

A M/S. TRANSMISSION CORPORATION OF A.P. LTD.  
v.  
M/S. LANCO KONDAPALLI POWER PVT. LTD.

DECEMBER 15, 2005

B [S.B. SINHA AND P.P. NAOLEKAR, JJ.]

*Arbitration and Conciliation Act, 1996; Section 9/Andhra Pradesh Electricity Reforms Act, 1998; Ss.28, 37 and 50/Electricity Act, 2003; Ss. 83, 84, 86, 94, 145, 154 and 174:*

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*Power purchase agreement between generator/supplier and Transmission Corporation—Rate fixed on the basis of certain capacity charges on the output—Corporation issuing show cause notice to the supplier for refixing capacity charges—Filing of an application before Civil Court by the supplier for issuance of permanent injunction against the Corporation—Dismissed by Civil Court—High Court granted an injunction restraining the Corporation from refixing the capacity charges—Filing of an application by the Corporation for refixing the capacity charges before State Electricity Regulatory Commission—Challenge to—Proceedings before the Commission stayed by High Court—On appeal, Held: Since the power of the Chief Justice or his nominee to appoint an arbitrator is judicial, jurisdiction of the High Court/Civil Court in terms of the 1996 Act would be a subject matter for determination by the High Court in the writ proceedings pending before it—The Court under Section 9 of the 1996 Act could formulate interim measures to protect the right of the parties before the Arbitral Tribunal from being frustrated by directing the parties to maintain status quo—A Writ Court could grant an injunction in exercise of its power under Article 226, however, final relief could be granted by the Arbitral Tribunal—Though, Supreme Court's power to interfere with the order of the High Court is discretionary, but it is not a fit case to interfere with the order of the High Courts in exercise of the power under Article 136 of the Constitution of India.*

**Appellant-Transmission Corporation and respondent-supplier/generator of electricity entered into a Power Purchase Agreement. In terms of the agreement, the price to be paid therefor by the Corporation included “Capacity charges” and “variable charges”. Though the Corporation had been paying**

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the price on the basis of capacity charges on the output of the plant fixed at 368.144 MW but it issued a show cause notice to the supplier for refixing the capacity charges on the out put of the plant at 351.49 MW with retrospective effect. Respondent-supplier filed an application in terms of the arbitration clause in the agreement under Section 9 of the Arbitration and Conciliation Act praying for issuance of a permanent injunction against the Corporation restraining it from taking any unilateral decision pursuant to the show cause notice. The Corporation filed an application before the Andhra Pradesh Electricity Regulatory Commission praying for refixation of the installed capacity of the plant in terms of Section 37(1) of the A.P. Electricity Reforms Act, 1998/Section 86(1)(f) r/w Section 74 of the Electricity Act, 2003. The supplier filed an application in terms of Article 14 of the Arbitration clause of the Power Purchase Agreement before the Chief Justice of the Andhra Pradesh High Court, for issuing a writ of prohibition against the Commission. The High Court stayed the proceedings. In the meantime, application for grant of injunction was dismissed by the Civil Court holding that the Commission alone had the jurisdiction to decide the dispute. On appeal, the High Court set aside the order of the Civil Court and granted an injunction restraining the Commission from refixing the capacity charges till disposal of the original petition by the Civil Court. Hence the present appeal.

It was contended by the appellant-Transmission Corporation that the Respondent-supplier, although not being a licensee within the meaning of the 2003 Act, was required to have a licence as it supplied electrical energy to the appellant; that by virtue of the provisions contained in the 1998 Act and the 2003 Act, not only the jurisdiction of the Civil Court is barred, but also the dispute and differences, if any, arose between the two licensees and/or two generating companies could be referred to the Commission only in terms of Section 86(1)(f) of the 2003 Act and thus the High Court committed a serious error in passing an order of injunction; that the High Court despite findings of the City Civil Court to the effect that it had no jurisdiction to pass an interim order in terms of Section 9 of the 1996 Act, did not address itself to the said question, and granted an injunction only on the premise that the jurisdiction of the Commission to proceed with the arbitration in terms of the reference made by the appellant is subjudice.

Respondent submitted that Sections 37 and 50 of the Andhra Pradesh Electricity Reforms Act have no application to the facts of the present case as it is not a case where a dispute between the two licensees is involved; that the

A dispute between the parties being confined to the interpretation of the expression 'installed capacity' within the meaning of the provisions of the agreement; that the Commission which is primarily concerned with framing of tariffs and adjudication of disputes between licensees and others have no jurisdiction to decide disputes and differences between the parties arising under an agreement; that the parties were ad idem as regard construction of the agreement as payments of the bills had been made on the basis of the installed capacity of 368.144 MW; and that without resolution of the dispute, the Appellant could not have taken an unilateral action in changing the terms and conditions thereof for the purpose of the payments of bills.

C Dismissing the appeal, the Court

HELD: 1.1. A 7-Judge Bench of this Court in the case of *M/s S.B.P. & Co. v. Patel Engineering Ltd. & Anr.*, by overruling an earlier Constitution Bench Judgment of this Court in *Konkan Railway Corporation Ltd. & Anr. v. Rani Constructions Pvt. Ltd.*, held that the power of the Chief Justice or his nominee under the Arbitration and Conciliation Act, 1996 is a judicial power as opposed to the administrative power. The contention of the Appellant that the City Civil Court or for that matter the High Court have no jurisdiction in terms of the 1996 Act, therefore, must finally be determined by the High Court itself. Such a question indisputably will also be a subject-matter of determination by the High Court in the writ proceedings pending before it.

E [804-D, E]

*M/s S.B.P. & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 9 SCALE 1, followed.

F *West Bengal Electricity Regulatory Commission v. CESC Ltd.*, [2002] 8 SCC 715 and *Grid Corporation of Orissa Ltd. v. Indian Charge Chrome Ltd.*, [1998] 5 SCC 438, held inapplicable.

1.2. The Court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. Section 9 of the 1996 Act should be applied so that status quo may be directed to be maintained having regard to the fact that the parties understood the workability of the agreement in a particular manner.

G [807-D-E]

H *Firm Ashok Traders and Anr. v. Gurumukh Das Saluja and Ors.*, [2004] 3 SCC 155 and *Jagdish Chandra Gupta v. Kajaria Traders (India) Ltd.*, AIR (1964) SC 1882, referred to.

1.3. A writ court can also grant injunction in exercise of its power under Article 226 of the Constitution of India. If injunction is refused in this proceeding, the interim order passed in the writ proceedings shall continue. It may give rise to a stalemate. It may violate the well-known rule of judicial comity. [807-G] A

*Wander Ltd. and Anr. v. Antox India P. Ltd.*, [1990] Supp. SCC 727 and *M/s Power Control Appliances and Ors. v. Sumeet Machines Pvt. Ltd.*, [1994] 2 SCC 448, referred to. B

'*A Treatise on The Law Governing Injunctions*' by Spelling and Lewis', referred to. C

2.1. The interim direction ordinarily would precede finding of a *prima facie* case. When existence of a *prima facie* case is established, the court shall consider the other relevant factors, namely, balance of convenience and irreparable injuries. The High Court in its impugned judgment although not directly but indirectly has considered this aspect of the matter when on merit it noticed that the Appellant has raised a dispute as regard payment of an excess amount of Rs.35 crores although according to the Respondent a sum of Rs.132 crores is due to it from the Appellant and the Appellant had been paying the amount for the last two years as per the contract. If the parties had been acting in a particular manner for a long time upon interpreting the terms and conditions of the contract, if pending determination of the lis, an order is passed that the parties would continue to do so, the same would not render the decision as an arbitrary one. Even the Appellant had prayed for adjudication at the hands of the Commission in the same manner. Thus, it itself thought that the final relief would be granted only by the Arbitrator. The Commission is yet to apply its mind. Even before the Commission, the Appellant has not made any application for a direction in terms of sub-section (2) of Section 94 of the Act. [808-G, H; 809-A] D E F

2.2. The Respondent has installed the Power Generation Plant. It has continuously been supplying electrical energy to the Appellant. It has to discharge its contractual obligation. The Appellant being the only consumer, the Respondent has no other option but to supply electrical energy to it. In the event, the dispute is referred to the arbitrator, the equity between the parties can be adjusted. [809-D] G

3.1. It is well-settled that this Court would not interfere with an order H

**A** of the High Court only because it will be lawful to do so. Article 136 of the Constitution vests this Court with a discretionary jurisdiction. In a given case, it may or may not exercise its power. It is not a fit case where interference with the High Court's judgment would be a proper exercise of jurisdiction under Article 136 of the Constitution of India. [809-G]

**B** *Chandra Singh and Ors. v. State of Rajasthan and Anr.*, [2003] 6 SCC 545; *State of Punjab v. Savinderjit Kaur*, [2004] 4 SCC 58; *N.K. Prasada v. Government of India and Ors.*, [2004] 6 SCC 299; *Inder Parkash Gupta v. State of J&K and Ors.*, [2004] 6 SCC 786 and *State of Uttaranchal Through Collector, Dehradun and Anr. v. Ajit Singh Bhola and Anr.*, [2004] 6 SCC 800, relied on. [811-A, B]

**C** 3.2. The High Court is requested to consider the desirability of hearing both the writ petition as also the petition under Section 11 of the 1996 Act filed by the Respondent. All the contentions of the parties shall remain open and any observation made by the High Court in the impugned order or by this Court must be considered to have been made for the purpose of disposal of the interim prayer.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7522 of 2005.

**E** From the Judgment and Order dated 5.10.2004 of the Andhra Pradesh High Court in A.A.O. No. 3269 of 2004.

P.P. Rao, A.T. Rao and A. Subba Rao with him for the Appellant.

**F** C.A. Sundram, G. Ramakrishna Prasad, Mohd. Wasay Khan, Dr. K.P. Kyalasanath, Suyodhan Byrapanchi, Kodanram and Shiv Prasad with him for the Respondent.

The Judgment of the Court was delivered by

**S.B. SINHA, J.** Leave granted.

**G** *Background facts*

The parties herein entered into a Power Purchase Agreement on 31.03.1997 for short gestation liquid fuel based power project of 355 MW.

**H** The said agreement contained an arbitration clause in Article 14 thereof.

*Dispute*

The Plant was commissioned. In terms of the said agreement, the power generated in the Plant constructed by the Respondent herein was to be supplied to the Appellant Corporation. The price to be paid therefor by the Appellant included 'capacity charges' and 'variable charges'. Upon commission of the Plant, various tests as regard capacity of the plant to generate electricity were carried out. The Appellant herein had been paying capacity charges on the output of the Plant which was fixed at 368.144 MW from 08.11.2001. A notice, however, was issued by the Appellant alleging that the capacity charges payable by it with reference to the installed capacity should have been fixed at 334.75 MW x Rh (relative humidity) factor with tolerance limit of + or 5% as per the agreement which works out at 351.49 MW and on that premise as to why future payments should not be made accordingly and why the previous bills should not be revised with reference thereto. The Respondent by a letter dated 17.12.2003 demanded withdrawal of the said notice from the Appellant.

*Proceedings*

In view of the threatened action on the part of the Appellant herein, an application purported to be under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, 'the 1996 Act') was filed before the City Civil Court praying for a permanent injunction restraining the Appellant herein from taking any unilateral decision pursuant to the said show cause notice. Evidently, the said application was filed relying on or on the basis of the arbitration clause contained in the said Power Purchase Agreement.

The Appellant, however, filed an application before the Andhra Pradesh Electricity Regulatory Commission (for short, 'the Commission') originally constituted under the Andhra Pradesh Electricity Reform Act, 1998 (for short, '1998 Act'), praying, *inter alia*, for fixing the installed capacity of the Plant and for consequential reliefs.

The said application before the Commission was filed by the Appellant herein on the premise that the Commission alone has the jurisdiction to arbitrate in respect of disputes and differences arising between the parties or to nominate an arbitrator therefor in terms of Section 37(1) of the 1998 Act corresponding to Section 86(1)(f) read with Section 174 of the Electricity Act, 2003 (for short, '2003 Act'). However, in the meantime, as no arbitrator was appointed by the Appellant in terms of the arbitration agreement contained

A in Article 14 of the Power Purchase Agreement, an application purported to be under sub-sections (3) and (4) of Section 11 of the 1996 Act was filed before the Chief Justice of the Andhra Pradesh for appointment of an arbitrator. The said application is still pending.

B A writ petition marked as Writ Petition No.7838 of 2004 was also filed by the Respondent before the Andhra Pradesh High Court on or about 22.04.2004 praying for issuance of a writ of prohibition against the Commission restraining it from proceeding to adjudicate the dispute between the parties on the premise that the constitution of the Commission was incomplete. In the said writ petition, an interim order was passed by the High Court directing  
C “interim stay of the impugned proceedings purported to be taken by Respondent No.1 (Appellant herein) in terms of the impugned notice”.

The Respondent’s application for grant of injunction in the proceedings initiated before the City Civil Court in the meanwhile was taken up for hearing and by an order dated 11.08.2004, the said Interlocutory Application was  
D dismissed, holding that having regard to the provisions of the 1998 Act and the 2003 Act, the Commission alone had the jurisdiction to decide the dispute and not the City Civil Court.

*Contentions of the Appellant*

E An appeal thereagainst was preferred by the Respondent before the High Court which was marked as Appeal No.3269 of 2004, wherein by reason of the impugned judgment and order dated 05.10.2004, the High Court while setting aside the said order of the City Civil Court granted an injunction restraining the Appellant herein from refixing the capacity of the Plant at 334.75 MW x Rh Factor at the site till disposal of the OP by the City Civil  
F Court.

Mr. P.P. Rao, the learned Senior Counsel appearing on behalf of the Appellant, would submit that the Respondent herein, although not being a licensee within the meaning of the 2003 Act, was required to have a licence as it supplied electrical energy to the Appellant herein.  
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It was urged that in view of the provisions contained in the 1998 Act and the 2003 Act, not only the jurisdiction of the Civil Court is barred, any dispute and difference between the two licensees and/or two generating companies can be referred to an arbitration of the Commission only, as envisaged under Section 86(1)(f) of the 2003 Act and in that view of the  
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matter, the High Court committed a serious error in passing an order of injunction. A

It was submitted that both under the 1998 Act as also under the 2003 Act, the Commission had the requisite jurisdiction to pass an interim order also and, thus, the said Acts are self-contained Codes. B

Mr. Rao contended that the High Court despite findings of the City Civil Court to the effect that it had no jurisdiction to pass an interim order in terms of Section 9 of the 1996 Act, did not address itself to the said question, could not have proceeded to allow the appeal preferred by the Respondent herein and granted ad interim order of injunction only on the premise that the jurisdiction of the Commission to proceed with the arbitration in terms of the reference made by the Appellant herein is subjudice. C

*Contentions of the Respondent*

Mr. C.A. Sundaram, the learned Senior Counsel appearing on behalf of the Respondent, on the other hand, submitted that Sections 37 and 50 of the 1998 Act have no application to the facts of the present case as it is not a case where a dispute between the two licensees is involved. The dispute between the parties being confined to the interpretation of the expression 'installed capacity' within the meaning of the provisions of the agreement, the Commission which is primarily concerned with framing of tariffs and adjudication of disputes between licensees and others as envisaged, *inter alia*, under Section 9, 29 and 33 of the Act can be said to have no jurisdiction to decide disputes and differences between the parties arising under an agreement. In view of the fact that the parties were ad idem as regard construction of the said agreement as payments of the bills had been made on the basis of the installed capacity 368.144 MW from 08.11.2001 to 10.12.2003, and having regard to the arbitration agreement contained in the contract; without resolution of the dispute in terms thereof, the Appellant could not have taken an unilateral action in changing the terms and conditions thereof for the purpose of the payments of bills. D E F

In any view of the matter, the Appellant itself having made the following prayers before the Commission : G

"In the aforesaid facts and circumstances, the Applicant prays that Hon'ble Commission may pass appropriate orders in respect of the following : H

A (a) To fix the Installed Capacity of the plant, M/s Lanco Kondapalli Power Limited, as 334.75 MW x RH factor at the site Reference Conditions (as per PPA) with tolerance limit of + 5%.

B (b) To allow AP TRANSCO to pay all future power purchase bills (fixed charges, variable charges, Incentive etc.) based on the capacity on 334.75 MW x RH factor and as per all other provisions of PPA including tolerance limit.

C (c) To allow APTRANSCO to revise all previous power purchase bills (fixed charges, variable charges incentive etc.) from inception based on the capacity of 334.75 MW x RH factor and as per all other provisions of PPA including tolerance limit;

and thus cannot now turn round and contend that it would do so unilaterally without any award made in that behalf. The Respondent, thus, not only has a *prima facie* case keeping in view that that a sum of Rs.132 crores is due to the Respondent, the balance of convenience also lies in its favour.

D *Agreement*

Clause 35 of Article I of the said agreement defines 'Installed Capacity' to mean :

E "the maximum electrical generating capacity of the Project or a Generating Unit, as the case may be, in megawatts ("MW") as measured at the generator terminals, determined from time to time pursuant to the tests given in Schedule F, subject to adjustments for the Ambient Reference Conditions.

F *Explanation 1* : Where the output of one or more Generating Units of the Project or of the Project as a whole, in final tests to be specified by the Board is higher than the output initially guaranteed by the manufacturer /supplier thereof, the output initially guaranteed by the manufacturer/supplier will be the installed capacity thereof, as from the date of such final tests. However, where the output of one or more

G Generating Units of the Project or of the Project as a whole, in final tests to be specified by the Board is lower than the output initially guaranteed by the manufacturer/supplier thereof, that lower output alone will be the installed capacity thereof.

H *Explanation 2* : The installed Capacity furnished in the Bid is taken

as the nominal capacity and for installed Capacity as determined as per Explanation 1 above, a tolerance limit of plus or minus 5% is permitted.” A

The expression ‘Project’ has been defined in sub-clause 47 of the said agreement to mean :

“the combined cycle power station proposed to be established at Kondapally, Krishna Dist., in Andhra Pradesh, India, consisting of 2 (two) Generating Units, which are designed for poly-fuel-firing and 1 (one) steam Generating Unit, having a nominal installed capacity of 355 Mega Watts (ISO) adjusted to Ambient Reference Conditions.” B C

Schedule A appended to the said agreement provides for the technical limits, clause 3 whereof defines ‘Dynamic Parameters’ to mean :

“3. Dynamic Parameters

The Dynamic Parameters are the essential operating characteristics which will define the limits within which a Unit or the Project is required to operate during normal operation. D

The Dynamic Parameters of each Unit and the Project will initially be those projected in the EPC Contract. During testing under the EPC Contract, the Company will establish Dynamic Parameters and it will supply details of these to the Board. Subject to the Dynamic Parameters being adjusted and verified prior to the COD of each Unit and the Project COD, the Dynamic Parameters established by the Company shall replace those projected in the EPC Contract and shall be deemed incorporated into this Schedule.” E F

Relevant parts of Article 14 containing the arbitration agreement between the parties read as under:

“Article 14

14.1 Information Dispute Resolution G

(a) Each party shall designate in writing to the other party is a representative who shall be authorized to resolve any dispute arising under this Agreement in an equitable manner.

(b) If the designated representatives are unable to resolve a dispute H

A under this Agreement within fifteen (15) days, such dispute shall be referred by such representatives to a senior officer designated by the Company and a senior officer designated by the Board, respectively, who shall attempt to resolve the dispute within a further period of fifteen (15) days.

B (c) The parties hereto agree to use their best efforts to attempt to resolve all disputes arising hereunder promptly, equitably and in good faith, and further agree to provide each other within reasonable access during normal business hours to any and all non-privileged records, information and data pertaining to any such dispute.

C 14.2 Arbitration

D (a) In the event that any dispute is not resolved between the Parties pursuant to Article 14.1, then such dispute shall be settled exclusively and finally by arbitration. It is specifically understood and agreed that any dispute that cannot be resolved between the parties, including any matter relating to the interpretation of this Agreement, shall be submitted to arbitration irrespective of the magnitude thereof, and the amount in dispute or whether such dispute would otherwise be considered justiciable or ripe for resolution by any court or arbitral tribunal. This Agreement and the rights and obligations of the Parties hereunder shall remain in full force and effect pending the award in such arbitration proceedings, which award shall determine whether and when termination of this Agreement if relevant shall become effective.

F xxx xxx xxx

G (f) Any decision or award of an arbitral tribunal appointed pursuant to this Article 14.2 shall be final and binding upon the Parties and shall be the sole and exclusive remedy between the Parties regarding any claims, counterclaims, issues or accountings presented or pled to the arbitrators. The Parties waive any rights to appeal or any review of such award by any court or tribunal of the competent jurisdiction. The Parties agree that any arbitration made may be enforced by the Parties against assets of the relevant Party wherever those assets are located or may be found, and judgment upon any arbitration award may be

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entered by any court of competent jurisdiction thereof. The Parties expressly submit to the jurisdiction of any such court. A

- (g) All arbitration awards shall be denominated in Indian Rupees. If the arbitration award (or part thereof) consists of any currency other than Indian Rupees, then award (or part thereof) shall be converted to Indian Rupees based on the applicable market rate(s) of foreign exchange, not exceeding such TT selling rate(s) as published by the State Bank of India on the date of such payment. Interest at a rate equal to the Working Capital Rate plus two percent (2%) shall be due and payable to the Party on receipt of an arbitration award from the date thirty (30) days after the date such award is made pursuant to this Article 14.2 through the date of payment. B
- (h) Any arbitration proceedings or award rendered hereunder and the validity, effect and interpretation of this Article 14 shall be governed by the laws of India and (to the extent applicable) the New York Convention on the Recognition and Enforcement of Arbitral Awards, June, 10, 1958, to which England and India are parties. C
- (i) The Parties agree that any amount due under this Article 14.2 shall be due as a separate debt and shall not be affected by or merged into any judgment being obtained for any other sum due under or in respect of this Agreement." D E

*Statutory provisions :*

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

'Licensee' has been defined in Section 2(e) of the 1998 Act as under:

"Licensee" or "licence holder" means a person licensed under section 14 of the Act to transmit or supply energy including APTRANSCO;" H

- A It is not in dispute that the Commission was constituted in terms of the Act. Section 37 of the said Act contains a non-obstante clause stating that notwithstanding anything contained in the 1996 Act, any dispute arising between the licensees shall be referred to the Commission. The Commission may proceed to act as arbitrator or nominate arbitrator or arbitrators to adjudicate and settle such disputes. Section 28 of the 1998 Act empowers the
- B Commission to issue an interim order as it deems proper for securing compliance if it is satisfied that a licensee is contravening or is likely to contravene any relevant condition or requirement of the licence.

- C The 2003 Act came into force with effect from 26.05.2003. Sub-section (64) of Section 2 of the said Act defines the State Commission to mean, *inter alia*, the State Electricity Regulatory Commission constituted under sub-section (1) of Section 82 thereof. In terms of Section 82, a State Government is enjoined with a duty to constitute a commission within six months from the appointed day. The proviso appended to sub-section (1) of Section 82, however, postulates that the commission earlier constituted shall continue and its
- D Chairperson, Members, Secretary and officers and other employees shall continue to function for the purpose of the said Act. Section 86 provides for functions of the State Commission. Clause (f) of sub-section (1) thereof empowers the State Commission to adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration. Section 158 of the said Act occurring in Part XVI deals with dispute resolution, which reads as under :
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- F “158. Arbitration.-Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996)”

- G Sub-section (2) of Section 94 of the Act empowers the State Commission to pass an interim order in any proceeding before it. The Civil Court’s jurisdiction is barred under Section 145 of the said Act which reads as under::

- H “145. Civil court not to have jurisdiction.-No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in section 126 or on appellate authority referred to in section 127 or the adjudicating officer

appointed under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.” A

In terms of the Section 185, the Electricity Regulatory Commissions Act, 1998 was repealed but in terms of sub-section (3) thereof the provisions of the enactments specified in the Schedule, not inconsistent therewith shall apply to the States in which such enactments are applicable. Item No.3 of the Schedule refers to the Andhra Pradesh Electricity Reform Act, 1998. B

*Analysis of the agreement and the statutory provisions* C

The Appellant is a licensee within the meaning of both the 1998 Act and the 2003 Act.

The question as to whether the Respondent should have taken a licence or permit under the 2003 Act or not is not a matter which requires our immediate attention. The Appellant is a licensee and the Respondent is a generating company in terms of the provisions of the 2003 Act. Section 37 of the 1998 Act deals with disputes between the licensees. D

*Prima facie* Section 50 of the 1998 Act, which bars the jurisdiction of the Civil Court keeping in view the language employed therein, is required to be read with Section 37 thereof. The resolution of the disputes between the parties rests upon the proper interpretation of the said Power Purchase Agreement and in particular the definition of ‘installed capacity’. Who would arbitrate in respect of the said dispute is the principal question. It is no doubt true that in the event if it ultimately be held that the arbitration clause contained in the contract between the parties dated 31.03.1997 stood superseded in view of the provisions of the 1998 Act and the 2003 Act, arguably, the question of Civil Court’s granting of an order of injunction in terms of Section 9 or the High Court to determine the question as to who should be appointed as an arbitrator, may not arise. As to whether Section 86(1)(f) of the 2003 Act confers an exclusive jurisdiction to decide all disputes and differences between a licensee and a generating company is open to question. It may or may not be that the said provision may have to be read with other provisions contained in the power of the Commission to resolve disputes between various parties as for example Sections 9, 20 or 29 thereof. But it would be matter of construction of the relevant provisions as to whether by reason of Section 86(1)(f) of the 2003 Act, the Commission derives E F G H

- A a power so as to enable it to arbitrate also in relation to a dispute arising out an agreement although the Commission may not have any role to play whatsoever in respect thereof.

*Determination*

- B The learned Counsel for the parties, as noticed hereinbefore, have argued before us on the interpretation of the provisions of the relevant statutes and agreement for determining the effect and purport thereof.

- C As at present advised, however, we refrain ourselves from expressing any opinion one way or the other having regard to the fact that the matter ultimately must receive a detailed consideration at the hands of the High Court both in the writ petition as also in the application filed by the Respondent under Section 11 of the 1996 Act.

- D We do so for the reason that recently a 7-Judge Bench of this Court in *M/s S.B.P. & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 9 SCALE 1 overruling an earlier Constitution Bench Judgment of this Court in *Konkan Railway Corporation Ltd. & Anr. v. Rani Constructions Pvt. Ltd.*, [2002] 2 SCC 388, held that the power of the Chief Justice or his nominee under the 1996 Act is a judicial power as opposed to the administrative power. The contention of the Appellant that the City Civil Court or for that matter the High Court have no jurisdiction in terms of the 1996 Act, therefore, must finally be determined by the High Court itself. Such a question indisputably will also be a subject-matter of determination by the High Court in the writ proceedings pending before it.

- E However, it is not a case where any dispute has arisen in respect of a statutory function of the Commission to frame tariff and in that view of the matter the decision of this Court in *West Bengal Electricity Regulatory Commission v. CESC Ltd.*, [2002] 8 SCC 715 cannot be said to have any application whatsoever.

- F The ratio laid down in *Grid Corporation of Orissa Ltd. v. Indian Charge Chrome Ltd.*, [1998] 5 SCC 438 whereupon Mr. Rao placed strong reliance is not applicable in this case as therein it was found that the High Court erroneously assumed that the Regulatory Commission had failed to arbitrate under Section 37(1) of the 1998 Act, which was found to be factually incorrect.

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In *A.P. Gas Power Corporation Ltd. etc. v. A.P. State Regulatory Commission and Anr etc.*, [2004] 10 SCC 511, the question was as to whether the Appellant therein was required to take, under the law, a licence for utilization/sale or supply of power generated by it to the participating/shareholding industries or to their sister concerns or the industries to whom the shares of A.P. GPCL have been transferred by the participating industries. It was held that such licence was necessary, stating

“...It would surely be a supply to a non-participating industry and in that event it would be necessary to have a licence under the relevant provisions of law. If there is such a legal requirement, merely an agreement amongst certain parties would not exclude the application of law. Provisions of law regulating the situation, would prevail over any kind of agreement amongst some individuals as a group or otherwise. We are, therefore, of the view that such a clause in the Memorandum of Understanding would not do away with the requirement of having a licence for supply of electricity generated by A.P. GPCL to such concerns which may be under the same group as the participating industries but not the participating industries themselves.”

The Respondent, therefore, has raised triable issues. What would constitute triable issues has succinctly been dealt with by the House of Lords in its well-known decision in *American Cyanamid Co v. Ethicon Ltd.*, (1975) 1 AER 504, holding :

“Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expression as ‘a probability’, ‘a *prima facie* case’, or ‘a strong *prima facie* case’ in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.”

It was further observed :

“Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the

A interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

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The factors which he took into consideration, and in my view properly, were that Ethicon's sutures XLG were not yet on the market; so that had no business which would be brought to a stop by the injunction; no factories would be closed and no workpeople would be thrown out of work. They held a dominant position in the United Kingdom market for absorbable surgical sutures and adopted an aggressive sales policy."

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We are, however, not oblivious of the subsequent development of law both in England as well as in this jurisdiction. The *Chancery Division in Series 5 Software v. Clarke*, [1996] 1 All ER 853 opined:

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"In many cases before *American Cyanamid* the prospect of success was one of the important factors taken into account in assessing the balance of convenience. The courts would be less willing to subject the plaintiff to the risk of irrecoverable loss which would befall him if an interlocutory injunction was refused in those cases where it thought he was likely to win at the trial than in those cases where it thought he was likely to lose. The assessment of the prospects of success therefore was an important factor in deciding whether the court should exercise its discretion to grant interlocutory relief. It is this consideration which *American Cyanamid* is said to have prohibited in all but the most exceptional case. So it is necessary to consider with some care what was said in the House of Lords on this issue."

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In *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.*, [1999] 7 SCC 1, this Court observed that Laddie, J. in *Series 5 Software* (supra) had been able to resolve the issue without any departure from the true perspective of the judgment in *American Cyanamid*. In that case, however, this Court was considering a matter under Monopolies and Restrictive Trade Practices Act, 1969.

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In *S.M. Dyechem Ltd. v. Cadbury (India) Ltd.*, [2000] 5 SCC 573,

Jagannadha Rao, J. in a case arising under Trade and Merchandise Marks Act, 1958 reiterated the same principle stating that even the comparative strength and weaknesses of the parties may be a subject matter of consideration for the purpose of grant of injunction in trade mark matters stating :

“21. Therefore, in trademark matters, it is now necessary to go into the question of “comparable strength” of the cases of either party, apart from balance of convenience. Point 4 is decided accordingly.”

The said decisions were noticed yet again in a case involving infringement of trade mark in *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.*, [2001] 5 SCC 73.

We are, however, herein concerned with a different type of case. Same standard would be applicable in a case involving Section 9 of the 1996 Act.

In this connection, we may notice a decision of this Court in *Firm Ashok Traders and Anr. v. Gurumukh Das Saluja and Ors.*, [(2004) 3 SCC 155]. Although therein the applicability of the arbitration agreement was in question having regard to a Constitution Bench decision of this Court in *Jagdish Chandra Gupta v. Kajaria Traders (India) Ltd.*, AIR (1964) SC 1882, this Court maintained an order appointing a Receiver albeit with certain modifications on the premise that the right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated.

We have referred to *Firm Ashok Traders*, (supra) not because we agree with the principle laid down therein but only to suggest that Section 9 of the 1996 Act should be applied so that status quo may be directed to be maintained having regard to the fact that the parties understood the workability of the agreement in a particular manner.

A writ court can also grant injunction in exercise of its power under Article 226 of the Constitution of India. If injunction is refused in this proceeding, the interim order passed in the writ proceedings shall continue. It may give rise to a stalemate. It may violate the well-known rule of judicial comity.

In ‘A Treatise on The Law Governing Injunctions’ by Spelling and Lewis’ it is stated :

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A “Sec. 8. Conflict and Loss of Jurisdiction.

Where a court having general jurisdiction and having acquired jurisdiction of the subject-matter has issued an injunction, a court of concurrent jurisdiction will usually refuse to interfere by issuance of a second injunction. There is no established rule of exclusion which would deprive a court of jurisdiction to issue an injunction because of the issuance of an injunction between the same parties appertaining to the same subject-matter, but there is what may properly be termed a judicial comity on the subject. And even where it is a case of one court having refused to grant an injunction, while such refusal does not exclude another coordinate court or judge from jurisdiction, yet the granting of the injunction by a second judge may lead to complications and retaliatory action”

The High Court, therefore, while noticing the interim order passed in the writ proceedings may have the said principle in mind.

D In *Wander Ltd. and Anr. v. Antox India P. Ltd.*, [1990] Supp. SCC 727, it is stated :

E “The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a *prima facie* case. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted.”

F [See also *M/s Power Control Appliances and Ors. v. Sumeet Machines Pvt. Ltd.*, [1994] 2 SCC 448].

G The *interim* direction ordinarily would precede finding of a *prima facie* case. When existence of a *prima facie* case is established, the court shall consider the other relevant factors, namely, balance of convenience and irreparable injuries. The High Court in its impugned judgment although not directly but indirectly has considered this aspect of the matter when on merit it noticed that the Appellant has raised a dispute as regard payment of an excess amount of Rs.35 crores although according to the Respondent a sum

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of Rs.132 crores is due to it from the Appellant and the Appellant had been paying the amount for the last two years as per the contract. A

Conduct of the parties is also a relevant factor. If the parties had been acting in a particular manner for a long time upon interpreting the terms and conditions of the contract, if pending determination of the lis, an order is passed that the parties would continue to do so, the same would not render the decision as an arbitrary one, as was contended by Mr. Rao. Even the Appellant had prayed for adjudication at the hands of the Commission in the same manner. Thus, it itself thought that the final relief would be granted only by the Arbitrator. B

The Commission is yet to apply its mind. Even before the Commission, the Appellant has not made any application for a direction in terms of subsection (2) of Section 94 of the Act. C

The Respondent has installed the Power Generation Plant. It has continuously been supplying electrical energy to the Appellant. Indisputably, it has to discharge its contractual obligation. The Appellant being the only consumer, the Respondent has no other option but to supply electrical energy to it. In the event, the dispute is referred to the arbitrator, the equity between the parties can be adjusted. Without going into the correctness or otherwise of the claim of the Respondent, we may notice, that according to it, the Appellant owes a hefty sum of Rs.132 crores to it. According to the Appellant, in the event, the disputes and differences between the parties are determined in its favour, it may be held, that it has paid an excess sum of Rs.35 crores only. D E

Clause 2 of Article 14 postulates that pending arbitration, the rights and obligations of the parties shall remain in full force and effect pending the award in such arbitration proceedings, which award shall determine whether and when termination of the said agreement if irrelevant shall become effective. F

It is now well-settled that this Court would not interfere with an order of the High Court only because it will be lawful to do so. Article 136 of the Constitution vests this Court with a discretionary jurisdiction. In a given case, it may or may not exercise its power. The question came up for consideration before this Court in *Chandra Singh and Ors. v. State of Rajasthan and Anr.*, [2003] 6 SCC 545 wherein it was observed: G

“42. In any event, even assuming that there is some force in the H

A contention of the appellants, this Court will be justified in following *Taherakhatoon v. Salambin Mohd.* wherein this Court declared that even if the appellants' contention is right in law having regard to the overall circumstances of the case, this Court would be justified in declining to grant relief under Article 136 while declaring the law in favour of the appellants."

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[See also *State of Punjab v. Savinderjit Kaur*, [2004] 4 SCC 58]

The said principle was reiterated in *N.K. Prasada v. Government of India and Ors.*, [2004] 6 SCC 299 stating:

C "...It is trite that in a given case, the Court may refuse to exercise its discretionary jurisdiction under Article 136 of the Constitution."

In *Inder Parkash Gupta v. State of J&K and Ors.*, [2004] 6 SCC 786, it was stated:

D "42. In ordinary course we would have allowed the appeal but we cannot lose sight of the fact that the selections had been made in the year 1994. A valuable period of 10 years has elapsed. The private respondents have been working in their posts for the last 10 years. It is trite that with a view to do complete justice between the parties, this Court in a given case may not exercise its jurisdiction under Article 136 of the Constitution of India."

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The same principle has been reiterated in *State of Uttaranchal Through Collector, Dehradun and Anr. v. Ajit Singh Bhola and Anr.*, [2004] 6 SCC 800 wherein it was stated:

F "9...Having regard to the manner in which the District Magistrate took over possession of the premises, which appears to us as at present advised, to be high-handed, arbitrary and without any legal sanction we are not persuaded to exercise our discretion under Article 136 of the Constitution of India to set aside the interim order passed by the High Court. It is well settled that this Court will not exercise its discretion and quash an order which appears to be illegal, if its effect is to revive another illegal order."

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We, therefore, are of the opinion that it is not a fit case where interference with the High Court's judgment would be a proper exercise of jurisdiction under Article 136 of the Constitution of India.

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We would, however, request the High Court to consider the desirability **A**  
of hearing both the writ petition as also the petition under Section 11 of the  
1996 Act filed by the Respondent herein as expeditiously as possible and  
preferably within a period of six weeks from the date of communication of this  
order.

It goes without saying that all the contentions of the parties shall **B**  
remain open and any observation made by the High Court in the impugned  
order or by us herein must be considered to have been made for the purpose  
of disposal of the interim prayer.

The appeal is dismissed. No costs.

S.K.S.

Appeal dismissed. **C**