regulation.

2. Prayer for revision of tariff was also made in O.P.No.5 of 2017, which was not allowed and no appeal was preferred against the said order; therefore, it has become final and binding and is hit by the principles of *res judicata*.

3. The DISCOMs are estopped from altering the terms and conditions of PPAs unilaterally and seeking curtailment of period to the detriment of the petitioners, that too after the petitioners have altered their position by making huge investments and performing its obligations under the respective PPAs relying on the tariff order issued by the Commission. The DISCOM cannot be permitted to divest the rights that have accrued to the petitioners and seek revision of the same unilaterally in an arbitrary manner.

4. The petitioners having invested in the wind power generation units in the State of Andhra Pradesh on the basis of policy developed in the year 2015-16, cannot be subjected to tariff revision only after three years. The petitioners have obtained loans and have their own financial plan based on which the projects have been installed. Therefore, seeking reduction in tariff, change in parameters etc. and that too contrary to the terms of the PPAs, is arbitrary.

5. The State in matters of commercial transactions has to act fairly and in a transparent manner. The terms and conditions of commercial contract such as PPAs cannot be violated merely because other party to the contract is the State.

**CONTENTION OF DISCOM**

30. The Commission was approached as early as on 30.10.2015 to modify certain parameters specified in the Regulation and also requesting to

modify the order dated 01.08.2015. Similar request was again made through a letter addressed to the Commission on 10.12.2016. However, the Commission did not change the normative parameters in the Regulation, but curtailed the operational period of the Regulation only upto 31.03.2017. The Solar Energy Corporation of India, a Govt. of India Undertaking, invited bids for supply of wind power, many developers offered to supply power at Rs.346 per unit; therefore, there being material change of parameters/condition, O.P.No.5 of 2017 has been preferred.

**ORDER BY THE LEARNED SINGLE JUDGE**

31. The learned single Judge has not entered into the merits of the matter. Having prima facie found that O.P.No.17 of 2019 appears to be maintainable, the learned single Judge has directed the APERC to determine the issues raised in the O.P.

32. The main issue now to be considered in these appeals is whether O.P.No.17 of 2019 is maintainable, to allow APERC prayer for amending the Regulation No.1 of 2015 by specifying the reduced norms and parameters; to pass orders amending the wind power tariff determined vide orders dated 01.08.2015 and 26.03.2016 respectively considering the amended norms and parameters in the Regulation No.1 of 2015 and lastly to pass orders effecting the reduced/amended tariff in the PPAs entered by APDISCOMS with the wind power generators/solar power generators, post issuance of Regulation No.1 of 2015.

## CONTENTIONS OF THE PARTIES IN THE WRIT APPEALS

33. The appellants who are wind and solar power generators, while reiterating the submissions made before the writ court, would mainly harp on the failure of the writ court to pass orders on merit deciding the maintainability of O.P.No.17 of 2019 or for that matter O.P.No.67 of 2019 and, at the same time, holding that prima facie O.P.No.17 of 2019 appears to be maintainable.

34. It is contended that there is no power vested with the commission under the 2003 Act for making a retrospective legislation and more so when the same has the effect of taking away vested rights. Any amendment to the tariff would amount to fixation of tariff in retrospective manner, which is not permissible and that the Doctrine of Promissory Estoppel operates even in the field of Legislation.

35. In respect of O.P.No.67 of 2019, which relates to solar developers, an additional ground is raised that once tariff is discovered under Section 63 of the 2003 Act through competitive bidding, the same cannot be reopened or revised. Thus, the tariff is not discovered by the Commission, but it has only adopted the tariff, therefore, the revision of tariff discovered under Section 63 of the 2003 Act is impermissible. If at all permissible, the same should be in the same process in which it was earlier discovered and not by way of passing an order in O.P.No.67 of 2019.

36. According to the solar power developers, the learned single Judge has granted an implied blessing to APDISCOMS to approach the Commission and pursuant thereto, DISCOM has filed O.P.No.67 of 2019 to seek

revision of 2012 Tariff Order. The observation by the learned single Judge that "If the DISCOMS feel that the tariff is high they have to avail the statutory remedies only subject to limitation, res judicata etc." as well as by way of granting an interim arrangement till the alleged dispute is resolved by the Commission, has propelled the DISCOM to prefer O.P.No.67 of 2019. According to the solar power developers, the learned single Judge has conferred jurisdiction on the Commission, where none exists. Referring to some of the submissions made by DISCOM in O.P.No.67 of 2019, it is highlighted that the DISCOM is projecting as if O.P. is preferred on the directions of the High Court.

37. It is further argued on behalf of solar power developers that tariff discovered through competitive bidding under Section 63 of the 2003 Act, cannot be interfered with and that public notice issued by the Commission is unlawful and untenable.

**CONTENTIONS ON BEHALF OF DISCOM**

38. Per contra, learned Advocate General would submit that interest of consumers and public interest are paramount consideration. Therefore, if at a later point of time, the tariff fixed for the petitioners is found to be on higher side, nothing would prevent the Commission to entertain the O.P. for amending the Regulation and parameters to reduce the tariff.

39. Learned Advocate General appearing on behalf of the DISCOM has argued that tariff fixed by the Commission being in force for a period of 25 years, the Regulation is capable of being amended despite the control order having been restricted upto 31.03.2017. He would refer to the order passed

by the Commission in O.P.No.5 of 2017 and in the case of 41 PPAs. Referring to clause 5 of Regulation No.1 of 2015, it is further argued that the Commission has expressly reserved power to amend or modify the provisions of the Regulation and the tariff under clause 25 of Regulation No.1 of 2015 and it is this power which has been exercised while deciding O.P.No.5 of 2017. On the same reasoning, it is submitted that APERC does not become *functus officio* despite curtailment of the control period, more so, when determination of tariff is dynamic and amenable to modification.

40. Referring to ***Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Limited***[12], it is argued that Regulation passed by the Commission can be subjected to amendment by referring to adjudicatory power of the Commission. By referring to ***Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited and ors.*** [13], it is further submitted that tariff fixed in the PPA being a result of statutory process, the same can be amended because it is not a private contract, but a contract which is the outcome of a statutory process. He would further submit that whether the tariff so amended/reduced by the Commission can be given retrospective effect, is considered by the Commission while deciding O.P.No.17 of 2019 and it is not a case of inherent lack of jurisdiction.

41. Learned Advocate General would further submit that in exercise of powers under Section 86 (1)(b) of the 2003 Act, the Commission can also resort to issue public notice for public hearing even though tariff is determined under Section 63 of the 2003 Act (for solar power developers).

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[12] **(2009) 6 SCC 235**
[13] **(2016) 8 SCC 743**

42. Learned Advocate General has referred to ***State of Orissa and Anr. v. Bhupendra Kumar Bose***[14], ***Tarini Infrastructure Limited and ors*** (supra), ***PTC India Limited v. Central Electricity Regulatory Commission***[15] and ***Energy Watch Dog*** (supra).

**DISCUSSION AND FINDING IN GROUP-B MATTERS**

43. Regulation No.1 of 2015 dated 31.07.2015 is titled as Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Tariff determination for Wind Power Projects) Regulations, 2015. It shall remain force upto 31.03.2020 unless reviewed earlier or extended by the Commission.

44. As earlier stated, vide order 13.07.2018 in O.P.No.5 of 2017, the period of Regulation No.1 of 2015 was curtailed from 31.03.2020 to 31.03.2017. The word "Control Period" has been defined to mean the period during which norms for determination of tariff specified in the Regulation shall remain valid, whereas the word "Tariff Period" has been defined to mean the period for which tariff is to be determined by the Commission on the basis of norms specified in the Regulation. The Regulation applies to the Wind Power Projects to be commissioned within the State of Andhra Pradesh for generation and sale of electricity wholly or partly to the distribution licencee within the State of Andhra Pradesh subsequent to the date of notification of the Regulation and where tariff for a generating station or a unit thereof based on wind energy source, is to be

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[14] **AIR 1962 SC 945**
[15] **(2010) 4 SCC 603**

determined by the Commission under Section 62 read with Section 86 of the 2003 Act. The provision concerning "Tariff Period" has been made in clause 5 of the Regulation, stating that the Tariff Period for wind power projects shall be equal to the useful life of the projects as defined under Regulation 2(p) to be reckoned from the date of commercial operation of the wind power projects. The useful life of the wind power projects is 25 years from the date of commercial operation, as mentioned in clause 2(p) of the Regulation. Thus, a conjoint reading of the word "Control Period" and "Useful Life" makes it explicit that tariff determined under the parameters fixed by the Regulation shall be valid for a period of 25 years. Clause 8 of the Regulation makes provision for Levellized Tariff. The same is reproduced hereunder for ready reference:

> "8. **Levellized Tariff**: Levellized Tariff is calculated by carrying out levellization for 'useful life' considering the discount factor for time value of money. The discount factor considered for this purpose is equal to the weighted average cost of capital on the basis of normative debt-equity ratio (70:30) specified under Regulation 11. Considering the normative debt-equity ratio and weighted average of the rates of interest and post tax return on equity, the discount factor is calculated. Interest rate for the loan component (i.e.70%) of Capital Cost is considered as explained under Regulation 12. For equity component (i.e. 30%), post tax Return on Equity (ROE) of 16% is considered as explained in Regulation 14."

45. Chapter II of the Regulation deals with Financial Principles, which is governing the tariff fixation process. Deviation from norms has been made permissible under clause 22 subject, however, to the condition that the

levellized tariff over the useful life of the project on the basis of the norms in deviation does not exceed the levellized tariff calculated on the basis of the norms specified in these Regulations and further that reasons for deviation from the norms specified under these Regulations shall be recorded in writing.

46. Clause 25 confers power on the Commission that the Commission may, at any time, vary, alter, modify or amend any provisions of these Regulations.

47. By two separate orders dated 01.08.2015 and 26.03.2016, the Commission determined the generic preferential tariff for wind power projects for its useful life of 25 years.

48. On the basis of tariff determined under Regulation No.1 of 2015, the petitioners entered into due diligence and approached the nodal agency for approval of the project and executed the agreement with New and Renewable Energy Development Corporation (NREDCAP) and, thereafter, it approached the Distribution Company for execution of PPA on the basis of determination of tariff under Section 62 of the 2003 Act.

49. Power Purchase Agreement executed between the power developers and the DISCOM is a commercial contract, which is subject to the provisions of the 2003 Act and Regulation No.1 of 2015. Article 2.2 of the PPA binds the parties to the effect that the Wind Power Producer shall be paid tariff for energy delivered at the interconnection point for sale to DISCOM, which shall be firm at Rs.4.84 per unit without Accelerated

Depreciation for a period of 25 years from the date of commercial operation. Article 7 speaks about Duration of Agreement, i.e. for 25 years. One of the special provisions contained in Article 11.2 provides that no oral or written modification of the agreement either before or after its execution shall be of any force or effect unless such modification is in writing and signed by the duly authorized representatives of the Wind Power Producer and the DISCOM, subject to the condition that any further modification of the agreement shall be done only with the prior approval of the Commission. Thus, any amendment or modification can happen with the consent of both the parties and not in a unilateral manner or under the guise of an order passed by the Commission in the O.P.

50. The PPAs entered into with 41 Wind Power Producers was pending for consent of the Commission, wherein the APSPDCL raised objection before the Commission. While according consent to the 41 PPAs, the Commission, vide its order dated 31.12.2017 noted that by its letter dated 03.03.2017, the Chief General Manager, APSPDCL, requested the Commission to permit the distribution companies to withdraw these 41 PPAs without considering them for grant of consent. The request was made on the ground that the capacity utilization factor has become higher due to advancement of technology than that was considered by the Commission in its Regulation or orders and other State Electricity Regulatory Commissions reduced the tariff for wind power projects. The APSPDCL also highlighted that competitive bidding by Solar Energy Corporation of India Limited was stated to have fetched lower tariff of Rs.3.46 per unit. A.P. Distribution

Companies also filed O.P.No.5 of 2017 on the ground that tariff determined for Andhra Pradesh State is detrimental to the consumers of the State. According to the DISCOM, it has been decided not to purchase power from big generators with whom PPAs were entered into, but approval of the Commission was not given. The DISCOM also instructed the concerned Superintending Engineers and Chief Engineers by memo dated 26.04.2017 not to take joint meter readings for the 41 wind power projects until further instructions.

51. Opposing the proposed withdrawal of PPAs by APSPDCL for 41 Wind Power Producers, they stated that relying on the Wind Power Policy of the Government of Andhra Pradesh and the Commission's Tariff Order, they set up their respective power projects and signed the PPAs and the projects have been commissioned in March 2017 and, further, that Ministry of New and Renewable Energy, Government of India, has observed that Governments could not go back on contractual agreements and requested the State Government to take up the matter with the Commission for consent. One of the power purchase developers, viz. M/s. Axis Energy Ventures India Private Limited related with 18 PPAs stated that entire project capacity of 4000 MW involves an investment of around Rs.28,000 crores and generates direct employment to around 18000 persons. It has already invested about Rs.2,500 crores in implementation of these projects. Therefore, objection put forth by APSPDCL deserves to be rejected.

52. Arguments on similar lines were advanced by other wind power generators whose PPAs were under consideration before the Commission.

53. The Commission in its order dated 13.12.2017, took note of the various clauses of Regulation No.1 of 2015 and the salient features of the agreement contained in different articles of the PPAs to conclude that subject PPAs (41 PPAs) being governed by Regulation No.1 of 2015 have to be dealt with according to its provisions. The Commission recorded a finding that these Wind Power Generating Plants with agreed dates of commercial operation and injecting power into the grid being received by the two distribution companies in the State of Andhra Pradesh may not be justifiably asked to put the clock back, more so, when the establishment of these generating units was actuated by the Wind Power Policy of the State Government and the Regulation by the State Commission. However, the Commission noted that if any legal consequences flow from the orders that may be passed in O.P.No.1 of 2017 and O.P.No.5 of 2017 on the file of the Commission, the parties to the PPAs shall be bound by them. Significantly, the Commission observed that the terms and conditions incorporated in the PPAs shall be subject to any modification in the manner provided by the PPAs. When the relations between the parties are governed by contractual obligations and rights arising out of consensus ad idem, any change in the same is equally permissible and acceptable in law through the same process of agreement between the parties.

54. Agreeing consent to the 41 PPAs, the Commission passed the following operative order:

> "63. The present consideration has to be ordered in tune with the above conclusions. Accordingly,--

a) the subject Power Purchase Agreements are regulated by the Commission as having its consent and are taken on record;

b) these Power Purchase Agreements and the parties thereto shall be bound by the legal consequences that may flow concerning each of them from the orders that may be passed or the directions that may be given in O.P.No.1 of 2017 and O.P.No.5 of 2017 on the file of this Commission;

c) any and all incentives/conditions envisaged in the Articles of the Power Purchase Agreements are subject to modification from time to time as per the directions of the Andhra Pradesh Electricity Regulatory Commission as agreed under Article 7 of the Power Purchase Agreements;

d) any modification of the Power Purchase Agreements shall be of force and effect only when it is in writing and signed by the duly authorized representatives of the wind power producers and the distribution companies, subject to the condition that any further modification of the agreements shall be done only with the prior approval of the Andhra Pradesh Electricity Regulatory Commission as envisaged under Article 11.2 of the Power Purchase Agreements. The parties to these Power Purchase Agreements are at liberty to come to an agreement regarding any modification or amendment of any terms and conditions on voluntary negotiations between themselves in this regard and approach the Commission to give effect to such agreements in the manner provided by the Power Purchase Agreements;

e) the terms and conditions of the Power Purchase Agreements are subject to the provisions of the Electricity Act, 2003 and amendments made to it from time to time and also subject to Regulation by the Andhra Pradesh Electricity Regulatory Commission as stipulated at item No.5 of the preamble to the Power Purchase Agreements and the amendments to the Power

Purchase Agreements as per the respective orders of the Andhra Pradesh Electricity Regulatory Commission shall be carried out from time to time as stipulated by Article 11.2 of the Power Purchase Agreements;

f) the distribution companies are at liberty to invoke the enabling Articles in the Power Purchase Agreements for any modification or amendment to the relevant terms and conditions dependent on the Capacity Utilization Factor, capital cost, depreciation, interest, return on equity and the like and to approach the Commission for appropriate reliefs and any such requests will be considered on merits in accordance with law, with notice to and a reasonable opportunity of hearing to the other parties to the respective Power Purchase Agreements;

g) the rights and obligations of the parties under the Power Purchase Agreements shall be subject to change in law i.e., any change in statutes or rules or regulations governing these Power Purchase Agreements;

h) both the distribution companies in the State of Andhra Pradesh are hereby directed not to enter into any fresh Power Purchase Agreements with any power developer using any source or fuel for power generation, without prior intimation to and permission from the Commission until further orders from the Commission depending upon any change of circumstances or exigencies of the power sector in the State."

55. The DISCOMS preferred O.P.No.5 of 2017 seeking the reliefs as stated in paragraph 22 of the petition, which are reproduced as hereunder:

"In view of the above and also the precarious financial position of APDISCOMs, the petitioners humbly pray the Hon'ble Commission for the following reliefs in the public interest and to meet the ends of justice.

(i) To curtail the control period of the regulation 01 of 2015 (Terms and Conditions for Tariff Determination for Wind Power Projects in the State of Andhra Pradesh for the period valid up to 31.03.2017.

(ii) Considering the aforesaid emerged facts and market discovered price and formulating appropriate parameters, determine the tariff for FY: 2017-18."

56. The Commission, vide its order dated 13.07.2018, disposed of O.P.No.5 of 2017 in the following manner:

"8.22 Even if PPAs were entered into by the DISCOMs with the wind generators they are not enforceable under law unless they are specifically approved by the Commission u/s 86 (1) (b). As seen from the ARR proposals for FY2017-18 & 2018-19 submitted by the DISCOMs the State achieved surplus power generation, met and even exceeded the RPPO obligation and unless and until there is a need to purchase power the Commission is not obliged to approve the Power Purchase Agreements. While considering any such PPAs the Commission shall be guided by the consumer interest as also the principles and methodologies specified by Central Commission for determination of tariff as mentioned u/s 61. Accordingly, the Commission would like to follow the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 dated 17-04-2017 for determination of project specific wind tariff for such PPAs entered into on or after 01-04-2017 by the DISCOMs if it is otherwise found necessary to procure power at competitive rates in the interest of the consumers at large in the State of Andhra Pradesh. Hence, the wind generators who have setup wind power projects in Andhra Pradesh have no reason to have any fear that

their financial interests are adversely affected if the Regulation No.1 of 2015 is curtailed upto 31-03-2017. There is another set of 4 PPAs filed by the same Axis wind Energy on 18-01- 43 2018 but for which no such PPAs were filed by the DISCOMs. Hence, the same were returned as no request on the said PPAs is received from the DISCOMs. Subsequently the CGM, P&MM, IPC, APSPDCL vide letter dated 02-05-2018, submitted 4 Nos copies of the PPAs essentially requesting for necessary consent of the Commission. The same have been examined in the Commission and the PPAs returned with certain observations as mentioned therein, vide letter dated 01-06-2018.

8.23 Hence, the Commission accepts the prayer of the petitioner to curtail the Regulation No.1 of 2015 treating it as valid upto 31-03-2017. This Regulation is accordingly curtailed upto 31.03.2017 by the Commission in exercise of the powers conferred on it under section 181 read with section 61, 62 & 86 (1) (b) of Electricity Act and clause 55 of Regulation 1 of 1999 referred to above. Consequently, the Order of the Commission dated 30.03.2017 in O.P. No. 15 of 2017 (issued suo-motu computing generic tariff for wind power projects) stands nullified with effect from 01.04.2017, means it ceases to exist in the eyes of law from that date.

8.24 However, this Regulation will continue to be applicable to all the PPAs which were entered into upto 31-03-2017 and approved by the Commission. Any PPAs entered into after 31-03-2017 will be subject to determination of project specific wind tariff by taking into all the relevant factors and on the merits of each case. Thus, the issues mentioned at Sl. No. I & III at para-6 above are decided in the affirmative i.e. in favour of the petitioners.

8.25 Here, it is appropriate to refer to the decision of the Commission in it's Order dated 30-03-2017 in O.P.No.15 of 2017 (SUO-MOTU) in the matter of notifying the generic preferential tariff applicable from 01- 04-2017 to 31-03-2018 in respect of Wind Power Projects in the State of Andhra Pradesh pursuant to clause 6 of Regulation 1 of 2015. Wherein, it was specifically mentioned that, "this order is subject to any further or final orders that may be passed by the Andhra Pradesh Electricity Regulatory Commission in accordance with law in O.P.NO.5 of 2017 and O.P.No.1 of 2017 on its file and on the letters / communications received by the Commission and clubbed with the said Original Petitions 5 of 2017 and 1 of 2017 and any other orders that may be passed in any matter incident or ancillary thereto". Hence, if any wind power generator has made any investment / signed PPA after 01-04-2017 in any wind power project he is fully aware of the consequences of the above order of the Commission."

57. In O.P.No.17 of 2019, the DISCOMs prayed for the following reliefs:

"i. To amend the regulation 01 of 2015 by specifying the reduced norms and Parameters as follows:

a. Capacity Utilization Factor (CUF): 26.5%
b. Return on Equity (ROE): 14%
c. Loan Tenure: 13 years
d. Interest on term loan: 9.23%
e. Depreciation: 5.28% (13 years) (Remaining spread for the balance period considering 10% salvage value)
f. Interest on Working Capital: 11.66%

ii. To pass orders amending the Wind Power tariff determined vide orders dated: 01.08.2015 & 26.03.2016 respectively considering the amended norms and parameters in the regulation 01 of 2015.

iii. To pass orders effecting the reduced/amended tariff in the PPAs entered by APDISCOMs with the Wind Power generators, post issuance of Regulation 01 of 2015."

58. The above reliefs were claimed on the ground that most of the Wind projects were commissioned during the above said period being used with advanced technology machines with increased hug heights and rotor diameter for more efficiency, which was taken note of by the Commission in its RE Tariff Regulations, 2017 including dynamic changes in the market conditions and adopted reduced financial parameter values and also increase in the CUF due to better technology. The relevant tariff order of concerned year taken by the Commission is applicable for the entire PPA period of 25 years resulting long term unjustified burden on DISCOMs vis-à-vis end consumers. The Commission has taken cognizance of O.P.No.17 of 2019 and issued public notice dated 06.02.2019, inter alia, mentioning that DISCOMs have filed petition seeking to revise the tariff fixed for wind power projects pursuant to Regulation No.1 of 2015 and the Commission has decided to conduct public hearing in this matter.

59. Soon thereafter, the Government of India, Ministry of New and Renewable Energy, issued communication dated 22.02.2019 to the Principal Secretary (Energy), Government of Andhra Pradesh, which reads thus:

" Please find enclosed a copy of representation received from the Indian Wind Turbine Manufacturers Association (IWTMA) dated 19th February 2019 informing that the State utilities of Andhra Pradesh have moved a petition to the State Electricity Regulatory Commission (APERC) for revisiting the

Power Purchase Agreements (PPAs) already signed with wind developers.

In this connection, the Ministry advises that since the contractual agreements are sacrosanct these should not be revisited unless there is a specific provision to do so in the agreement. Further, I would like to mention that revisiting PPAs would shake the confidence of investors in the sector and would adversely affect future bids.

I shall be grateful if you could kindly inform us the reasons for petition seeking review of PPAs."

60. In ***Gujarat Urja Vikas Nigam Limited v. EMCO Limited and another***[16]**,** the Supreme Court, in paragraphs 37 to 40, held thus:

"37. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the first respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.

38. The first respondent knowing fully well entered into the PPA in question which expressly stipulated under Article 5.2 that "the tariff is determined by the Hon'ble Commission vide tariff order for solar based power project dated 29-1-2010".

39. Apart from that both Respondent 2 and the Appellate Tribunal failed to notice and the first respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of Para 5.2 of the PPA:

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[16] **(2016) 11 SCC 182**

"In case, commissioning of solar power project is delayed beyond 31-12-2011, GUVNL shall pay the tariff as determined by the Hon'ble GERC for solar projects effective on the date of commissioning of solar power project or abovementioned tariff, *whichever is lower*."

(emphasis supplied)

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first respondent not being able to commence the generation of electricity within the "control period" stipulated in the First Tariff Order. It also visualised that for the subsequent control period, the tariffs payable to a Projects/power producers (similarly situated as the first respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the first respondent would be entitled only for lower of the two tariffs. Unfortunately, the said stipulation is totally overlooked by the second respondent and the Appellate Tribunal. There is no whisper about the said stipulation in either of the orders.

40. The first respondent has created enough confusion. While on one hand the first respondent asserted a right to seek determination of a separate tariff independent of the tariff fixed under the First Tariff Order in view of the stipulation contained in the First Tariff Order that "for a project that does not get such benefit, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts" did not seek a relief before the second respondent to determine a separate tariff but claimed the benefit of the Second Tariff Order. Assuming for the sake of argument that the petition filed by the first respondent (1270/2012) is to be treated as an application for determination of separate tariff which would be identical with the tariff fixed under the Second

Tariff Order, whether the first respondent would be entitled for such a relief depends, if at all he is entitled to seek such a determination, on a consideration of "all the relevant facts" but not by virtue of the operation of the Second Tariff Order.

61. In ***Tarini Infrastructure Limited and ors.*** (supra), the Hon'ble Supreme Court, in paragraphs 12 and 16, held thus:

"12. While Section 61 of the Act lays down the principles for determination of tariff, Section 62 of the Act deals with different kinds of tariffs/charges to be fixed. Section 64 enumerates the manner in which determination of tariff is required to be made by the Commission. On the other hand, Section 86 which deals with the functions of the Commission reiterates determination of tariff to be one of the primary functions of the Commission which determination includes, as noticed above, a regulatory power with regard to purchase and procurement of electricity from generating companies by entering into PPA(s). The power of tariff determination/fixation undoubtedly is statutory and that has been the view of this Court expressed in paras 36 and 64 of *A.P. TRANSCO* v. *Sai Renewable Power (P) Ltd.* [*A.P. TRANSCO* v. *Sai Renewable Power (P) Ltd.*, (2011) 11 SCC 34] This, of course, is subject to determination of price of power in open access (Section 42) or in the case of open bidding (Section 63). In the present case, admittedly, the tariff incorporated in PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers. In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. Rather, it is a determination made in the

exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved."

16. When the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life (20 years) as has been envisaged by Clause 4.6 of PPA in the case of Junagadh. That apart, modification of the tariff on account of air-cooled condensers and denying the same on account of claimed inadequate pricing of biogas fuel is itself contradictory."

(emphasis supplied)

62. In ***Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Private Limited*** (supra), the Hon'ble Supreme Court has referred to the earlier judgments in ***Gujarat Urja Vikas Nigam Limited v. EMCO Limited and another*** (supra) and ***Tarini Infrastructure Limited and ors*** (supra), to hold thus in paragraphs 31, 60 and 66:

"31. Having referred to the above decisions, we shall now make an independent endeavour to analyse the present case in the context of factual matrix and the relevant statutory provisions. An amendment to tariff by the Regulatory Commission is permitted under Section 62(4) read with Section 64(6) of the Act. Section 86(1)(*a*) clothes the Commission with the power to determine the tariff and under Section 86(1)(*b*), it is for the Commission to regulate the price at which electricity is to be procured from the generating companies. Section 86(1)(*e*) deals with promoting co-generation and generation of electricity from renewable sources of energy. Therefore, there cannot be any quarrel with regard to the power conferred on the Commission with regard to fixation of tariff for the electricity procured from

the generating companies or amendment thereof in the given circumstances."

60. In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between GUVNL and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs 15 per unit for twelve years, the first respondent should commission the solar PV power project before 31-12-2011. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, the Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers.

"66. In *Gujarat Urja Vikas Nigam Ltd.* v. *EMCO Ltd.* [*Gujarat Urja Vikas Nigam Ltd.* v. *EMCO Ltd.*, (2016) 11 SCC 182 : (2016) 4 SCC (Civ) 624] , facts were similar and the question of law raised was whether by passing the terms and conditions of PPA, the respondent can assail the sanctity of PPA. This Court held that power producer cannot go against the terms of the PPA and that as per the terms of the PPA, in case, the first respondent is not able to commence the generation of electricity within the "control period" the first respondent will be entitled only for lower of the tariffs."

63. The legal position which emerges on the basis of the above three judgments is that the tariff once determined can be amended by the

Regulatory Commission in exercise of powers under Section 62(4) read with Section 64(6) and Section 86(1)(a) and (b). In ***Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Private Limited*** (supra), the Hon'ble Supreme Court considered the judgment in ***Tarini Infrastructure Limited*** (supra), in paragraph 31, but still proceeded to make an endeavour to analyse the case in the context of factual matrix and the relevant statutory provisions to conclude the paragraph that there cannot be any quarrel with regard to the power conferred on the Commission with regard to fixation of tariff for the electricity procured from the generating companies or amendment thereof in the given circumstances. Similarly, in paragraphs 65 and 66, sanctity of PPAs has been highlighted, holding that sanctity of PPAs entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission and that terms of PPAs are binding on both the parties equally.

64. While that being so, in the case at hand, we are faced with not only prayer for revision/reduction of tariff, but also to amend Regulation No.1 of 2015 by amending the parameters. The issue, therefore, is not merely about Commission's power to amend tariff, but we are also required to consider whether amendment of the Regulation which has now ceased to remain in force for the petitioner power producers, can be allowed and whether such power exists with the Commission in the given factual matrix and circumstances.

65. The first relief prayed for in O.P.No.17 of 2019 seeks to amend the parameters of Regulation No.1 of 2015. The Regulation has been enacted as a subordinate legislation, which has already expired after 31.03.2017 in view of the order passed in O.P.No.5 of 2019. The Control Period having already been curtailed, Regulation No.1 of 2015 has already expired. Therefore, its operational life and parameters cannot be amended post its expiry. The APERC, while deciding the matter of according consent to 41 PPAs, rejected the request of the DISCOMs not to grant consent and disallowed the request to withdraw the said 41 PPAs. In its order dated 13.12.2017, the Commission approved the sanctity of the PPAs. The DISCOM has not appealed against the said order. Therefore, the same is binding between the parties. All the 41 Wind Developers are party to the present proceedings. As earlier referred in the preceding paragraphs of this judgment, the DISCOM made a prayer to withdraw consent to 41 PPAs on the same ground on which O.P.No.17 of 2019 is preferred. The DISCOM, having not preferred any appeal in the matter of 41 PPAs, is estopped from raising the same contentions once again by preferring another O.P. It is very significant to note that in O.P.No.5 of 2017 also, the DISCOM not only prayed for curtailment of the Control Period of the Regulation, but also prayed to determine the tariff for FY 2017-18 considering emerged facts in the petition and market discovered price and formulating appropriate parameters. This prayer having not been considered and granted, it is impliedly rejected by the Commission. Once again, DISCOM has not preferred any appeal against the order passed in O.P.No.5 of 2017 refusing to allow the second relief. Both the orders would, therefore, operate as

*res judicata* and the same issue between the same parties cannot be adjudicated time and again. Regulation No.1 of 2015 was noted by the Commission duly setting out the parameters for determination of generic levellized tariff for Wind Power Projects. Subsequently, through separate proceedings, the Commission determined and issued two Tariff Orders, relying on which the DISCOM and the developers have executed PPAs duly concluded through public hearings.

66. In ***Tarini Infrastructure Limited and ors*** (supra), it is observed that "when the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life". Thus, Tariff Order itself, being subject to periodic review, was the main guiding factor in the matter of ***Tarini Infrastructure Limited and ors*** (supra), whereas in the case at hand, in the Tariff Order No.3 of 2015 (suo-motu) dated 01.08.2015 and the Tariff Order in O.P.No.13 of 2016 (suo-motu) dated 26.03.2016, no such power is reserved by mentioning in the Tariff Orders that the same is subject to period review. For facility of reference, Tariff Order No.3 of 2015 is reproduced as hereunder:

> "Accordingly, the parameters taken into consideration as per the Regulation No. 1 of 2015 for determination of tariff are as hereunder:

| | **Parameter** | **Value** |
|---|---|---|
| A | Tariff Period | 25 years |

| | | |
|---|---|---|
| B | Useful Life | 25 years |
| C | Capital Cost | Rs.600 lakhs/MW (including evacuation cost) |
| D | O & M Expenses | Rs.8.57 lakhs / MW |
| E | O & M Expenses' Escalation | 7.52% p.a. |
| F | Depreciation for the first 10 years | 7% p.a. |
| G | Depreciation for the remaining useful life of the plant | 1.33 % p.a. |
| H | Capacity Utilization Factor (CUF) | 23.5% |
| I | Return on Equity | 16% |
| J | Interest Cost on Debt | 13% |
| K | Tenure of Loan | 10 years |
| L | Interest on Working Capital | 13.5% |
| K | Debt Equity Ratio | 70 : 30 |
| L | Discount Rate | 10.81% |

Based on the above parameters and considering the useful life of the Wind Power Plants as 25 years, the levelised generic preferential tariff works out to Rs.4.83 / unit without considering the accelerated depreciation and Rs.4.25 with accelerated depreciation. The Commission accordingly, notifies the levelised generic preferential tariff as follows:

| **Tariff without AD benefit** | **Tariff with AD benefit** |
|---|---|

| | |
|---|---|
| Rs.4.83 | Rs.4.25 |

This tariff shall be applicable for all the new wind power projects entering into Power Purchase Agreements (PPA) on or after the date of notification of the Regulations in the Official Gazette of the Govt. of Andhra Pradesh i.e., 31-07-2015. This order is signed, dated and issued by the Andhra Pradesh Electricity Regulatory Commission."

- Tariff Order in O.P.No.13 of 2016 (suo-motu) dated 26.03.2016 is reproduced as hereunder:

| **Sl.No.** | **Parameter** | **Value** |
|---|---|---|
| 1. | Tariff Period | 25 years |
| 2. | Useful Life | 25 years |
| 3. | Capital Cost | Rs.600.9 lakhs/MW (including evacuation cost) |
| 4. | O & M Expenses | Rs.9.06 lakhs |
| 5. | O & M Expenses' Escalation | 5.72% p.a. |
| 6. | Depreciation for the first 10 years | 7% p.a. |
| 7. | Depreciation for the remaining useful life of the plant | 1.33 % p.a. |
| 8. | Capacity Utilization Factor | 23.5% |
| 9. | Return on Equity | 16% |
| 10. | Interest Cost on Debt | 12.76% |
| 11. | Tenure of Loan | 10 years |
| 12. | Interest on Working | 13.26% |

| | | |
|---|---|---|
| | Capital | |
| 13. | Debt Equity Ratio | 70: 30 |
| 14. | Discount Rate | 10.64 |

Based on the above parameters and considering the useful life of the Wind power Plant as 25 years, the levelised generic preferential tariff works out to Rs.4.84 per unit without considering the Accelerated Depreciation and Rs.4.25 per unit with Accelerated Depreciation as tabulated below.

| **Tariff without AD benefit** | **Tariff with AD benefit** |
|---|---|
| Rs.4.84 | Rs.4.25 |

The above tariff shall be applicable for all the new Wind Power Projects entering into Power Purchase Agreements (PPA's) with AP Discoms on or after 01-04-2016."

67. The Power Purchase Agreement entered between the parties, sample copy of which is a part of material papers, has also fixed the tariff in Article 2.2 for 25 years without mentioning that the same is subject to periodic review. Article 7 of the PPA deals with Duration of Agreement specifically mentioning that the PPA shall continue in force for 25 years commencing from the date of commercial operation and can be renewed for such period of time and on such terms and conditions as may be mutually agreed upon by the parties subject to consent of the APERC. It is mentioned at the last of Article 7 that any and all incentives/conditions envisaged in the Articles of this Agreement are subject to modification

from time to time as per the directions of APERC. However, it does not speak about the modification of tariff, but it only says about the incentives and conditions. Although clause 5 of the introductory part of the PPA provides that the terms and conditions of the agreement are subject to the provisions of the 2003 Act and the amendments made to the Act from time to time and also subject to regulation by APERC, however, as observed by the Hon'ble Supreme Court in ***Tarini Infrastructure Limited and ors.*** (supra), there is no express condition in the PPA or in the Tariff Order that the same is subject to periodic review. Unless Tariff Order itself is subject to periodic review, general recital in the agreement that the terms and conditions of the agreement are subject to modification from time to time as per the direction or subject to regulation by the APERC, would not clothe the APERC with the jurisdiction to retrospectively amend the Regulation/parameters so as to reduce the tariff.

68. Determination of tariff at a particular point of time is based on the Wind Power Policy of the Government, both Central and State as also other nodal agencies at the relevant point of time and the prevailing market conditions and a host of other factors. If the Tariff Order is subject to review, as and when some parameter or some market condition is changed, then, there will be policy uncertainty discouraging the investors, including global investors to come forward for development of renewable energy, which is one of the thrust areas to reduce carbon emission and global warming.

69. Although in paragraph 18 of in ***Tarini Infrastructure Limited and ors.*** (supra), it was held that court must lean in favour of flexibility and not read inviolability in terms of the PPA insofar as the tariff stipulated therein as approved by the Commission is concerned, however, later, when the judgments in ***Gujarat Urja Vikas Nigam Limited v. EMCO Limited and another*** (supra) and ***Bangalore Electricity Supply Co. Ltd. v. Konark Power Projects Ltd.*** [17], were brought to the notice of the Hon'ble Supreme Court, in the matter of ***Tarini Infrastructure Limited and ors.*** (supra), it was observed thus in paragraphs 20, 21 & 22:

> "20. Before parting, a word about the recent pronouncements of this Court in *Gujarat Urja Vikas Nigam Ltd.* v. *EMCO Ltd.* [*Gujarat Urja Vikas Nigam Ltd.* v. *EMCO Ltd.*, (2016) 11 SCC 182 : (2016) 2 Scale 75] and *Bangalore Electricity Supply Co. Ltd.* v. *Konark Power Projects Ltd.* [*Bangalore Electricity Supply Co. Ltd.* v. *Konark Power Projects Ltd.*, (2016) 13 SCC 515 : (2015) 5 Scale 711] , relied upon by the appellant. <u>All that would be necessary to note in this regard is the context in which the bar of a review of the terms of a PPA was found by this Court in the above cases</u>.
>
> 21. In *Gujarat Urja Vikas Nigam Ltd.* v. *EMCO Ltd.* [*Gujarat Urja Vikas Nigam Ltd.* v. *EMCO Ltd.*, (2016) 11 SCC 182: (2016) 2 Scale 75] the power purchaser sought the benefit of a second tariff order made effective to projects commissioned after 29-1-2012 (the power purchaser had commissioned its project on 2-3-2012) though under PPA it was to be governed by the first tariff order of January 2010. Under the first tariff order for such projects which were not commissioned on or before the date fixed under the said order, namely, 31-11-2011

[17] **(2016) 13 SCC 515**

> the tariff payable was to be determined by the Gujarat Electricity Regulatory Commission. The power producer in the above case did not seek determination of a separate tariff but what was sought was a declaration that the second tariff order dated 27-1-2012 applicable to PPA(s) after 29-1-2012 would be applicable. It is in this context that this Court had taken the view that the power producer would not be relieved of its contractual obligations under PPA.
>
> 22. In *Bangalore Electricity Supply Co. Ltd.* v. *Konark Power Projects Ltd.* [*Bangalore Electricity Supply Co. Ltd.* v. *Konark Power Projects Ltd.*, (2016) 13 SCC 515 : (2015) 5 Scale 711] , this Court held that it was beyond the power of the State Commission to vary the tariff fixed under the approved PPA in view of the specific provisions in Regulations 5.1 and 9 of the KERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2004 and 2011 respectively as the same specifically excluded PPA concluded prior to the date of notification of the Regulations in question."

70. Therefore, the judgment in ***Tarini Infrastructure Limited and ors.*** (supra), also underlines and gives due importance to the context in which the power of review of the terms of the PPA was found by the Supreme Court in its previous judgments. It was further noticed that it was beyond the power of the State Commission to vary the tariff fixed under the approved PPA, in view of specific provisions in Regulation 5.1 and 9 of the KERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2004 and 2011, as the same specifically excluded PPA concluded prior to the date of notification of the Regulation in question. (*Bangalore Electricity Supply Co. Ltd.* Supra)

71. In the case at hand also, the Commission, in its order dated 13.07.2018 in O.P.No.5 of 2017, while curtailing the period of Regulation, held that this Regulation will continue to be applicable to all the PPAs which were entered into upto 31.03.2017 and approved by the Commission with further specific order that PPAs entered into after 31.03.2017 will be subject to determination of project specific wind tariff by taking into account all the relevant factors and on the merits of each case. Meaning thereby, the tariff fixed prior to 31.03.2017 under the parameters laid down in Regulation No.1 of 2015 shall continue to govern the PPAs entered into before the said date, but, thereafter, project specific wind tariff shall be binding on all future projects. Thus, the Commission itself, on its judicial side, has passed the order binding the DISCOM of the tariff mentioned in the PPA, against which no appeal has been preferred by the Commission. The judgment rendered by the Hon'ble Supreme Court would thus operate in the context of specific terms of Regulation and the Tariff Order, which is completely distinguishable from the Regulation, Tariff Order, PPAs and subsequent orders of the Commission in 41 PPAs case and O.P.No.5 of 2017. In the case at hand, on the basis of factual matrix and the previous proceedings between the parties, it is not open for the Commission to amend the parameters to reduce the tariff which has already been made operative for 25 years by separate Tariff Orders, without mentioning that they are subject to periodic review. *Ex consequenti,* we have no hesitation in holding that prayer made in O.P.No.17 of 2019 is not maintainable, therefore, the proceedings of O.P.No.17 of 2019 and O.P.No.67 of 2019 on the file of the APERC deserves to be and is hereby quashed.

72. The issue as to whether the authority empowered to make a subordinate legislation and enact the same with retrospective effect has been considered by the Hon'ble Supreme Court in ***Mahabir Vegetable Oils (P) Ltd and Anr. v.State of Haryana and Ors.*** [18], ***Vice-Chancellor, M.D. University, Rohtak v. Jahan Singh*** [19] and ***State of Rajasthan and Ors. v. Basant Agrotech (India) Limited*** [20]. The said judgments can profitably be referred on this score. The following has been held in paragraphs 39 and 53 in ***Basant Agrotech (India) Limited*** (supra).

> "39. From the aforesaid, it is luculent that the language used therein is quite different. In the case at hand, Section 16 uses the words "from time to time". Even if we accept the submission of the learned counsel for the State that the words "time to time" are redundant, the provision does not remotely suggest to have conferred power on the State Government to make rules with retrospective effect. In fact, the aforestated decision was cited with immense aplomb during the course of hearing that words "time to time" empower the State Government or the delegate to make the rules retrospectively. It may be noted, that despite so much gloss put on the said proposition in the written note of submission, there is a real departure but we think, and we should, that the original submission made in the course of hearing deserves to be dealt with."
>
> "53. Thus, the conspectus of authorities and the meaning bestowed in the common parlance admit no room of doubt that the words "from time to time" have a futuristic tenor and they do not have the etymological potentiality to operate from a

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**[18] (2006) 3 SCC 620**
**[19] (2007) 5 SCC 77**
**[20] (2013) 15 SCC 1**

previous date. The use of the said words in Section 16 of the Act cannot be said to have conferred the jurisdiction on the State Government or delegate to issue a notification in respect of the rate with retrospective effect. Such an interpretation does not flow from the statute which is the source of power. Therefore, the notification as far as it covers the period prior to the date of publication of the notification in the Official Gazette is really a transgression of the statutory postulate. Thus analysed, we find that the view expressed by the High Court on this score is absolutely flawless and we concur with the same. We may reiterate for the sake of clarity that we have not adverted to the defensibility of the analysis from other spectrums which are founded on the principles set forth in *Kesoram case* [*State of W.B.* v. *Kesoram Industries Ltd.*, (2004) 10 SCC 201] as the matter has been referred to a larger Bench and the lis in these appeals fundamentally pertains to the retrospective applicability of the notification issued by the State Government as regards the rate of cess on the major mineral i.e. rock phosphate."

73. In ***Binani Zinc Limited v. Kerala State Electricity Board and others***[21], the Hon'ble Supreme Court has held that any amendment of the tariff would amount to fixation of tariff in a retrospective manner, which is not permissible. It is observed thus in paragraph 36 of the judgment:

"36. The Commission has been empowered to frame tariff. It has, however, not been empowered to frame tariff with retrospective effect so as to cover a period before its constitution. The matter might have been different if such a power had been conferred on the Commission. It is now a well-settled principle of law that the rule of law inter alia

[21] **(2009) 11 SCC 244**

> postulates that all laws would be prospective subject of course to enactment of an express provision or intendment to the contrary."

74. The case of solar power generators vis-à-vis challenge to the APERC's petition vide O.P.No.67 of 2019 appears to be on a stronger footing for the reason that indisputably the tariff for this group of developers was discovered through competitive bidding under Section 63 of the 2003 Act. The said provision stipulates that notwithstanding anything contained in Section 62 of the 2003 Act, appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. After the competitive bidding process is finalized, the DISCOM, after being satisfied that the tariff quoted by the solar power developers was aligned with the price at which it was willing to purchase solar power, accepted the bid and filed a petition before the Commission for adoption of tariff in accordance with Section 63 of the Act. The Commission after applying its mind and on being satisfied with the legitimacy of the transparent competitive process being followed, adopted the tariff under Section 63 of the 2003 Act vide its letter dated 21.02.2015. It is, therefore, not open for the parties and for the Commission as well to undo the tariff discovered through competitive bidding process under Section 63 of the 2003 Act. On this score, it would be profitable to refer to the law laid down by the Hon'ble Supreme Court in ***Har Shankar and Ors.***

***v. Dy. Excise and Taxation Commissioner and Ors.*** [22], wherein, the following has been laid down in paragraph 16:

> "16. Those interested in running the country liquor vends offered their bids voluntarily in the auctions held for granting licences for the sale of country liquor. The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations

[22] **(1975) 1 SCC 737**

> arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force.

75. It was argued on behalf of the respondents that in the absence of competitive bidding guidelines issued by the Central Government, the tariff discovered through competitive bidding process cannot be said to be under Section 63 of the 2003 Act, though it may be a result of bidding process. On this issue, it would be appropriate to refer that at the time when competitive bidding was conducted in the present case, the draft tariff guidelines were already circulated by the Central Government, which were later on finalized without any change. The Division Bench of Gujarat High Court, dealing with a similar situation in the matter of ***Indian Wind Energy Association v. Gujarat Urja Vikas Nigam Limited***[23], held thus:

> "It is not in dispute that there are draft guidelines issued by the Ministry of Power. Before undertaking bidding process for determination of tariff under Section 63 of the Act, order No. 2 of 2016 is passed by the Gujarat Electricity Regulatory Commission. In the order itself, while determining tariff at Rs. 4.19 kWh, the Commission has observed that as per the provisions of the Tariff policy, procurement from renewable energy projects by distribution licensees is recommended through competitive bidding to keep the tariff low and it is specifically observed in the said order that it is open for the distribution licensees to approach the Commission for adoption of the tariff discovered through competitive bidding process. It is also observed that in such cases, tariff determined by the

[23] **AIR 2018 Guj 42**

Commission in the order No. 2 of 2016 will act as a ceiling tariff."

"Draft guidelines issued by the Ministry of New and Renewable Energy itself recognizes that in case of ongoing bidding process, if the bids have already been submitted by bidders prior to the notification of the Guidelines and/or SBDs, and if there are any deviations between the Guidelines and/or the SBDs and the proposed RfS, PPA, PSA (if applicable), the RfS, PPA and the PSA shall prevail. In view of such guidelines, it cannot be said that 1st respondent cannot undertake competitive bidding process for determination of tariff in exercise of powers under Section 63 of the Act, more particularly in absence of any provisional or final guidelines. If at all any final guidelines are not issued, provisional guidelines can be acted upon. Policy framed under Section 3 of the Act is general policy by the Central Government and in view of availability of draft guidelines issued by the Ministry of New and Renewable Energy, it cannot be said that no bidding process could be undertaken by the 1st respondent. Such process undertaken is in the interest of consumers and even tariff order passed by 3rd respondent Commission in Order No. 2 of 2016 also clearly recommends for taking steps for competitive bidding process by the licensees as contemplated under Section 63 of the Act. In view of draft guidelines, powers conferred under Section 63 and the functions of the Commission as contemplated under Section 86 of the Act, it cannot be said that such process undertaken by the 1st respondent is without any authority of law."

76. The present is also a case where the bidding process was conducted during operation of the draft guidelines. Therefore, agreeing with the law laid down by the Division Bench of the Gujarat High Court, we are of the view that the Commission has not committed any error in adopting the tariff

discovered through competitive bidding process under Section 63 of the Act. By issuing public notice, the Commission is now trying to undo the tariff discovered under the process envisaged under Section 63 of the 2003 Act by adopting the procedure prescribed under Section 62 of the 2003 Act, which is not at all permissible. Therefore, in respect of solar developers also, it is declared that the Commission cannot proceed with the hearing of O.P.No.67 of 2019 seeking reduction of the tariff in the PPAs entered with the solar developers.

77. While referring to the poor financial condition of DISCOM, respondents have vehemently argued that it has become imperative for the DISCOM to seek reduction of the tariff on the changed parameters. However, the Hon'ble Supreme Court in a recent judgment in ***Maharashtra State Electricity Distribution Company Limited*** [24] held that DISCOMs would necessarily have to raise funds to clear their contractual obligations, while continuing to get supply of electricity from the generators. The following has been held in paragraphs 196 and 197 of the judgment.

> "196. There being no dispute in the present case with regard to the principal sums due under the monthly bills, interest on delayed payment at 2% in excess of SBI PLR cannot be said to be arbitrarily high. There is no reason for this Court to reduce the contractual rate of interest and thereby alter or modify the contract between the parties, in exercise of its powers under Article 142 of the Constitution of India."
>
> "197. We need not go into the question whether or not the Appellant has funds to clear its interest liability. The Appellant

[24] **2021 SCC ONLINE 913**

cannot continue to get supply of electricity without having appropriate funds. Appellant would necessarily have to raise funds to clear its contractual obligations."

78. It is also to be seen that DISCOMs are realizing energy charges from the consumers. Therefore, the reason for poor financial condition of the DISCOM may be different than the tariff fixed in the subject PPAs.

79. In another recent judgment rendered by the Hon'ble Supreme Court in ***Southern Power Distribution Power Company Limited of Andhra Pradesh & Anr v. M/s. Hinduja National Power Corporation Limited & Anr.*** [25] , it has been held thus in paragraph 105:

"105… As already discussed hereinabove, every decision of the State is required to be guided by public interest and the power is to be exercised for public good. For reasons unknown, the appellants - DISCOMS took a decision to resile from their earlier stand, due to which, not only the huge investment made by HNPCL would go in waste, but also valuable resources of the public including thousands of acres of land would go in waste. As already discussed hereinabove, the reasons/grounds, which are sought to be given in I.A. No. 1 of 2018 in O.P. No. 19 of 2016 and I.A. No. 2 of 2018 in O.P. No. 21 of 2015, filed on 4th January, 2018, were very much available between 2011 till 15th May, 2017. It is not as if something new has emerged between 15th May, 2017 and 4th January, 2018, which would have entitled the appellants - DISCOMS to resile from their earlier stand. We have no hesitation to hold that the appellants - DISCOMS could not be permitted to change the decision at their whims and fancies and, particularly, when it is adversarial to the public interest and public good. The

[25] **2022 SCC OnLine SC 133**

record would clearly show that the change in decision is arbitrary, irrational and unreasonable."

80. For all the above-stated reasons, all the writ appeals in Group-B deserve to be and are hereby allowed. The impugned order passed by the learned single Judge is set aside. The proceedings of O.P.No.17 of 2019 and 67 of 2019 on the file of the APERC are quashed.

**GROUP- C MATTERS**

81. Group-C matters, i.e. W.A.Nos.110, 114, 143, 156, 168, 172, 174, 175, 176, 190 and 191 of 2020, are preferred by Andhra Pradesh State Load Despatch Centre against the order passed by the learned single Judge under the caption **"Curtailment"** holding that curtailment of power for any reason whatsoever cannot be ordered and that all the generators are entitled to a notice before any such action is taken except in a very grave and sudden emergency. The learned single Judge further directed the respondents in the writ petitions not to take any coercive steps of any nature including curtailing production, stopping evacuation or the like except after giving due notice to the generators and as per the PPAs; the Regulation and 2003 Act. W.P.No.11461 of 2021 has been preferred for a similar relief as that of in the writ petitions preferred before the learned single Judge on the issue of curtailment of power. Hence, W.P.No.11461 of 2021 is disposed of along with the present group of writ appeals.

82. Group-D matters are review applications seeking review of the interim order dated 27.01.2020 passed by the Division Bench in different

writ appeals appointing Power System Operation Corporation Limited (POSOCO) to ascertain the reason of curtailment undertaken by the APSLDC from the writ petitioners is in terms, or in contravention of the extant laws, regulations and policies in the context of 'Must Run Status', further directing the parties to submit their claim before the POSOCO and thereafter by appointing experts, report to the extent directed by the Court be prepared by POSOCO and sent to the Registry of this Court for persual within a period of four weeks. The POSOCO has submitted its report, which is available in a sealed cover. However, before the review petitions could be taken up for hearing and orders, all the writ appeals have been heard finally and are being disposed of by this common judgment.

83. Referring to Sections 31, 32 and 33 of the 2003 Act, which deals with constitution of State Load Despatch Centre, functions of State Load Despatch Centre and compliance of directions, it is argued by the learned counsel that SLDC being an independent statutory body, it is required to follow the Grid Code. It is entrusted with the task of ensuring proper and smooth functioning of the Grid, through which electricity is supplied by the generators to the ultimate consumers through the distribution licencees as well as the transmission licencees. It is the function of the SLDC to ensure that there is neither over-injection of power into the Grid as also no overdrawing of power from the Grid, both of which are dangerous to the overall functioning of the Grid. In order to operate the Grid, SLDC maintains a proper scheduling in 15 minute slots to maintain equilibrium between the projected demand and the sources from where such demand is

to be met. The decision taken and orders given to back down power to the generating companies was in keeping with all the factors, which had to be considered at a real-time basis and the same was not based on mala fides or colourable exercise of power. It is further argued that SLDC is no way connected with the dispute between the generators and DISCOMs. The directions for curtailment or backing down are issued under Section 33(1) of the 2003 Act, the Indian Electricity Grid Code, 2010 and the Andhra Pradesh Code of Technical Interface.

84. Referring to paragraph 4.3.5 of the Andhra Pradesh Code of Technical Interface, it is argued that despatch instructions are required to be issued by e-mail/telephone confirmed by exchange of names of operators sending and receiving the same and logging the same at each end. All such oral instructions shall be complied with forthwith and written confirmation shall be issued promptly by fax, tele-printer or otherwise. Thus, there is no provision for prior notice to the generators as has been directed by the learned single Judge and it is not possible also to issue such prior notice, because the decision for backing down or curtailment is taken on a real-time basis. The Grid Safety norms have supremacy over the Must Run Status and as a matter of fact, solar and wind power generators are also not constant and their power generation also varies depending upon climatic conditions.

85. It is also argued that curtailment is applied for Grid safety as a last resort and occasions arising Grid safety cannot be predicted; therefore, action cannot be deferred for prior notice. It is also argued that technical

issues need not be entertained under Article 226 of the Constitution of India and it should be left to be decided by the Commission, as reiterated by the Hon'ble Supreme Court in ***West Bengal Electricity Regulatory Commission v. CESC Ltd.***[26], also reiterated in ***Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Limited and others*** [27]. Reference is also made to the judgments of the Hon'ble Supreme Court in ***Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Gauhati and Ors.***[28], ***Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central-I and Anr.***[29] and ***U.P. State Road Transport Corporation and another v. Mohd. Ismail and others***[30].

86. Per contra, learned counsel for the respondents/writ petitioners would strenuously urge that the curtailment orders were issued immediately after interim orders were passed by this Court compelling the writ petitioners to prefer I.A.No.9 of 2020, which was allowed directing respondents to restore the last uncontested position/status quo ante and directing the A.P. Transco. To immediately reconnect the applicants' wind power project to the State Grid at the approved temporary connection point (Borampalli Sub Station) and allow the petitioners to continue to supply power to ASPDCL as before.

87. It is further argued that learned single Judge has only directed the SLDC to follow principles of natural justice and abide by law, against which SLDC should not have any grievance. Referring to the notice dated 01.06.2021, which is part of material papers in W.P.No.11461 of 2021, it is

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**[26] (2002) 8 SCC 715**
**[27] (2011) 12 SCC 400**
**[28] (2015) 8 SCC 519**
**[29] (2008) 14 SCC 151**
**[30] (1991) 3 SCC 239**

argued that SLDC has issued notice before curtailment, therefore, the argument that issuance of prior notice is not possible, is contrary to their own actions and is factually not correct. It is always feasible to issue notice, unless grave and sudden emergency exists, as has been observed by the learned single Judge. Arguing that subsequent event which occurs during pendency of the writ petition can always be taken into consideration in moulding the relief, learned counsels would refer to the judgments of the Hon'ble Supreme Court in ***Hukum Chandra (dead) through L.Rs. v. Nemi Chand Jain and Ors.***[31] and ***Om Prakash Gupta v. Ranbir B. Goyal***[32].

88. According to the learned counsel for the respondents/writ petitioners, the power curtailed after issuance of backing down instructions to one of the solar power generators, was in fact purchased from thermal power generators, which is not at all permissible as wind and solar power generators should be allowed to operate on Must Run Basis. In all cases where curtailment was made necessitating filing of interim application, there was no issue of Grid safety and the same was done in a routine manner, only to coerce the writ petitioners for the reason that they have approached this Court under Article 226 of the Constitution of India.

89. While dealing with curtailment issue, learned single Judge has observed that there being cases of abrupt disconnection of a generator to a sub-station from which the generated power is evacuated, interim order was passed in I.A.No.9 of 2020 on 25.07.2019, restraining SLDC from taking any coercive steps, but steps continued to be taken without obtaining

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[31] **(2019) 13 SCC 363**
[32] **(2002) 2 SCC 256**

permission from the court. Learned single Judge has further observed that the terms of the contract have to be honoured and the State cannot give a direction to the DISCOMs or to the generators that the price is high and in any case, the issue is to be dealt with by the appropriate authority and the respondents cannot use tactics like curtailment or backing down. Learned single Judge, therefore, directed that no coercive steps be taken including curtailment of production, stopping evacuation or the like except after giving due notice to the generators and as per the PPAs, Regulations and the 2003 Act.

90. The issue of curtailment is a part of Grid Code and the Regulations made thereunder. The Central Electricity Regulatory Commission has notified, by way of Gazette Notification dated 28.04.2020, the Regulations namely Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 (in short, "the Regulations, 2010). The preamble to the Regulation states that the Indian Electricity Grid Code (IEGC) is a regulation made by the Central Commission in exercise of powers under clause (h) of sub-section (1) of Section 79 read with clause (g) of sub-section (2) of Section 178 of the 2003 Act. It further says, IEGC also lays down the rules, guidelines and standards to be followed by various persons and participants in the system to plan, develop, maintain and operate the power system, in the most secure, reliable and economic and efficient manner, while facilitating healthy competition in the generation and supply of electricity.

91. Part-5 of the Regulations, 2010 makes provision under the caption "Operating Code".

Clause 5.2 (u), which provides for special requirements for solar/wind generators, reads as under:

"(u) Special requirements for Solar/ wind generators

System operator (SLDC/ RLDC) shall make all efforts to evacuate the available solar and wind power and treat as a must-run station. However, System operator may instruct the solar /wind generator to back down generation on consideration of grid security or safety of any equipment or personnel is endangered and Solar/ wind generator shall comply with the same. For this, Data Acquisition System facility shall be provided for transfer of information to concerned SLDC and RLDC

(i) SLDC/RLDC may direct a wind farm to curtail its VAr drawl/injection in case the security of grid or safety of any equipment or personnel is endangered.

(ii) (ii) During the wind generator start-up, the wind generator shall ensure that the reactive power drawl (inrush currents in case of induction generators) shall not affect the grid performance."

92. Part-VI of the Regulations, 2010 makes provision regarding Scheduling and Despatch Code. Clauses 6.5.7 to 11 specifically deal with Despatch Schedule and the priority for evacuation to the power plants which are treated as Must Run Stations, i.e. Renewable Power Plants except for biomass power plants and non-fossil fuel based cogeneration plants. Clauses 6.5.7 to 11 read as under:

"7. By 6 PM each day, the RLDC shall convey:

(i) The ex-power plant "despatch schedule" to each of the ISGS, in MW for different time block, for the next day. The summation of the ex-power plant drawal schedules advised by all beneficiaries shall constitute the ex-power plant station-wise despatch schedule.

(ii) The "net drawal schedule" to each regional entity , in MW for different time block, for the next day. The summation of the station-wise ex-power plant drawal schedules from all ISGS and drawal from /injection to regional grid consequent to other long term access, medium term and short-term open access transactions, after deducting the transmission losses (estimated), shall constitute the regional entity-wise drawal schedule.

8. The SLDCs/ISGS shall inform any modifications/changes to be made in drawal schedule/foreseen capabilities, if any, to RLDC by 10 PM or preferably earlier.

9. XXXX

10. The declaration of the generating capability by hydro ISGS should include limitation on generation during specific time periods, if any, on account of restriction(s) on water use due to irrigation, drinking water, industrial, environmental considerations etc. The concerned Load Despatch Centre shall periodically check that the generating station is declaring the capacity and energy sincerely, and is not manipulating the declaration with the intent of making undue money through UI.

> 11. Since variation of generation in run-of-river power stations shall lead to spillage, these shall be treated as must run stations. All renewable energy power plants, except for biomass power plants, and non-fossil fuel based cogeneration plants whose tariff is determined by the CERC shall be treated as 'MUST RUN' power plants and shall not be subjected to 'merit order despatch' principles."

93. A conjoint reading of two provisions quoted above would manifest that SLDC/RLDC is enjoined to make all efforts to evacuate the available solar and wind power and treat as a must-run station. It is also implicit that must-run power plants like solar and wind power plants shall not be subjected to Merit Order Despatch principles. There is no material placed before us by SLDC substantiating that there was any threat to the grid security or safety of any equipment or persons on the occasions when curtailment was ordered to solar and wind power plants. As a matter of fact, there was no such threat in existence, for the simple reason that amount of power curtailed from solar and wind power generators was purchased from thermal power stations, as alleged by solar and wind power generators and not refuted by the DISCOMs.

94. Neither the SLDC nor the DISCOM had responded to the respondents/writ petitioners' allegation that power curtailed from wind and solar generators was purchased from thermal power generators. If that be so, SLDC has violated the Must Run principle, which applies for priority in evacuation of power from solar and wind power generators. The SLDC itself has violated the Grid Code. The fact that there was no curtailment

before the issues brought before this Court surfaced or before the interim order passed by this Court, would itself suggest that curtailment was not on account of Grid safety. Even if there may not be any mala fide on the part of SLDC to direct curtailment or backing down, the fact that it was done without there being any threat to the Grid safety, would itself demonstrate that there was an extraneous reason for directing curtailment. Therefore, petitioners' allegation that it was an outcome of the interim order passed by this Court or to coerce the petitioners, cannot be lightly brushed aside or rejected. Solar and wind power generators enjoy priority in evacuation, because as per para 6.5.11 of the Grid Code, Merit Order Discharge does not apply to renewable energy. Curtailment cannot be ordered on the pretext of Grid management or frequency management without there being any threat to the Grid safety.

95. The curtailment issue cropped up during pendency of the writ petitions. Therefore, in most of the writ petitions, it was not the main prayer, but was raised subsequently. In some of the writ petitions, such prayer was made in the relief clause as has been observed by the learned single Judge. The law as to when subsequent event can be taken note of for moulding the relief, has been dealt with by the Hon'ble Supreme Court in ***Om Prakash Gupta*** (supra), wherein the following has been laid down in paragraph 11:

> "11. The ordinary rule of civil law is that the rights of the parties stand crystallized on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the

lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (*i*) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (*ii*) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (*iii*) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise. In *Pasupuleti Venkateswarlu* v. *Motor & General Traders* [(1975) 1 SCC 770: AIR 1975 SC 1409] this Court held that a fact arising after the lis, coming to the notice of the court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the court cannot be blinked at. The court may in such cases bend the rules of procedure if no specific provision of law or rule of fair play is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The Court speaking through Krishna Iyer, J. affirmed the proposition that the court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the Court cautioned: (*i*) the event should be one as would stultify or render inept the decretal remedy, (*ii*) rules of procedure may be bent if no specific provision or fair play is violated and there is no other special circumstance repelling resort to that course in law or justice, (*iii*) such cognizance of subsequent events and developments should be cautious, and (*iv*) the rules of fairness to both sides should be scrupulously obeyed."

96. Once again, in ***Hukum Chandra*** (supra), quoting ***Om Prakash Gupta*** (supra) and ***Ramesh Kumar v. Kesho Ram*** [(1992) Supp (2) SCC 623], the Hon'ble Supreme Court has held thus in paragraph 16:

> 16. The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtained at the commencement of the litigation. Whenever, there is subsequent events of fact or law, which have a material barring on the rights of the parties to relief or on the aspects of moulding appropriate relief to the parties, the court is not precluded from taking cognizance of the subsequent changes of fact and law to mould the relief."

97. The fact that SLDC has not faced any problem during the last 2 ½ years, i.e. after 24.09.2019 when the impugned order has been passed by the learned single Judge, would itself demonstrate that issuance of prior notice before curtailment or backing down is possible and, in fact, one such notice has been filed by the petitioners as part of material papers in W.P.No.11461 of 2021.

98. In view of the above, we are of the considered opinion that since Merit Order Despatch does not apply to renewable energy, which runs on Must Run Basis, the learned single Judge has not committed any illegality in directing that the respondents shall not take any coercive steps of any nature including curtailing production, stop evacuation or the like except after due notice to the generators. The writ appeals preferred by SLDC against this part of the order passed by the learned single Judge have no merit, deserve to be and accordingly dismissed.

99. Group-D matters are review applications preferred by SLDC challenging the interim order dated 27.01.2020 passed by the Division Bench appointing POSOCO as agency to ascertain the reason of curtailment undertaken by APSLDC. However, since curtailment issue has already been dealt by us while deciding the writ appeals in 'Group C', prayer for review of the interim order dated 27.01.2020, has become infructuous. It is academic or infructuous also for the reason that while deciding the writ appeals, we have not referred to the Expert Report by POSOCO in terms of the interim order under review. Accordingly, all the review applications are dismissed as infructuous.

**OPERATIVE PORTION**

100. Based on the above discussion, we hold that W.A.Nos.383, 384, 393, 424, 433, 435, 436, 440, 441, 447, 463, 477 of 2019, W.A.Nos.6, 70, 75, 138 of 2020 and W.A.Nos.880, 910, 935 and 936 of 2021 forming part of Group-A, are allowed and the order passed by the learned single Judge fixing the interim rate or interim tariff of Rs.2.44p for solar power and Rs.2.43p for wind power and for payment of all the pending and future bills of all the petitioners, is set aside and instead the DISCOM is directed to make payment of all pending and future bills at the rate mentioned in the PPAs. The payment of arrears/pending bills shall be made within a period of six weeks from today.

101. The writ appeals forming part of Group-B, i.e. W.A.Nos.388, 392, 394, 396, 401, 423, 443, 444, 445, 446, 452, 470 of 2019, W.A.No.105 of 2020 and W.A.No.909 of 2021 are allowed and the order passed by the

learned single Judge in the writ petitions is set aside. Consequently, it is directed that proceedings in O.P.No.17 of 2019 and O.P.No.27 of 2019 before the APERC shall stand quashed, by a Writ of Certiorari, being not maintainable.

102. The writ appeals forming part of Group-C, i.e. W.A.Nos.110, 114, 143, 156, 168, 172, 174, 175, 176, 190 and 191 of 2020, preferred by Andhra Pradesh State Load Despatch Centre, are dismissed. W.P.No.11461 of 2021, which is filed questioning the curtailment of power, is disposed of observing that the operative portion of the order passed by the learned single Judge in the writ petitions pertaining to this batch shall apply to this writ petition also.

103. The review applications forming part of Group-D are dismissed as infructuous.

No order as to costs. Pending miscellaneous applications, if any, shall stand closed.

**PRASHANT KUMAR MISHRA, CJ** **NINALA JAYASURYA, J**

MRR