

INDIAN THERMAL POWER LTD. ETC. ETC.

v.

STATE OF M.P. AND ORS.

FEBRUARY 16, 2000

[G.T. NANAVATI AND S.N. PHUKAN, JJ.]

*Electricity (Supply) Act, 1948:*

*Section 43A(2)—Tariff notification—During negotiation of terms of various agreements relating to power projects with private investors pursuant to Policy Decision of the Government to privatise the power sector—Effect of, on the ongoing negotiations—After the issue of tariff notification, Central Government suggested to give priority to those projects offering least tariff so as to ensure benefit of capacity addition from such projects in the 9th Five Year Plan—Electricity Board decided to prioritise the projects for providing escrow protection mainly on the basis of least tariff criterion—Held, decision of Board not arbitrary or unreasonable—Board was also entitled to alter the terms of escrow agreement as there was no statutory obligation under Section 43 or 43-A of the Act to maintain escrow account—Although Power Purchase Agreements were concluded contract, but there was no obligation under PPA to execute escrow agreement at a date prior to the first unit commercial operation date—Tariff criteria based on and consistent with the notification issued under Section 43-A(2) cannot be described as a hoax, unrealistic or arbitrary—Constitution of India, Articles 298, 299—Policy decision Administrative Law—Arbitrariness.*

*Electricity—Board deciding to give priority to those power projects offering least tariff fixed in accordance with the mandate of such notification—Held, court would not interfere and substitute a different criterion—Constitution of India—Articles 226 and 136—Interference with.*

*Constitution of India—Articles 226 and 136—Decision of Expert Committee—Certain assumption made by it for determining the project costs—Held, if such assumptions based on valid basis and not fanciful or arbitrary—Court would not invalidate such assumptions—Practice and Procedure.*

A *Words and Phrases*—“Statutory contract”—*Meaning of*—*Within the meaning of Contract Act, 1872.*

B Pursuant to liberalisation of the electricity sector by the Government of India, MOUs and Power Purchase Agreements (PPAs) were entered into by the State Government and Madhya Pradesh Electricity Board (MPEB), with independent power producers (IPPs) for establishing the power projects and for sale of entire electricity generated by these projects to MPEB. Under the PPA, MPEB was supposed to open the letters of credit in respect of amounts payable by it. According to the escrow agreement, MPEB was also to maintain escrow account with its bank following the C first commercial operation date of the power projects. Execution of escrow agreement and opening of escrow account subject to conditions of the parties agreeing to the terms and conditions of the proposed escrowable thereof.

D The IPPs were insisting upon escrow coverage/protection and issuance of Letter of Comfort in their favour so as to enable the Financial Institutions (“FIs”) to lend them enough money. MPEB had agreed to cooperate with and assist IPPs in obtaining financial assistance from the FIs by making a provision for different types of securities for payment of its dues to the IPPs. There was no reluctance or refusal on the part of E MPEB to provide escrow coverage to all or as many as possible, but it was not possible for it to issue Letters of Comfort and provide escrow coverage and enter into escrow agreements with all of them as the appellants desired and the FIs required better escrow coverage than the one which the MPEB was willing to provide. The IPPs including the appellants could obtain the F financial closure because of their inability to persuade the FIs to lend them enough money.

G During the course of negotiations between M.P. Government, MPEB and IPPs, Central Government in exercise of its power under Section 43-A(2) of Electricity (Supply) Act issued a notification amending its earlier tariff notification. Under the amended tariff notification and suggestion made by the Government of India to give priority to those projects which offered the least tariff so as to get the benefit of capacity addition from those projects during the 9th Five Year Plan, MPEB decided to prioritise the projects for providing escrow protection mainly on the basis H of least tariff criterion and after considering an optimum mix of liquid

fuel, hydel and coal based projects. The IPPs were also called upon to furnish security deposit of an amount equal to 2% of the approved project cost.

Writ petition was filed by the appellants before the High Court praying for a writ of mandamus directing the respondents to grant escrow facility to it. Similar petitions were filed by other IPPs. A single Judge of the High Court directed the Government and MPEB to take fresh decision. Letter Patent Appeals were filed by the State Government, IPPs and MPEB, and the Division Bench allowed the appeals and dismissed the writ petitions filed by the IPPs. Hence this appeal.

It was contended by the appellants/IPP's that they had entered into PPAs under Sections 43 and 43A of the Electricity Supply Act and as such they were statutory contracts and therefore, MPEB had no power and authority to alter their terms and conditions; that the MOUs and PPAs were concluded contract and therefore, it was not open to MPEB to unilaterally change the conditions of those contracts and to invite fresh bids on the basis of the new least tariff criterion; that MPEB having decided to provide escrow coverage to 4 or 6 IPPs, no need had arisen for it to change that decision, even though it was justified in entering into negotiations for reduction of tariffs.

Disposing of the appeals, this Court

**HELD :** 1.1. Provisions of Sections 43 and 43-A of the Electricity Act indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43-A(2) and notifications issued thereunder. Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render a contract a statutory contract. If entering into a contracts containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory

**A** requirements of Section 43-A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory. [936-A-D]

**B** 1.2. Though MOUs and PPAs were concluded contracts it cannot be said that under those contracts the appellants and other IPPs acquired a legal right and MPEB incurred an enforceable obligation in respect of providing escrow coverage. The provisions of MOUs and PPAs disclose that the obligation to open and maintain an escrow account is to be discharged by MPEB to execute an escrow agreement at an earlier date.

**C** Execution of the escrow agreement and opening of an escrow account are contingent upon an agreement between the parties regarding the terms and conditions of those agreements and accounts. The terms and conditions of the escrow agreement could not be finalised in view of the disagreement of the financial institutions with the terms and conditions suggested by MPEB and some of the appellants and their insistence upon certain other conditions. It was not because of any lack of effort on the part of MPEB. In any case it cannot be said that any legal right in favour of IPPs to have an escrow agreement at that stage had come into existence. Therefore, the question of MPEB going back upon the terms and conditions of the concluded contract does not arise at all. [938-F; H 939-A-C]

**E** 1.3. The Minister of Power, Government of India had drawn the attention of the State Government to the delay in finalising the projects and the need to take a final decision in the matter as early as possible and to the recent amendments to the notifications issued under Section 43-A of the Electricity (Supply) Act. Though the said amendment is prospective it cannot be said that it was totally irrelevant and could not have been taken into consideration by MPEB to seek revision of PPAs by revising better terms from those IPPs who had agreed to undertake the projects. But the situation in which all were placed was such that it was not possible for the MPEB, IPPs and FIs to enter any further agreements regarding escrowable coverage and financial closures. Therefore, the decision of MPEB to invite offers for better terms in its favour by different parameters so as to enable it to prioritise the projects for providing escrow protection based on the least tariff criterion and to decide about the optimum mix of liquid fuel, hydel and coal based projects cannot be said to be unreasonable and arbitrary. [940-B-D]

**F**

**G**

**H**

1.4. The least tariff criterion cannot be said to be a hoax when it is based upon and consistent with the notification issued under Section 43-A(2). To give priority to that project which will supply electricity to MPEB at a cheaper rate far from being regarded as a hoax or as an excuse must be regarded as a rational criterion because it will be more beneficial to the MPEB and the general public who are the ultimate consumers of electricity. The situation in which MPEB was placed at a relevant time justified adopting that criterion and the Court cannot in such matters substitute its opinion and say that it would have been better if a different criterion had been adopted. After the event it may be visualise that it would have been better if a different course was adopted or decision was taken. But that cannot render the decision already taken arbitrary or invalid so long as it is taken *bona fide* and is based upon consideration of relevant aspects. Prioritisation could have been done on the basis of the dates on which Techno-Economic Clearance was sanctioned or it could have been on the basis of the date of sanction given by the financial institutions. If, however, considering all the relevant aspects MPEB thought to prioritise the projects on the basis of the least tariff criterion it cannot be said thereby it acted in an arbitrary or unreasonable manner. It is also not possible to accept the contention that the said criterion was adopted with a view to favour some and rule out others as no material is available on record to justify such an inference. [941-H; 942-A-C]

2. Though it was argued that the Expert Committee, which was constituted for tariff evaluation for the improved offers submitted by IPPs, had made certain wrong and unrealistic assumptions on the basis of which the project cost was to be estimated and the least tariff to be determined, but it would not be proper for this Court to examine in detail the various assumption as they are technical matters and moreover, the techno-economic clearance was given by Central Electricity Authority on the basis of such assumptions. Certain assumptions had to be made while determining the project cost and inviting offers on the basis thereof. Once it is found that there was some valid basis for making these assumptions and that it is found that there was some valid basis for making these assumptions and that they are not fanciful or arbitrary it would not be proper to invalidate the decision taken on the basis of such assumptions. They were made applicable equally in all. The rate of foreign exchange variation was adopted on the basis of the advice of the Ministry of Finance. Having considered all the relevant facts and circumstances it is not possible to

**A** agree with the contention that the least tariff criterion was not a good criterion as it was unrealistic and arbitrary. [942-D; 943-A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1140-43 of 2000 Etc. Etc..

**B** From the Judgment and Order dated 25.6.99 of the Madhya Pradesh High Court in L.P.A. Nos. 106, 111, 71 and 99 of 1999.

C.S. Vaidyanathan, K.N. Rawal, Additional Solicitor General, K.K. Venugopal, Kapil Sibal, K. Parasaran, M.L. Jaiswal, Anoop G. Choudhary, T.R. Andhyarujina, K.S. Cooper, Dushyant Dave, Shanti Bhushan, B. Dutta, H.N. Salve, Dr. Abhishek Singhvi, F.S. Nariman, V.A. Mohta, Raju Ramachandran, Gopal Subramaniam, Subramonium Prasad, Gaurav Aggarwal, Aditi Singh Sameer Vyas, Ms. Bina Gupta, J.S. Goswami, Ms. Seema Sapra, Ms. Vanita Bhargava, Ms. Neena Gupta, P.S. Shroff, Ms. Suparna Srivastava, Ms. Gouri Rasgotra, Ms. Purnima Singh, Suman J. Khaitan Jayant Bhushan, Ashok Kumar Gupta, Bharat Sangal, Ms. Asha Pathak, Anand Pandey, Prasanto Sen, S. Ganesh, S. Vajifdar, P.N. Kapadia, U.A. Rana, Ms. Rashmi, Rajesh Nair, Ms. Shally Maggon, Zubin Behramkamdin, Ms. Alka Bharucha, R.N. Karanjawala, Ms. Nandini Gôre, Vishwanathan, Manik Karanjawala, M. G. Ramachandran, Piyush Sharma, Pramod Dayal, Anand Padmanabhan, Satish K. Agnihotri, Rajendra Singhvi, R. Sasiprabhu, Manish Garg, Sumant Batra, Ms. Asha Barmola, Ms. Manjula Gupta, S.K. Gambhir, Awanish Sinha, Anil Sharma, Krishnanand Pandeya, Dilip Tandon, B. Krishna Prasad, Rajiv Shakdhar, Vipin Nair, P.B. Suresh, Parag Tripathi, Ms. Swathi Singh, Ms. Rakhi Ray, Ms. Monica Sharma, Ravindra Srivastava, Parag Tripathi, N.P. Midha, S.B. Upadhyay, Kevic Setalvad, Prasanto Sen, A. Sapre, Ms. Shobhna Bajaj, Manish Garg and Nikivesh R. Amit Srivastava for the appearing parties.

The Judgment of the Court was delivered by

**G** G.T. NANAVALI, J. Leave granted in all the S.L.Ps.

These appeals arise out of the common judgment of the Division Bench of the Madhya Pradesh High Court in a batch of Letters Patent Appeals (Nos. 70 to 72, 93 to 99, 105, 108 and 117 of 1999 and Writ Petition

**H** No. 1685 of 1998) filed against the common judgment and order of a single

Judge of that Court in Writ Petitions filed by India Thermal Power Ltd. (W.P. 3534/1988), Bhandar Power Ltd. (W.P. 4253/98), G.V.K. Power Ltd. (W.P. 4631/98), S.I.P. Power India Ltd. (W.P. 4694/98), M/s Shahpoorji Pallanji Power Co. Ltd. (W.P. 4742/98), Bhilai Power Supply Co. Ltd. (W.P. 238/98) and Jindal Power Ltd. (W.P. 6175/98).

In the year 1991-92, the Government of India declared a policy of liberalisation in the electricity sector and thereby widened the scope for private participation in generation, distribution and supply of electricity. Pursuant to that policy the State of Madhya Pradesh decided to invite private companies for setting up power plants at different places within the State so as to increase its power generating capacity by about 7000 MW. On 27.2.1992 Madhya Pradesh Electricity Board (MPEB) invited offers from potential private investors for pre qualification in establishment of four power projects. One of them was Thermal Power Project at Korba (West) in the district of Bilaspur. Indian Thermal Power Ltd. (hereinafter referred to as 'ITPL') made an application for establishment of that power plant. After considering its application the Government of Madhya Pradesh made an offer by issuing a letter of intent to ITPL to establish, operate and maintain a power plant at Korba (West) as a generating company. Similar advertisements were issued for other projects also and letters of intent were issued to those who were found qualified. In all 21 MOU's which were entered into between them and the State Government and MPEB. 13 Independent Power Producers (IPPs) entered into Power purchase Agreements (PPAs) with MPEB

Under the MOU and PPA the generating company has to undertake the project and offer for sale all net electrical out-put from the project to MPEB and the MPEB is under an obligation to purchase the same. We are not concerned with the other terms and conditions contained in the agreements and the mutual rights and obligations flowing from them except those relating to method and amount of payment. Article 8 of the PPA provides for the same. In order to secure payment to the IPP the MPEB will have to open one or more Letters of Credit in respect of amounts payable by it. The aggregate of each Letter of Credit shall be an amount necessary to meet two months projected tariff payments. By way of further security Clause (e) of Article 8.3 of ITPL's PPA provides for maintaining an Escrow Account with MPEB's bank at all times following the First Unit

- A Commercial Operation Date, in such for and substance, as may be mutually agreed by the parties. It further provides that such Escrow Account shall be (i) established and maintained by MPEB in accordance with Escrow Agreement and (ii) in form and substance acceptable to the parties. In the PPA's with other IPPs the provision regarding Escrow Account is differently worded. According to these agreements the Company and the MPEB have to cooperate and assist each other in establishing a practicable and appropriate Escrow Account mutually acceptable to the parties as a satisfactory security mechanism for the payment obligations of MPEB. The Escrow Account must take into account reasonable requirements of the lenders of the projects. The amount of the Escrow Account shall have to be the 'Escrow Account Amount' which means the amount equal to one and a half (1.5) times of the estimated average amount payable by MPEB in a Billing period. They do not provide for any Escrow Agreement before opening an Escrow Account. In addition to the Letter of Credit and the Escrow Account, the Article further provided for a guarantee by the Government of Madhya Pradesh.

- In discharge of its obligations under the MOU's and PPA's the Madhya Pradesh Government in December 1997 decided to recommend (1) Daewoo, (2) Pench, (3) Bina, (4) GBL, (5) STI and (6) Maheshwar to the Financial Institutions (FIs) for providing Escrow Protection to them and accordingly letters of comforts were sent to those six IPPs. Meanwhile negotiations were going on between Madhya Pradesh Government, MPEB and the IPPs regarding the terms and conditions of the Escrow Agreement. The Government had proposed to give Escrow Protection equal to one month's invoice. A meeting between Government Officers, MPEB and the Financial Institutions was also held on 5.9.1997 for discussing the issue of escrowable capacity available with MPEB and whether it was possible to reduce Escrow Cover to one month's invoice amount. In that meeting the Government suggested that in order to accommodate more number of IPPs the Escrow Cover may be reduced from 1.5 times to at least 1.2 times. The banks and Financial Institutions accepted the escrowable capacity of MPEB at about 2200 M.W. only and stated that Escrow Cover equal to 1.25 times could be accepted as reasonable. Even for this relaxation it insisted that MPEB shall have to take certain steps to improve its finances. The Financial Institutions also directed that MPEB should indicate to IPPs its ability/inability to provide Escrow Account facility to them so that there

may not remain any misunderstanding in that behalf. After considering various aspects the Financial Institutions decided to consider financial assistance to those four projects which had already received techno-economic clearance by them. IPPs thus approved were Shree Maheshwar Hydel Power Corporation Ltd., Daewoo Power India Ltd., Bina Power Supply Co. Ltd. and GBL Power Ltd. MPEB was requested to issue letters to all those IPPs to take steps to negotiate and achieve financial closure within next two or three months. Therefore, MPEB on 21.12.1997, wrote letters to the four approved IPPs about its decision to recommend them for grant of Escrow Protection and called upon them to finalise the negotiations within one month from the date of the letter and obtain financial closure and start commencement of the project work within three months of the execution of Escrow Agreement. They were told that in case of failure to perform any of the stipulations the Escrow Agreement will stand cancelled.

ITPL received techno-economic clearance from the Central Electricity Authority on 12/15.9.1997. Pursuant to the decision taken in the meeting with the Financial Institutions. MPEB wrote to ITPL on 21.4.1998 that it was considering granting Escrow Protection to them equal to one months' invoice amount and inquired whether ITPL was agreeable to that condition and also to the condition of executing the Escrow Agreement within one month and achieve financial closure within next three months. ITPL expressed its willingness. But IDBI, which was the main financial institution, did not agree to any reduction below 1.25 times the monthly billing and insisted that the Escrow Agreement should be executed before financial closure and COD. It also informed MPEB that as a part of the security package, FIs/banks would require IPPs to have first charge of its receivables. It further told MPEB that in absence of compliance with the above conditions it will be difficult for them to grant any financial closure to any of the IPPs. Thus the terms of the Escrow Agreement and the decision to whom Escrow Protection should be extended and to what extent could not be finalised because of lower assessment of the escrowable capacity of MPEB and unwillingness of the FIs to relax their stipulations.

While the negotiations and discussion in that behalf were going on the Central Government, in exercise of its power under Section 43A(2) of the Electricity Supply Act, 1984, issued a notification on 8.6.1998 amending

- A its earlier tariff notification dated 30.3.1992. That was followed by a letter dated 12/15.6.1998 of the Minister of Power, Government of India to the Chief Minister of Madhya Pradesh Government pointing out the necessity to finalise the projects quickly and drawing attention to the amendment made in the tariff notification dated 8.6.1998. He requested the Government to take an early decision by giving priority to those projects which offer the least tariff so as to ensure that in the 9th Five Year Plan they get the benefit of the capacity addition from those projects. The Minister of Power again wrote to the Government on 5.7.1998 and 11.7.1998 to quickly finalise the projects. The Madhya Pradesh Government therefore, decided to call all the IPPs on 14.7.1998 for discussion for altering terms and PPAs in view of the amendment in the tariff notification and the suggestion made by the Minister of Power. After the meeting MPEB took the decision to prioritise the projects for providing Escrow Protection mainly on the basis of least tariff criteria and after considering an optimum mix of liquid fuel, hydel and coal projects. By its letter dated 24.7.1998 it brought that decision to the notice of all the IPPs and called upon them to submit their offers containing better terms on the basis of the changed parameters mentioned in Part B of the proforma sent along with that letter. The IPPs were also called upon to furnish security deposit of an amount equal to of 2% of the approved project cost.
- D
- E ITPL protested and maintained that the terms of its PPA remained unchanged that the tariff offer by it was the cheapest, that it cannot be asked to give security of 2% and that it should be given six months' time from the date of approval of the Escrow by the Financial Institutions for obtaining financial closure and completing other formalities. It then filed a writ petition in the Madhya Pradesh High Court challenging the communication dated 24.7.1998 and prayed for a Writ of Mandamus directing the respondents to grant Escrow facility to it. Similar petitions were then filed by six other IPPs. All the seven writ petitions were heard by a learned single Judge. He was of the view that the Government and MPEB had not properly applied their mind before taking the impugned decision. He directed them to take a fresh decision objectively and dispassionately.
- F
- G

As some of the IPPs the State and MPEB were not satisfied with the said order they filed Letters Patents Appeals before the Division Bench of that court. The contentions raised before the Division Bench were that the PPAs are statutory contracts and the condition regarding Escrow Cover is

H

a statutory condition and, therefore, it is not open to the State Government to go back upon it. It was also contended that the principles of promissory estoppel and legitimate expectation would apply to the facts of these cases and, therefore, it was not open to MPEB to invite fresh bids and determine giving of priority for Escrow Protection on the basis of the new least tariff criteria. Contentions regarding priority of adopting least tariff criteria and who can be said to be lowest according to that criteria were also raised.

The Division Bench held that the PPAs are statutory contracts as they have been entered into under Sections 43 and 43A. It, however, upheld the contention raised by the State and MPEB that the decision to invite fresh bids on the basis of least tariff was taken in larger public interest and the least tariff criteria is a good criteria. It also held that once the IPPs participated in the negotiations and gave their fresh bids they can be said to have abandoned their right to seek enforcement of the PPAs and to challenge the letter dated 24.7.1998. It also held that as the ITPL had not challenged the earlier decision of issuing Letters of Comfort to six IPPs it was not now entitled to any relief. Taking this view the Division Bench allowed the appeals and dismissed the writ petitions filed by the IPPs.

It was contended by Mr. Cooper, learned senior counsel appearing for appellant GBL and also by some counsel appearing for other appellants that the appellant/IPP's had entered into PPAs under Sections 43 and 43A of the Electricity Supply act and as such they are statutory contracts and, therefore, MPEB had no power or authority to alter their terms and conditions. This contention has been upheld by the High Court. In our opinion the said contention is not correct and High Court was wrong in accepting the same. Section 43 empowers Electricity Board to enter into arrangement for purchase of electricity on such terms as may be agreed. Section 43 A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with Electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the official gazette. These provisions clearly indicate that the

- A agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in section 43A(2) and notifications issued thereunder. Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract.
- B If entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43A(2). Opening and maintaining of an Escrow Account or an Escrow Agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining Escrow Accounts that obligation cannot be regarded as statutory.
- C
- D

- It was contended by Mr. Harish N. Salve, learned senior counsel appearing for ITPL, Mr. Cooper, appearing for GBL, Mr. Dave, appearing for STI and other counsel appearing for the appellants that the MOUs and PPAs are concluded contracts and, therefore, it was not open to MPEB to unilaterally change the conditions of those contracts and to invite fresh bids on the basis of the new least tariff criteria. There is no dispute on the point that MOUs and PPAs are concluded contracts but to say that MOUs and PPAs are concluded contract is one thing and to say that under those contracts the appellants and other IPPs acquired a legal right and the MPEB incurred an enforceable obligation in respect of providing an Escrow coverage is a different thing. The MOUs and IPPs while providing for payment of dues by MPEB has also at the same time made provisions for securing these payments. Apart from an undertaking by MPEB under those agreements an obligation is imposed upon MPEB to open a revolving letter of credit or letters of credit for payment of the dues. By way of further security it is provided in those contracts that Escrow Account shall be opened and maintained by MPEB to secure payment of the amount equal to 1.5 times the monthly bill. Those contracts also provide for a guarantee agreement with the State Government for payment of dues of
- E
- F
- G
- H

MPEB. Thus the purpose of opening and maintaining an Escrow Account is to secure payment for the electricity to be supplied by the generating companies to MPEB. The Escrow Account is, therefore, really required to be opened at that stage and, therefore, it is provided in most of these contracts that the Escrow Account shall be opened at the time of the First Unit Commercial Operations Date. A

The MOUs with ITPL and SPPL do not specifically provide for an Escrow Agreement or an Escrow Account. The MOUs with other appellants is in the following terms : B

"The Board shall open a revolving letter of credit as well as create an escrow account in favour of ....., which ..... shall have recourse to in case of default." C

The PPAs with ITPL and Jindal contain the following clause with respect to Escrow Agreement and Escrow Account. ; D

"To the extent such is agreed in accordance with the following, MPEB shall at all times following the First Unit Commercial Operations Date maintain an Escrow Account with MPEB's Bank, in such form and substance as is mutually agreed by Parties and on terms no less favourable than those applicable to any other independent power generating company and into which MPEB shall, for each month, place funds therein and from which overdue payments under this Agreement may be made to the Company in the event of MPEB failing to maintain, replenish, renew, restore or replace one or more Letters of Credit in the amounts provided for above. Such Escrow Account shall be, (i) established and maintained by MPEB in accordance with Escrow Agreement; (ii) in form and substance acceptable to the Parties." E F

The clause relating to Escrow Account in PPAs with GBL, STI, SPP and Madhya Bharat is differently worded and is as under : G

*"Escrow Account.*

The Company and MPEB shall in good faith and expeditiously cooperate with the assist each other in establishing a practicable and appropriate Escrow Account mutually acceptable to the Par- H

A ties as a satisfactory security mechanism for the payment obligations of MPEB, taking into account the following parameters :

(i) the Escrow Account shall take into account the reasonable requirements of the Lenders of the Project; and

B (ii) the amount of the Escrow Account shall be the Escrow Account Amount."

The Escrow Account clause in the PPA with Bhilai is different from others and is in the following terms :

C "Escrow Account. MPEB shall at all times following the First unit Commercial operations Date or the date of deemed Commissioning for the first Generating Unit, maintain an Escrow Account with a Scheduled Bank pursuant to an Escrow Agreement in form and substance as is mutually agreed by the Parties and into which D MPEB shall, for each Month, place funds therein and from which overdue payments under this Agreement may be made to the Company in the event of MPEB failing to maintain, replenish, renew, restore or replace one or more Letters of Credit in the amounts provided for above. Such Escrow Account shall be established and maintained by MPEB in accordance with an Escrow E Agreement which shall be in form and substance acceptable to the Parties."

F These provisions in the MOU's and PPAs clearly disclose that the obligation to open and maintain an Escrow Account is to be discharged by MPEB after the First Unit Commercial Operations Date. They do not impose an obligation on MPEB to execute an Escrow Agreement at an earlier date. The Escrow Agreement is to be in such form and substance as is *Acceptable to the parties*. The Escrow Account is also to be established and maintained in the manner and to the extent *agreed by the parties*. G The only obligation of MPEB which had come into existence on execution of the MOU's and PPAs was to cooperate with and assist the appellants in the matter of execution of an Escrow Agreement and opening of an Escrow Account. Execution of the Escrow Agreement and opening of an Escrow Account are thus contingent upon an agreement between the parties regarding the terms and conditions of those agreements and accounts. The terms H and conditions of the Escrow Agreement could not be finalised in view of

the disagreement of the FIs with the terms and conditions suggested by the MPEB and some of the appellants and their insistence upon certain other conditions. Even though MPEB and most of the appellants were willing for an Escrow Coverage to the extent of one billing month's amount, the FIs insisted that it should be for one and a half month's billing amount. Even though MPEB was willing to provide Escrow Coverage to as many IPPs as possible on the basis of its assessment that its Escrowable capacity is more the FIs did not agree with that assessment and showed their willingness to assist the IPPs on the basis of MPEB's Escrowable capacity at 2200 MW only. Thus it was because of the FI's reluctance to agree with MPEB and the IPPs that the terms and conditions of the Escrow Account, could not be finalised and Escrow Agreements could not be executed. It was not because of any lack of effort on the part of MPEB. In any case it cannot be said that any legal right in favour of IPPs to have an Escrow Agreement at that stage had come into existence. Therefore, the question of MPEB going back upon the terms and conditions of the concluded contract does not arise at all. Mr. Nariman, learned senior counsel appearing for SPPL also submitted that till 24.7.1998 no legally enforceable right to have an Escrow Agreement had come into existence Mr. Shanti Bhushan, learned senior counsel appearing for Jindal has also not disputed this position.

The IPPs were insisting upon Escrow Coverage/protection and issuance of Letters of Comfort in their favour so as to enable them to persuade the FIs to lend them enough money and obtain financial closure. For executing the projects it is their duty to bring enough finance. No doubt when such large projects are undertaken it is expected that the party undertaking the project will require monetary help from FIs. They are financed partly by equity and partly by debt. Consistently with this position MPEB had agreed to cooperate with and assist IPPs in obtaining financial assistance from the FIs by making a provision for different types of securities for payment of its dues to the IPs. Though the Escrow Account will have to be opened at a later stage the appellants were insisting for letters of Comfort and Escrow Agreements even before even obtaining financial closure. There was no reluctance or refusal on the part of MPEB to provide Escrow Coverage to all or as many as possible. But it was not possible for it to issue Letters of Comfort and provide Escrow Coverage and enter into Escrow Agreements with all of them as the appellants desired and the FIs required better Escrow Coverage than the one which the MPEB was willing to provide. The situation which had arisen was beyond the control of MPEB. The IPPs including the appellants also could not obtain financial closure because of their inability to persuade the FIs

A to lend them enough money. This was the position in the month of July 1998.

The Minister of Power, Government of India had drawn the attention of the State Government to the delay in finalising the projects and the need to take a final decision in the matter as early as possible and to the recent amendments to the notifications issued under section 43A of the Electricity Supply Act. Though the said amendment is prospective it cannot be said that it was totally irrelevant and could not have been taken into consideration by MPEB to seek revision of PPAS by inviting better terms from those IPPs who had agreed to undertake the projects. But the situation in which all were placed was such that it was not possible for the MPEB, the IPPs and the FIs to enter into further agreements regarding Escrowable Coverage and financial closure. We are, therefore, of the opinion that the decision of the MPEB to invite offers for better terms in its favour on different parameters so as to enable it to priorities the projects for providing Escrow Protection based on least tariff criteria and to decide about the optimum mix of liquid fuel, hydel and coal based projects cannot be said to be unreasonable or arbitrary.

The ITPL was of the view that the least tariff criteria was a 'hoax' and, therefore, it did not give its fresh bid on the basis of that criteria. It has, therefore, no right to make any grievance with respect to what has happened after 24.7.1998. Jindal did make a fresh bid on the basis of least tariff criteria but protested against the condition of 2% security deposit and expressed its inability to give the security deposit as it believed that it was impossible to achieve financial closure within two months of providing a bankable Escrow Agreement Form. It was submitted by the learned counsel Mr. Shanti Bhushan that the condition to complete the formality regarding financial closure within two months should be held discriminatory and invalid and Jindal should be considered on that basis. He submitted that the tariff offered by Jindal was the lowest earlier and even after the revised offers. He submitted that those who were given Letters of Comfort earlier have a larger time to persuade the FIs and obtain financial closure. He submitted that considering the time usually taken by the FIs it was impossible to get financial closure within two months and, therefore, Jindal was entitled to be granted longer time for obtaining financial closure. He submitted that the Court should not deny it the relief which otherwise it is entitled to for non-compliance with the condition which was really impossible of compliance. He submitted that the conditions to give security deposit of 2% and to obtain financial closure within two months was

imposed with a view to favour some and exclude others whom they did not like. He also submitted that no such condition was included earlier in December when MPEB had issued Letters of Comfort. What is important to be noted is that Jindal did not furnish the security deposit nor had shown its willingness to give 2% security deposit if any longer time was given to it for obtaining financial closure. It is, therefore, obvious that it did not comply with one of the conditions of re-invitation of offer and, therefore, cannot complain if its offer has not been considered for prioritisation and grant of Escrow Coverage on that basis.

It was submitted by Mr. Dave, learned senior counsel appearing for STI that MPEB having decided to provide Escrow Coverage to 4 or 6 IPPs, really no need had arisen for it to change that decision, even though it was justified in entering into negotiations for reduction of tariffs. The Minister of Power, Government of India had pointed out in his letter dated 12/25.6.1998 that it would be better to give priority to those projects which offers the State the least tariffs for the power to be supplied to MPEB. He had also suggested that it was necessary to establish a mechanism to quickly finalise those steps and select projects with least tariffs for being given an Escrow facility urgently so as to ensure that in the 9th Plan they get the benefit of the capacity addition from those projects. It was under these circumstances that a fresh policy decision was taken and, therefore, no purpose would have been served by retaining the selection earlier made for recommending Escrow protection and going for negotiations for reduction of tariffs. No other IPP except those who had been given Letters of Comfort would have possibly participated in such negotiations. Therefore, it is not possible to agree with the contention that the priority fixed earlier should have been maintained by MPEB.

Some of the learned counsel challenged the least tariff criteria as 'hoax' because it is not rational, as an 'excuse' because it was adopted to favour some and rule out others and as 'unrealistic' as it is based upon certain assumptions which are not valid. It is difficult to appreciate how the least tariff criteria can be said to be hoax when it is based upon and consistent with the notification issued under section 43A(2). To give priority to that project which will supply electricity to MPEB at a cheaper rate far from being regarded as an hoax or as an excuse must be regarded as a rational criteria because it will be more beneficial to MPEB and the general public who are the ultimate consumers of the electricity. The situation in which MPEB was placed at the relevant time justified adopting

- A that criteria and the Court cannot in such matters substitute its opinion and say that it would have been better if a different criteria had been adopted. After the event it may be possible to visualise that it would have been better if a different course was adopted or decision taken. But that cannot render the decision already taken arbitrary or invalid so long as it is taken *bonafide* and is based upon consideration of relevant aspects.
- B Prioritisation could have been done on the basis of the dates on which TEC was sanctioned or it could have been on the basis of the date of sanction given by the Financial Institutions. If, however, considering all the relevant aspects MPEB thought it proper to priorities the projects on the basis of least tariff criteria it cannot be said that thereby it acted in an arbitrary or unreasonable manner. It is also not possible to accept the contention that the said criteria was adopted with a view to favour some and rule out others as no material is available on record to justify such an inference. It was submitted that least tariff criteria adopted by MPEB for deciding prioritisation is unrealistic. Our attention was drawn to certain assumptions on the basis of which the project cost was to be estimated and least tariff was to be determined. Our attention was also invited to the report of the Expert Committee which was constituted for tariff evaluation for the improved offers submitted by IPPs. The said Committee had opined as under :
- C
- D
- E "CONCLUSION : - Based on the factors and assumptions as brought out in para 3/N above, it can be stated that the project cost as compiled on Commercial Operation Date (COD) is not realistic or accurate. Any subsequent tariff calculations based on the unrealistic project cost are also un-reliable and unrealistic.
- F Given the set of assumptions, the resulting tariff for various IPPs falls in narrow range and a change in any of the assumptions can lead to a different tariff for the IPPs. Therefore such resulting tariffs, should not be depended upon to arrive at any conclusions or any subsequent decisions."
- G The Cabinet Sub Committee in spite of the objections raised by Bhilai and Bina had evaluated the offers on the basis of said wrong assumptions. It was submitted that the decision taken by the Cabinet Sub Committee based on unrealistic assumptions should be regarded as bad. We do not think that it would be proper for this Court to examine in details the various
- H assumptions as they are technical matters and moreover, the techno-

economic clearance was given by the CEA on the basis of such assumptions. Certain assumptions had to be made while determining the project Cost and inviting offers on the basis thereof. Once we find that there was some valid basis for making these assumptions and that they are not fanciful or arbitrary it would not be proper to invalidate the decision taken on the basis of such assumptions. They were made applicable equally to all. It was, however, submitted by Mr. Singhvi that the Foreign Exchange Variation percentage fixed at 2.553 was very low and that has benefited some of the IPPs with large foreign exchange equity participation. As indicated in the minutes of the Cabinet Sub Committee meeting the rate of foreign exchange variation was adopted on the basis of the advise of the Ministry of Finance. Having considered all the relevant facts and circumstances it is not possible for us to agree with the contention that the least tariff criteria was not a good criteria as it was unrealistic and arbitrary.

As regards the application of the least tariff criteria for evaluating the various revised bids for deciding prioritisation also there were some objections raised on behalf the appellants. Having gone through the minutes of the meeting of the Cabinet Sub Committee and the relevant facts and circumstances and on taking an overall view we find that the decision to recommend Maheshwar, Daewoo and Bina in respect of Maheshwar Hydel Project (82MW), Korba (East) Thermal Power Project (1070 MW) and Bina Thermal Power Project (578 MW) cannot be faulted. The decision in favour of these projects appears to have been taken *bona fide* and in overall public interest. That decision, therefore, did not call for any interference by the Court and the High Court was right in upholding that decision.

However, as regards Pench Thermal Power Project we find that it is not a pit-head project and it did not have any appropriate coal linkage. The coal linkage which was suggested by the State Government was neither approved by the coal companies nor by the Railways. Its project cost was also not properly evaluated and the cost of supplying water from the dam was not taken into consideration on the ground that the whole cost of the dam is to be borne by MPEB. We need not go into the further details regarding the merits and demerits of the Pench Project, as in view of the remaining available Escrowable capacity we are directing MPEB to reconsider its decision as to which remaining coal based project should be given priority in recommending it for Escrow Coverage.

A It was next contended by Mr. Nariman appearing for SPPL that right from the beginning the Government of India and even the State Government of Madhya Pradesh had accepted the policy of an optimum mix of liquid fuel project, hydel project and coal based project. He submitted that while deciding prioritisation on the basis of least tariff criteria the Government and the MPEB ought to have compared the tariffs within the fuel

B category and not between different fuels used. The MPEB also in its letters dated 24.7.1998 had declared that it would decide prioritisation of projects after considering an optimum mix of liquid fuel projects, hydel projects and coal based projects. He, therefore, submitted that the MPEB ought not to have exhausted all its Escrowable capacity by recommending one hydel

C project and three coal based projects for Escrow Coverage and financial assistance. As disclosed by the decision of the Cabinet Sub Committee and also by the order of the High Court produced before this Court no decision to recommend any liquid fuel project on priority basis for Escrow Coverage could be taken because of a stay order issued by the Madhya Pradesh High Court. No doubt it was an interim order and after the same was vacated

D the State Government could have soon thereafter taken a decision. However, not taking a decision then cannot be regarded as sufficient to vitiate the decision taken with respect to the hydel and thermal power projects. To us it appears that the compulsions of the situation have prevented the MPEB for not extending priority for Escrow coverage to any liquid fuel project. The decision to give priority to the two coal based and one hydel

E power projects was not taken with a view to favour them. Nor does it imply giving up an optimum mix policy.

In the result, the appeals filed by ITPL [out of SLP (C) Nos. 8654-8657/99], Jindal (out of SLP (C) Nos. 9796-9797/99), Bhilai (out of SLP (C) Nos. 10799-10802/99), SPPL (out of SLP (C) No. 14853/99), Madhya Bharat (out of SLP (C) No. 14792/99) and GBL (out of SLP (C) No. 9678/99) are dismissed and the appeals filed by STI (out of SLP (C) Nos. 9770-9772/99) are partly allowed. The decision to give priority to Pench is quashed and the MPEB is directed to take a fresh decision for giving priority for Escrow Coverage after considering its Escrowable

G capacity and other relevant factors. The MPEB shall do so within two months from the date of this order.

R.K.S.

Appeals dismissed  
Partly allowed.