A SOUTHERN POWER DISTRIBUTION POWER COMPANY LIMITED OF ANDHRA PRADESH (APSPDCL) & ANR.

v.

M/S HINDUJA NATIONAL POWER CORPORATION LIMITED & ANR

B

(Civil Appeal No. 1844 of 2020)

FEBRUARY 02, 2022

[L. NAGESWARA RAO AND B. R. GAVAI, JJ.]

C *Electricity Act, 2003 – ss. 61, 62, 64 and 86 – Power Purchase Agreement(PPA) – Appellants-distribution companies (DISCOMS) were to purchase 100% power generated by respondent no.1-HNPCL – O.P. No.21 of 2015 filed by HNPCL for determination of capital cost and O.P. No.19 of 2016 filed by appellants–DISCOMS for approval of PPA – However, on 4th January, 2018, appellants-*
D *DISCOMS filed IAs before the State Electricity Regulatory Commission for withdrawal of O.P. No.19 of 2016 and disposal of O.P. No.21 of 2015 – State Commission allowed withdrawal of O.P. No.19 of 2016 filed by appellants–DISCOMS and consequentially dismissed O.P. No.21 of 2015 filed by HNPCL – Appeal of respondent*
E *no.1-HNPCL allowed by Appellate Tribunal for Electricity (APTEL) which directed the State Electricity Regulatory Commission to dispose of O.P. No.21 of 2015 and O.P. No.19 of 2016 on merits – Correctness of – Held: APTEL rightly held that, on account of the assurance given by the State of Andhra Pradesh/APDISCOMS,*
F *HNPCL had altered its position and as such, it was not permissible for the appellants-DISCOMS to withdraw O.P. No.19 of 2016 – Conduct of appellants-DISCOMS would disentitle them to withdraw the application – Argument, that on account of increase of the capital cost of the project, the appellants–DISCOMS would be required to purchase power at much higher rate, also does not hold water since*
G *the State Electricity Regulatory Commission would only approve the cost as it would feel appropriate, as guided by the provisions u/s.61 of the Act of 2003 and the Regulations; and merely because, the cost of the project is estimated by HNPCL at a particular amount, the State Commission is not bound to accept the same – Further,*
H *perusal of s.64 of the Act of 2003 would reveal that even a*

Generating Company is entitled to make an application for determination of tariff u/s.62 of the Act of 2003 – As such, the State Commission was wholly unjustified in dismissing O.P. No.21 of 2015 filed by HNPCL – For reasons unknown, appellants-DISCOMS took a decision to resile from their earlier stand, due to which, not only the huge investment made by HNPCL would go in waste, but also valuable resources of the public including thousands of acres of land would go in waste – Appellants-DISCOMS, which are instrumentalities of the State, could not be permitted to change their decision at their whims and fancies and, particularly, when it was adversarial to the public interest and public good – The record clearly showed that the change in decision was arbitrary, irrational and unreasonable – IAs filed by appellants–DISCOMS, were acts, affecting public interest and public good, without there being any rational or reasonable basis for the same – Conduct of appellants–DISCOMS, deprecated – In any event, the impugned judgment of APTEL cannot be said to be prejudicial to the interests of any of the parties – What was done by APTEL was only to direct the State Electricity Regulatory Commission to dispose of the said two O.Ps on merits – Appeal dismissed with costs, quantified at Rs.5,00,000/- – State Electricity Regulatory Commission to decide the said two O.Ps, expeditiously, within six months.

Constitution of India – Arts.12 and 14 – Public Authority – State – Instrumentalities of the State – Held: Every action of a State is required to be guided by the touch-stone of non-arbitrariness, reasonableness and rationality – Every action of a State is equally required to be guided by public interest – Every holder of a public office is a trustee, whose highest duty is to the people of the country – The Public Authority is therefore required to exercise the powers only for the public good.

Dismissing the appeal, the Court

HELD: 1. The Appellate Tribunal for Electricity (APTEL) rightly held that, on account of the assurance given by the State of Andhra Pradesh/APDISCOMS, HNPCL had altered its position and as such, it was not permissible for the appellants-DISCOMS to withdraw O.P. No.19 of 2016. The grounds, which are sought to be urged in I.A. No.1 of 2018 in O.P. No.19 of 2016 and I.A. No.2 of 2018 in O.P. No.21 of 2015, were very much available

when the appellants-DISCOMS had entered into MoA on 17th May, 2013 and the Continuation Agreement dated 28th April, 2016. [Para 79][226-C-E]

2. In any case, the conduct of the appellants–DISCOMS, in the present case, would disentitle them to withdraw the application. [Para 87][230--C-D]

3. Another argument, that on account of increase of the capital cost of the project, the appellants-DISCOMS would be required to purchase power at much higher rate, also does not hold water. The State Electricity Regulatory Commission while determining the tariff would be guided by various factors as are required to be taken into consideration in view of the provisions of Section 61 of the Electricity Act, 2003. In any event, the appellants–DISCOMS have themselves reserved their right to contest the correctness of the cost on every component at an appropriate stage before the State Commission. Merely because, the cost of the project is estimated by HNPCL at a particular amount, the State Commission is not bound to accept the same. The State Commission would only approve the cost as it would feel appropriate, as guided by the provisions under Section 61 of the Act of 2003 and the Regulations. In that view of the matter, the argument in this regard also, is without substance. [Para 88][230-D-H]

4. In any event, the State Commission totally erred in dismissing O.P. No.21 of 2015 filed by HNPCL. Perusal of Section 64 of the Act of 2003 would reveal that even a Generating Company is entitled to make an application for determination of tariff under Section 62 of the Act of 2003. As such, irrespective of the question, as to whether an application for withdrawal of O.P. No.19 of 2016 filed by the appellants-DISCOMS could have been entertained, the State Commission was wholly unjustified in dismissing O.P.No.21 of 2015 filed by HNPCL. In any case, in the facts of the present case and, particularly, taking into consideration the conduct of the appellants-DISCOMS, the APTEL rightly held that the appellants– DISCOMS could not have been permitted to withdraw O.P. No.19 of 2016. [Para 99][230-A-C]

5. The appellants–DISCOMS are instrumentalities of the State and as such, a State within the meaning of Article 12 of the Constitution of India. Every action of a State is required to be guided by the touch-stone of non-arbitrariness, reasonableness and rationality. Every action of a State is equally required to be guided by public interest. Every holder of a public office is a trustee, whose highest duty is to the people of the country. The Public Authority is therefore required to exercise the powers only for the public good. [Para 100][234-C-E]

6. The determination of the capital cost of the project and the rate of tariff at which the power has to be purchased would always be subject to regulatory control of the State Commission. What has been done by the APTEL is only directing the State Commission to determine the same. [Para 104][237-F-G]

7. The record would clearly reveal that from the year 2012 onwards till 4th January, 2018, it was the consistent stand of the State of Andhra Pradesh as well as the APDISCOMS that it would be purchasing 100% power generated from the project of HNPCL. Not only an application being O.P. No.21 of 2015 was filed by HNPCL for determination of capital cost, but also O.P. No.19 of 2016 was filed by the appellants-DISCOMS for grant of approval to the Continuation Agreement dated 28th April, 2016 with the Amended and Restated PPA of 1998. The matters were heard finally on 15th May, 2017 and closed for orders. For some unknown reasons, exclusively within the knowledge of the appellants–DISCOMS, things turned topsy-turvy between 15th May, 2017 and 4th January, 2018, on which date, the appellants – DISCOMS did a somersault and filed applications for withdrawal of O.P. No.19 of 2016 and disposal of O.P. No.21 of 2015. Every decision of the State is required to be guided by public interest and the power is to be exercised for public good. For reasons unknown, the appellants– DISCOMS took a decision to resile from their earlier stand, due to which, not only the huge investment made by HNPCL would go in waste, but also valuable resources of the public including thousands of acres of land would go in waste. The reasons /grounds, which are sought to be given

in I.A. No. 1 of 2018 in O.P. No.19 of 2016 and I.A. No.2 of 2018 in O.P. No.21 of 2015, filed on 4th January, 2018, were very much available between 2011 till 15th May, 2017. It is not as if something new has emerged between 15th May, 2017 and 4th January, 2018, which would have entitled the appellants–DISCOMS to resile from their earlier stand. The appellants–DISCOMS could not be permitted to change the decision at their whims and fancies and, particularly, when it is adversarial to the public interest and public good. The record would clearly show that the change in decision is arbitrary, irrational and unreasonable. [Para 105][237-G-H; 238-A-E]

8. I.A. No.1 of 2018 in O.P. No.19 of 2016 and I.A. No.2 of 2018 in O.P. No.21 of 2015 filed by the appellants-DISCOMS, are acts, which have been done wrongfully and wilfully without reasonable and probable cause. The act is one, affecting public interest and public good, without there being any rational or reasonable basis for the same. [Para 107][239-D-E]

9. In any case, the impugned judgment of APTEL cannot be said to be of such a nature, which can be said to be prejudicial to the interests of any of the parties. What has been done by the APTEL is only to direct the State Commission to dispose of O.P. No.21 of 2015 filed for determination of capital cost and O.P. No.19 of 2016 filed for approval of Amended and Restated PPA (Continuation Agreement) on merits. On remand, the State Commission would be bound to take into consideration all the relevant factors and the contentions to be raised by both the parties before deciding the said O.Ps. [Para 109][239-F-G]

Hulas Rai Baij Nath v. Firm K.B. Bass and Co. **[1967] 3 SCR 886 – distinguished.**

Arjun Singh v. Mohindra Kumar **AIR 1964 SC 993 : [1964] 5 SCR 946;** *Tata Power Company Limited v. Reliance Energy Limited and others* **(2009) 16 SCC 659 : [2009] 9 SCR 625**; *Kumari Shrilekha Vidyarthi and others v. State of U.P. and others* **(1991) 1 SCC 212 :**

[1990] 1 Suppl. SCR 625; *Food Corporation of India v. M/s Kamdhenu Cattle Feed Industries* **(1993) 1 SCC 71 : [1992] 2 Suppl. SCR 322;** *Indian Oil Corporation Limited and others v. Shashi Prabha Shukla and another* **(2018) 12 SCC 85 : [2017] 13 SCR 268** *and Kalabharati Advertising v. Hemant Vimalnath Narichania and others* **(2010) 9 SCC 437 : [2010] 10 SCR 971 – referred to.**

Boal Quay Wharfingers Ltd. v. King's Lynn Conservancy Board **(1971) 1 WLR 1558 [Court of Appeal, England] – referred to.**

Case Law Reference

[1967] 3 SCR 886	**distinguished**	**Para 33**
[1964] 5 SCR 946	**referred to**	**Para 41 (i)**
[2009] 9 SCR 625	**referred to**	**Para 89**
[1990] 1 Suppl. SCR 625	**referred to**	**Para 101**
[1992] 2 Suppl. SCR 322	**referred to**	**Para 102**
[2017] 13 SCR 268	**referred to**	**Para 103**
[2010] 10 SCR 971	**referred to**	**Para 106**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1844 of 2020.

From the Judgment and Order dated 07.01.2020 of the Appellate Tribunal for Electricity at New Delhi in Appeal No. 41 of 2018.

C. S. Vaidyanathan, Sr. Adv., Mahfooz Ahsan Nazki, Polanki Gowtham, Ms. Rajeswari Mukherjee, Advs. for the Appellants.

Dr. Abhishek M. Singhvi, M. G. Ramachandran, Sr. Advs., Atul Sharma, Abhishek Sharma, Ms. Harshita Agarwal, Shubham Arya, Ms. L. Nidhiram Sharma, Alok Tripathi, Advs. for the Respondents.

The Judgment of the Court was delivered by

B. R. GAVAI, J.

1. The present appeal filed by the appellants – Distribution Companies (hereinafter referred to as "the appellants - DISCOMS") challenges the judgment and order dated 7th January, 2020, passed by the Appellate Tribunal for Electricity, New Delhi (hereinafter referred to as "the APTEL") in Appeal No. 41 of 2018, thereby allowing the

A appeal filed by the respondent No.1 – M/s Hinduja National Power Corporation Limited (hereinafter referred to as "HNPCL"). By the impugned judgment and order, the APTEL has directed the Andhra Pradesh Electricity Regulatory Commission (hereinafter referred to as "the State Commission") to dispose of O.P. No.21 of 2015 filed by
B HNPCL for determination of capital cost and O.P. No.19 of 2016 filed by the appellants – DISCOMS for approval of amended and restated Power Purchase Agreement (hereinafter referred to as "PPA") (Continuation Agreement) on merits.

2. The facts, in brief, giving rise to the present appeal are as
C under:

3. The erstwhile Andhra Pradesh State Electricity Board (hereinafter referred to as "APSEB") entered into a Memorandum of Understanding (hereinafter referred to as "MoU") with HNPCL on 17th July, 1992. As per the said MoU, APSEB transferred all the licenses,
D approvals, clearance and permits, fuel linkage, water required for establishment of the power project at Visakhapatnam in the erstwhile State of Andhra Pradesh, to HNPCL to generate and supply the electricity to APSEB.

4. An initial PPA was entered into between APSEB and HNPCL
E on 9th December, 1994. On 25th July, 1996, the Central Electricity Regulatory Commission (CERC) granted a Techno Economic Clearance for the power project for an estimated cost of Rs.4628.11 crores (Rs. 4.45 crores per MW).

5. Owing to certain change in conditions, the parties agreed to amend the initial PPA. Accordingly, an Amended and Restated PPA
F dated 15th April, 1998, was entered into between APSEB and HNPCL. Between the years 1998 and 2007, the Amended and Restated PPA, for sale of power by HNPCL to APSEB, was not implemented. Subsequently, in the year 2007, HNPCL approached the Government of Andhra Pradesh to revive the power project mainly structuring it as a merchant
G plant, offering 25% of the power generated to the State and balance 75% power to third parties. However, it appears that there were negotiations between the parties, and the State Government had offered to purchase 100% power generated from the plant of HNPCL and that HNPCL had agreed to it. The same would be clearly evident from the material placed on record, to which we will be referring hereinafter.

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6. The material placed on record would reveal that in the year 2011-2012, the Central Power Distribution Company of Andhra Pradesh Limited (hereinafter referred to as "APCPDCL") for and on behalf of four Distribution Companies of Andhra Pradesh (hereinafter referred to as "APDISCOMS") had initiated the process for procurement of power under Case-1 long term bidding route, to meet the base load requirements of APDISCOMS from the years 2014-2015 onwards. In the said bidding process, HNPCL participated and had successfully emerged as the second lowest bidder (L-2 bidder). After the completion of the bidding process, APCPDCL had filed O.P. No.55 of 2013 before the State Commission for approval of the tariffs emerged in the said bidding process. However, the State Level Expert Committee for evaluation of Case-1 bidding (hereinafter to as "Bid Evaluation Committee") in its meeting dated 28th September, 2012, had noted that, the State Government had informed that the entire capacity of HNPCL was encumbered to the State of A.P./APDISCOMS and was not available for consideration under the tender. Accordingly, the Bid Evaluation Committee had discarded HNPCL from the bidding process.

7. In the meanwhile, there was a correspondence between HNPCL and the State Government in the year 2012, with regard to the steps to be taken for the development of the project and requesting State support for scheduled commissioning of the project. In this regard, HNPCL addressed a letter dated 6th August, 2012 to the then Hon'ble Chief Minister of the erstwhile State of Andhra Pradesh, thereby conveying its intention to develop the project and seeking State's support. Vide communication dated 26th December, 2012, the State Government addressed a letter to HNPCL accepting its proposal and agreeing to purchase 100% power from the project of HNPCL as per the Amended and Restated PPA. Vide communication dated 14th January, 2013, HNPCL agreed to supply 100% power to the State-Distribution Companies at the tariff to be determined by the State Commission.

8. The HNPCL vide communication dated 16th May, 2013, addressed to the appellants – DISCOMS, *inter alia*, provided therein the details with regard to the estimated capital cost of the power project to the tune of Rs.6098 crores as against Rs.5545 crores that was given in June, 2010. The appellants – DISCOMS vide communication dated 17th May, 2013, expressed their reservations about the capital cost furnished by HNPCL and reserved their rights to contest the same before the State Commission.

A 9. On the same day, i.e., 17th May, 2013, a Memorandum of Agreement (hereinafter referred to as "MoA") was entered into between the APDISCOMS and HNPCL, thereby deciding to continue the Amended and Restated PPA dated 15th April, 1998, on the terms and conditions set out therein. In pursuance of the aforesaid MoA, a Fuel Supply Agreement ("FSA" for short) dated 26th August, 2013, came to B be entered between HNPCL and Mahanadi Coalfield Limited for coal supply for the said project.

10. On 12th March, 2014, a petition being O.P. No.21 of 2015, came to be filed by HNPCL before the State Commission for determination of capital cost for the project and for determination of the C tariff for such generation and sale of electricity by HNPCL to APDISCOMS.

11. Thereafter, on 2nd June, 2014, the Andhra Pradesh State Reorganisation Act, 2014, (hereinafter referred to as "Reorganisation Act") came into effect vide which the erstwhile State of Andhra Pradesh D was bifurcated into two States, i.e., the State of Andhra Pradesh and the State of Telangana.

12. On 28th July, 2015, HNPCL filed an Addendum Application in O.P. No.21 of 2015, thereby enhancing the capital cost of the project to Rs.8,087 crore. This capital cost was disputed by the APDISCOMS.

E 13. On 11th January, 2016, the first unit of the Power project (520 MW) was declared Commercial Operation Date (COD) by HNPCL. Vide interim order dated 1st March, 2016, the State Commission fixed the provisional tariff at the rate of Rs.3.61 per unit for supply of electricity by HNPCL to the APDISCOMS.

F 14. On 30th March, 2016, HNPCL filed I.A. No.5 of 2016 in O.P. No.21 of 2015, for payment of variable charges and fixed charges at Rs.1.80 per unit and Rs.2.16 per unit aggregating to Rs.3.96 per unit at 80% availability.

15. On 28th April, 2016, distinct Power Distribution Corporations G were created including the appellants – DISCOMS i.e. Southern Power Distribution Power Company Limited of Andhra Pradesh ("APSPDCL") and Eastern Power Distribution Company of Andhra Pradesh ("APEPDCL"). These corporations succeeded the APSEB, which had entered into the Amended and Restated PPA dated 15th April, 1998 with H HNPCL. As such, the Continuation Agreement to the Amended and

Restated PPA was entered into between the appellants – DISCOMS and HNPCL on 28th April, 2016.

16. On 11th May, 2016, the appellants – DISCOMS filed a petition being O.P. No.19 of 2016 before the State Commission for approval of the Continuation Agreement dated 28th April, 2016, read with the Amended and Restated PPA dated 15th April, 1998.

17. The State Government vide order dated 1st June, 2016, accorded approval for purchase of 100% power from HNPCL.

18. On 3rd July, 2016, the second unit of the HNPCL (520 MW) came to be declared COD by HNPCL.

19. Vide order dated 6th August, 2016, the State Commission re-determined the provisional tariff at the rate of Rs.3.82 per unit, payable by the appellants – DISCOMS for the power supplied by HNPCL.

20. On 15th May, 2017, the State Commission after hearing the parties on merits, reserved the judgment in both the petitions, i.e., in O.P. No.19 of 2016 and O.P. No.21 of 2015.

21. It is further to be noted that in the appeal arising out of interlocutory proceedings, the APTEL vide order dated 1st June, 2017, directed the State Commission to dispose of O.P. No.19 of 2016 and O.P. No.21 of 2015 on or before 14th August, 2017. The said period came to be extended from time to time, the last of such extension was granted till 31st January, 2018, vide order dated 10th January, 2018.

22. Thereafter, on 4th January, 2018, the appellants – DISCOMS filed two Interlocutory Applications, viz., (i) I.A. No.1 of 2018 in O.P. No.19 of 2016 for withdrawal of O.P. No.19 of 2016 together with initial PPA; and (ii) I.A. No.2 of 2018 in O.P. No.21 of 2015 for disposal of O.P. No.21 of 2015.

23. Vide order dated 31st January, 2018, the State Commission allowed withdrawal of O.P. No.19 of 2016 filed by the appellants – DISCOMS seeking approval of PPA and consequentially dismissed O.P. No.21 of 2015 filed by HNPCL seeking determination of tariff.

24. Aggrieved by the same, an appeal being Appeal No.41 of 2018, came to be filed by HNPCL before the APTEL. The said appeal came to be admitted by the APTEL vide order dated 26th February, 2018. The APTEL vide order dated 16th March, 2018, passed in I.A. No.211 of 2018 in the said appeal, as an ad hoc arrangement, directed

A the parties to maintain status quo as prevalent prior to 31st January, 2018. This was without prejudice to the rights and contentions of the parties in the main appeal, i.e., Appeal No.41 of 2018.

25. It is also to be noted that the order dated 16th March, 2018, passed by the APTEL in I.A. No.211 of 2018 in Appeal No.41 of 2018, B came to be challenged by the appellants – DISCOMS before the High Court of Andhra Pradesh by filing Writ Petition being Writ Petition No.10814 of 2018. Another writ petition being Writ Petition No.13689 of 2018 came to be filed by the appellants – DISCOMS challenging the order of the APTEL dated 26th February, 2018, admitting the appeal filed by HNPCL. The said writ petitions came to be dismissed by the C High Court of Andhra Pradesh vide order dated 2nd May, 2018.

26. In the meantime, on 16th April, 2018, HNPCL had filed an Execution Petition being Execution Petition No.3 of 2018 before the APTEL seeking execution of the order dated 16th March, 2018, passed by the APTEL in I.A. No.211 of 2018 in Appeal No.41 of 2018. Certain D directions were passed by the APTEL in the said Execution Petition vide order dated 31st May, 2018.

27. The appellants – DISCOMS had also challenged the order dated 16th March, 2018, passed by the APTEL, by way of Civil Appeal No.5772 of 2018 before this Court. This Court vide order dated 4th June, E 2018, refused to interfere with the said order, since it was an interim order. However, this Court directed the appeal to be decided expeditiously without taking into consideration the observations, in the order impugned before it, as conclusive.

28. Vide impugned judgment and order dated 7th January, 2020, F the APTEL allowed the appeal filed by HNPCL and directed the State Commission to dispose of O.P. No.21 of 2015 and O.P. No.19 of 2016. Being aggrieved thereby, the appellants – DISCOMS have approached this Court by way of the present appeal.

29. On 14th July, 2020, this Court passed the following order in the G present appeal:

> The appeal is admitted.
>
> Until further orders, the impugned order passed by the Appellate Tribunal for Electricity New Delhi in Appeal No. 41/ 2019 shall remain stayed.

H List for hearing after four weeks."

30. An application being I.A. No.67061 of 2020 for modification of the said order dated 14th July, 2020, came to be filed by HNPCL. This Court vide order dated 21st August, 2020, modified the order as under:

> "Heard.
>
> By order dated 14.07.2020, we directed the stay of impugned order passed by the Appellate Tribunal for Electricity, New Delhi, in Appeal No.41/2019.
>
> We clarify that there shall be no stay of the order dated 16.03.2018 passed by the Appellate Tribunal for Electricity, New Delhi, providing for interim measure. Order accordingly.
>
> The instant interlocutory application stands disposed of accordingly"

31. It appears from the record that during the intervening period, certain Interlocutory Applications have been filed from both the sides, wherein, the appellants – DISCOMS are seeking vacation of the interim order dated 21st August, 2020, whereas HNPCL is seeking implementation of the order dated 21st August, 2020. The record would show that the matter has been adjourned from time to time and was finally heard by this Court on 20th January, 2022.

32. We have heard Shri C.S. Vaidyanathan, learned Senior Counsel appearing on behalf of the appellants – DISCOMS and Dr. Abhishek Manu Singhvi and Shri M.G. Ramachandran, learned Senior Counsel appearing on behalf of HNPCL.

33. Shri C.S. Vaidyanathan, learned Senior Counsel appearing on behalf of the appellants – DISCOMS, submitted that the APTEL has grossly erred in holding that the appellants – DISCOMS were not entitled to apply for withdrawal of O.P. No.19 of 2016, filed for grant of approval of the PPA. It is submitted that unless there was prohibition in law, the appellants were very much within their right to apply for withdrawal of the O.P. filed by them. In this regard, Shri Vaidyanathan relied on the following authorities:

(i) Boal Quay Wharfingers Ltd. v. King's Lynn Conservancy Board[1] and

(ii) Hulas Rai Baij Nath v. Firm K.B. Bass and Co.[2]

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[1] (1971) 1 WLR 1558 [Court of Appeal, England)

[2] (1967) 3 SCR 886

34. Shri Vaidyanathan further submitted that the PPA was not a valid document until it was approved by the State Commission under Section 86(1)(b) of The Electricity Act, 2003 (hereinafter referred to as "the Act of 2003"). He further submitted that under Section 21 of The Andhra Pradesh Electricity Reform Act, 1998 (hereinafter referred to as "the Reform Act"), any agreement relating to generating, transmitting, distribution or supply of energy without the previous consent in writing of the Commission was void ab initio. He submitted that by the impugned judgment, the APTEL has, in effect, granted HNPCL a decree of specific performance of a contract, which is void ab initio. He further submitted that MoA dated 17th May, 2013 and the Continuation Agreement dated 28th April, 2016 were themselves contrary to the National Tariff Policy issued under Section 3 of the Act of 2003 and Regulation 5.2(b) of the Andhra Pradesh Electricity Regulatory Commission (Terms and conditions for determination of tariff for supply of electricity by a generating company to a distribution licensee and purchase of electricity by distribution licensees) Regulation, 2008 (Regulation No.1 of 2008) (hereinafter referred to as 'the Tariff Regulations') issued by the State Commission. As such, the direction by the APTEL, to continue to get the electricity supply from HNPCL, being contrary to the statutory provision, would not be tenable in law.

35. Shri Vaidyanathan submitted that the present project does not fall under any of the categories mentioned in Regulation 5.2 of the Tariff Regulations, which aspect has not been taken into consideration by the APTEL.

36. Shri Vaidyanathan further submitted that the finding of the APTEL, that HNPCL had made huge investments on the basis of the assurance given by the appellants – DISCOMS that they will purchase 100% power from it, is itself erroneous. He submitted that the initial project of HNPCL was lying in cold storage from 1996 to 2007. He submitted that in the year 2007, HNPCL had attempted to revive the project as a Merchant-power plant. He submitted that the project of HNPCL had also attained financial closure in the year 2010. He further submitted that before the acceptance of the proposal of HNPCL by the State Government, HNPCL had already completed upto 93% of the project. It is therefore, submitted that the finding that huge investments made by HNPCL were on the basis of the representation by the State Government is totally erroneous. In any case, he submits, that the appellants – DISCOMS are independent authorities and not bound by

the decision of the State. He submitted that under the scheme of the Act of 2003, the appellants – DISCOMS cannot purchase the power without the prior approval of the State Commission. He submits that the State has no role to play in the said matter. It is submitted that, in any case, the appellants – DISCOMS could not be bound by the representation made by the State Government.

37. Shri Vaidyanathan further submits that since the re-initiation of the project in the year 2007 by HNPCL is as a Merchant-power plant, it can very well sell the power to the third parties in the market. He submitted that however, the appellants – DISCOMS cannot be compelled to purchase the power from HNPCL, which will be at a very high price. He submitted that the capital cost of the project, which was initially estimated at Rs.4628.11 crores has now gone up to Rs.8087 crores, which will have a direct effect on the purchase price of the electricity by the appellants – DISCOMS. He therefore submits that if the appellants – DISCOMS are directed to purchase the electricity at such a high price, the loss would be ultimately to the consumers and as such, the direction given by the APTEL is also against the public interest.

38. Per contra, Dr. Abhishek Manu Singhvi and Shri M.G. Ramachandran, learned Senior Counsel appearing on behalf of HNPCL submitted that the order passed by the APTEL is such, which does not at all harm the appellants – DISCOMS. Dr. Singhvi submitted that by the impugned order, the APTEL has only directed the State Commission to dispose of O.P. No.21 of 2015 filed by HNPCL for determination of capital cost and O.P. No.19 of 2016 filed by the appellants – DISCOMS for approval of Amended and Restated PPA on merits.

39. Dr. Singhvi submits that the APTEL has given sound and elaborate reasons and as such, no interference is warranted in the present appeal.

40. Shri M.G. Ramachandran, learned Senior Counsel, submitted that when withdrawal of an application is sought, which has the effect of frustrating the contract and defeating the defendant's right, the appellants cannot be said to have the right to withdraw the proceedings. He relied on the following authorities in support of this proposition.

(i) Madhu Jajoo v. State of Rajasthan[3]

(ii) Kiran Girhotra & Ors. v. Raj Kumar & Ors.[4]

[3] AIR 1999 Raj 1
[4] (2009) 164 DLT 483

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(iii) M. Radhakrisna Murthy v. Government of A.P. & Ors.[5]

(iv) Smt. Ajita Debi v. Musst. Hossenara Begum[6]

(v) Mathuralal v. Chiranji Lal[7]

(vi) The Registrar, Manonmaniam Sundaranar University v. Suhura Beevi[8]

B

41. Shri Ramachandran has further submitted that a right of withdrawal is not an absolute right and that once the judgment is reserved there cannot be any further application seeking withdrawal. In support of this proposition, he relied on the following authorities:

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(i) Arjun Singh v. Mohindra Kumar[9]

(ii) Bharati Behera v. Jhili Prava Behera[10]

(iii) Rabia Bi Qasim v. Countrywide Consumer Financial Services Limited[11]

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(iv) Pujya Sindhi Panchayat v. Prof. C.L. Mishra[12]

(v) Yash Mehra v. Arundhati Mehra[13]

(vi) Dharani Sugars and Chemicals Limited v. TMN Engineering Industry[14]

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42. Dr. Singhvi, learned Senior Counsel, further submitted that, as a matter of fact, HNPCL desired to start the project as a Merchant-power plant. It is however, on the insistence of the State of Andhra Pradesh that HNPCL was compelled to supply 100% of power generated to the State. He further submitted that it is evident from the record that HNPCL had participated in the competitive bidding process conducted by the APCPDCL. It was the decision of the Bid Evaluation

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[5] (2001) 3 ALD 330 (DB)
[6] AIR 1977 Cal 59
[7] AIR 1962 Raj 109
[8] AIR 1995 Mad 42
[9] AIR 1964 SC 993
[10] W.P. No.26254 of 2013 decided by Orissa High Court on 18.04.2014
[11] ILR 2004 KAR 2215
[12] AIR 2002 Rajasthan 274 (DB)
[13] (2006) 132 DLT 166
[14] CRP PD No.3309 to 3312 of 2011 and MP No.1 of 2011 decided by the Madras High Court on 30.08.2017

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Committee, to not consider the bid submitted by HNPCL on the premise that the entire generation capacity of HNPCL's project was already encumbered to the State of Andhra Pradesh under the Amended and Restated PPA of 1998. He further submitted that not only this but the entire communication placed on record would show that it was the State Government, which had expressed its interest to purchase 100% power from HNPCL's project as per the Amended and Restated PPA dated 15th April, 1998.

43. He further submitted that on the reorganisation of the erstwhile State of Andhra Pradesh and its bifurcation into two States, i.e., the State of Andhra Pradesh and the State of Telangana; though the State of Telangana had demanded 54% of the power from HNPCL's project, the Government of Andhra Pradesh insisted HNPCL to supply 100% of the power to the State of Andhra Pradesh. He therefore submits that the APTEL has rightly, on appreciation of the material placed on record, held that it was on the representation of the State Government that the HNPCL had made huge investments for the project. He submitted that the contention of the appellants – DISCOMS, that if the power generated by the HNPCL is purchased by them, it will be at a very heavy cost, is totally erroneous. He submitted that, as a matter of fact, when as per the interim orders passed by the APTEL and this Court, the appellants – DISCOMS could have purchased the power from HNPCL at the rate of Rs.3.82 per unit, the appellants – DISCOMS are purchasing the power at a much higher rate from the generators, which were ranked much below HNPCL in the merit order. He further submits that the conduct of the appellants – DISCOMS is totally *mala fide.* Whenunder the interim orders of this Court as well as of the APTEL, they were bound to purchase the power at much lesser price than compared to the rate at which they are purchasing, they continued to purchase power at much higher price. He therefore submits that such an act, apart from being violative of the order of this Court, is contrary to the public interest.

44. Dr. Singhvi further submits that on account of *mala fide* attitude of the appellants – DISCOMS, it is not only HNPCL, but also the public at large, who are the sufferers. He submits that huge investment of thousands of crores of rupees is lying idle. He further submits that apart from generating employment for more than 1000 people, the generation project, which is fully operational, would also provide electricity in the State of Andhra Pradesh. He submitted that the contention of the

A appellants – DISCOMS that they had decided to withdraw the application on account of huge capital cost and the power being available in excess is also factually incorrect. He submits that recently the appellants have entered into an MoU with SEMBCORP Energy India in December, 2021 for generation of 625 MW of electricity. He submits that insofar as the price at which the electricity would be purchased by the appellants – B DISCOMS from the generation unit of HNPCL would be determined by the State Commission, which will have to take into consideration various aspects while approving the capital cost of the project as well as while doing the exercise of determination of tariff. The learned Senior Counsel therefore submits that no interference is warranted in the present C appeal.

45. The facts in the present case are not much in dispute. It is not in dispute that on 17th July, 1992, an MoU came to be entered between APSEB and HNPCL, vide which APSEB had transferred all the licences, approvals, clearance and permits, fuel linkage, water required for the D project to HNPCL. It is also not in dispute that on 9th December, 1994, an initial PPA came to be entered between HNPCL and APSEB. On 25th July, 1996, the CERC granted a Techno Economic Clearance for the power project for an estimated cost of Rs.4628.11 crores (Rs.4.45 crores per MW). It is also not in dispute that APSEB and HNPCL mutually agreed to amend 1994 PPA and accordingly, an Amended and E Restated PPA came to be executed on 15th April, 1998. It is also not in dispute that from 1996 till 2007, the project remained in cold storage. In the year 2007, the promoters of HNPCL approached the then Hon'ble Chief Minister of the erstwhile State of Andhra Pradesh. It appears that certain discussions took place between the then Hon'ble Chief Minister F of erstwhile State of Andhra Pradesh and the promoters of HNPCL. On 5th January, 2007, Mr. G.P. Hinduja addressed a communication to the then Hon'ble Chief Minister of the erstwhile State of Andhra Pradesh. It will be relevant to refer to the following excerpt from the said communication, which reads thus:

G "As per our discussion I am summarizing herein below our proposal for your ready reference:

1. Vizag Power project will be mainly structured as a Merchant plant and implemented in a period manner with an initial capacity of 1040 MW and increasing upto 400 MW in a phased manner.

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2. GoAP will sign a MoU with the Project Sponsors to provide:

- Title deeds for 1122.38 acres of land against balance payment of Rs.16.48 cr.
- Transfer of remaining land of 1921.34 acres against payment of an amount of Rs. 67.63 cr.
- Infrastructure support including for construction, power and water.
- Recommend to GoI mega status for the project.
- Revive the Coal supply and Transportation Agreements.
- Facilitate environment clearance from MOEF.
- Sanction of all other applicable State Approvals.

3. GoAP will have the first right of refusal, in the MoU, to purchase 25% of the power at regulated tariff."

46. It could thus be seen that when HNPCL proposed to revive the project in the year 2007, it was mainly structured as a Merchant plant, wherein the Government of Andhra Pradesh was to have the first right of refusal, to purchase 25% of the power at regulated tariff.

47. It is also not in dispute that APCPDCL on behalf of all the four APDISCOMS (viz., Central Power Distribution Company of Andhra Pradesh Limited, Southern Power Distribution Company of Andhra Pradesh Limited, Northern Power Distribution Company of Andhra Pradesh Limited and Eastern Power Distribution Company of Andhra Pradesh Limited) had conducted bidding process for procurement of power of 2000 MW +/- 20% under Case-1 to meet the base load requirements of APDISCOMS from the year 2014-2015 onwards. It is also not in dispute that in the said bidding process, HNPCL had also submitted its bid and successfully emerged as L-2 bidder. After completion of the bidding process, APCPDCL had applied for approval of the tariff at which the power was to be purchased from the successful bidders in the said process. It will be relevant to refer to paragraph 4(u) of the order dated 13th August, 2013, passed by the State Commission in O.P. No. 55 of 2013, filed by APCPDCL on behalf of all the four APDISCOMS, which reads thus:

A "u) In the minutes of meeting held on 28th September 2012, the Bid Evaluation Committee noted that "The Principal Secretary, Energy informed the Evaluation Committee that the entire capacity of Hinduja National Power Corporation Limited (HNPCL) is encumbered to the state of A.P. / DISCOMs of A.P. and hence not available for consideration under this tender. Hence, HNPCL must be taken out of the bid process and APERC must be informed accordingly. Hence the Committee took the note of it and decided to separate HNPCL from the bid process"

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C 48. It could thus be seen that though HNPCL had successfully emerged as the L-2 bidder in the open bidding process, it was at the instance of the State of Andhra Pradesh that the Bid Evaluation Committee had discarded the bid of HNPCL, on the ground that the entire capacity of HNPCL was encumbered to the State of Andhra Pradesh/ APDISCOMS.

D 49. It will also be relevant to refer to the following excerpt from the letter dated 26th December, 2012, addressed by the Principal Secretary to Government, Energy Department, to HNPCL:

"This Is to Invite your attention to the above cited letter intimating the implementation of the coal fired power project (1040 MW) by you at Visakhapatnam and supply of power therefrom. In this regard, HNPCL has sought certain support so as to achieve scheduled commissioning of the Project commencing in July 2013. ***On this matter I am to clarify that Government of Andhra Pradesh reiterates its Interest in purchasing 100% power (through APDISCOMs) from the said project, as already contemplated in the restated PPA entered into between APSEB and HNPCL in 1998 based on the MOU in 1992 on the broad conditions mentioned in the PPA signed in 1998, except to the extent they may stand modified due to Impact of change in laws/rules and regulatory standards guiding such power projects post 1998.***

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2. In this background, the Government of Andhra Pradesh hereby agrees to facilitate the implementation of the power project to achieve the timeline for schedule commissioning. ***The Government has also decided to direct the APDlSCOMs as the successor***

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entities of APSEB to enter into a continuation Agreement to the PPA of 1998 With HNPCL to this effect."

[emphasis supplied]

50. A perusal of the said letter dated 26th December, 2012, would reveal that the Government of Andhra Pradesh has reiterated its interest in purchasing 100% of power (through APDISCOMS) from the said project, as already contemplated in the restated PPA entered into between APSEB and HNPCL in 1998 based on the MoU of 1992. No doubt that it mentions that the same shall be except to the extent they may stand modified due to impact of change in laws/rules and regulatory standards guiding such power projects post 1998. The said letter would also reveal that the Government had decided to direct the APDISCOMS as the successor entities of APSEB to enter into a continuation agreement to the PPA of 1998 with HNPCL to the said effect. It will also be relevant to note that in the said letter it is observed that the State Government will take necessary steps within three months for execution of PPA and provision of Transmission System for Start-up Power and Power Evacuation. In the said letter, the State had also agreed for providing assistance in obtaining statutory clearances/approvals from State/local authorities within the timeline for scheduled commissioning of Project.

51. In response to the aforesaid letter, HNPCL addressed a communication dated 14th January, 2013, to the State Government, thereby expressing its concurrence to the proposal given by the Government of Andhra Pradesh of procuring entire power from the Project. Vide the said letter dated 14th January, 2013, HNPCL requested the State Government to provide all the necessary support required for taking the requisite approvals from the State Commission for tariff determination based on the actual project cost.

52. A further communication dated 16th May, 2013, was addressed by HNPCL to the appellants - DISCOMS. By the said letter, HNPCL had estimated the project cost to the tune of Rs.6098 crores. The said project cost was worked out on the basis of the order passed by the CERC dated 4th June, 2012, providing a Benchmark Capital Cost (Hard cost) model for Thermal Power Stations with Coal as Fuel for tariff determined by the Commission under Section 62 of the Act of 2003.

53. The appellants – DISCOMS vide communication dated 17th May, 2013, recorded that the documents of capital cost of the Project

A were received without prejudice to the rights of APDISCOMS to contest the cost of the project on every component before the State Commission at appropriate stage and that the receiving of the capital cost document did not constitute that the APDISCOMS had agreed/accepted the same without demur.

B 54. On the same day, i.e., 17th May, 2013, an MoA for continuation of the Amended and Restated PPA dated 15th April, 1998, came to be executed between APDISCOMS and HNPCL. It will be relevant to refer to clauses E and F of the said MoA dated 17th May, 2013, which read thus:

C "E. HNPCL shall agree that the entire capacity of the project and all the units of the power station shall at all times be for the exclusive benefit of the DISCOMs and the DISCOMs shall have the exclusive right as well as obligation to purchase the entire capacity from the project. HNPCL shall not grant to any third party or allow any third party to obtain any

D entitlement to the Available Capacity and/or scheduled energy. In case DISCOMs do not avail power up to the Available Capacity provided by HNPCL, DISCOMs shall pay to HNPCL the capacity charges for such unavailed Available Capacity.

E Notwithstanding the above, in case DISCOMS do not avail power up to the Available Capacity provided by HNPCL, HNPCL shall have the option to sell such Available Capacity not availed by DISCOMS to any third party or require the payment of capacity charges from DISCOMS towards such

F unavailed Available Capacity not sold to third parties. DISCOMs shall not be required to pay capacity charges for such capacity sold to third parties.

F. Transmission line/system for start-up power and power evacuation from the Project will be provided by DISCOMs through APTRANSCO in time so as to ensure availability

G of power evacuation facility at the time of COD of Unit 1. DISCOMs assure that power evacuation shall be done through APTRANSCO without any delay."

55. It could thus be seen that in the MoA dated 17th May, 2013, it

H was agreed that the entire capacity of the project and all the units of the

power station shall at all times be for the exclusive benefit of the DISCOMS and the DISCOMS were to have the exclusive right as well as the obligation to purchase the entire capacity from the project. Vide the said MoA, HNPCL was restrained from granting to any third party or allowing any third party to obtain any entitlement to the available capacity and/or scheduled energy. It was further agreed that in case DISCOMS do not avail power up to the Available Capacity provided by HNPCL, the DISCOMS were to pay HNPCL, the capacity charges for such un-availed Available Capacity. No doubt, that in case the DISCOMS failed to avail power up-to the Available Capacity provided by HNPCL, an option was available to HNPCL to sell such Available Capacity, not availed by DISCOMS, to any third party. It was also agreed that the DISCOMS were not required to pay capacity charges for such capacity sold to third parties. As per the said MoA, the Transmission line/system for start-up power and power evacuation from the project was to be provided by DISCOMS through Transmission Corporation of Andhra Pradesh (APTRANSCO) in time so as to ensure availability of power evacuation facility at the time of COD of Unit-1. It is also not in dispute that in pursuance of the execution of the said MoA, HNPCL entered into an FSA with Mahanadi Coalfield Limited for supply of coal for the project.

56. Pursuant to the execution of the said MoA, an application being O.P. No.21 of 2015 came to be filed by HNPCL before the State Commission on 12th March, 2014, for determination of Capital Cost of the coal fired power station of 1040 MW (2 x 520 MW) capacity in the district of Visakhapatnam.

57. Pursuant to these events, the Reorganisation Act came into effect on 2nd June, 2014, thereby bifurcating the erstwhile State of Andhra Pradesh into the State of Andhra Pradesh and the State of Telangana. It is the contention of HNPCL that after the bifurcation of the erstwhile State of Andhra Pradesh, though the State of Telangana demanded 54% of the power from the project, the Government of Andhra Pradesh insisted HNPCL to supply 100% of the power to the State of Andhra Pradesh.

58. It is not in dispute that HNPCL filed an Addendum Application in O.P. No.21 of 2015 on 28th July, 2015, thereby showing the capital cost of the project to have increased to Rs.8087 crores.

59. When O.P. No.21 of 2015, was listed before the State Commission on 26th September, 2015, the State Commission passed the following order:

> "Sri P. Shiva Rao, learned Standing Counsel for the respondents filed counter on behalf for the respondents and sought for further time to respond to the further material filed by the petitioner by way of addendum before the Commission. Sri P. Shiva Rao, learned Standing Counsel for the respondents also represented that they are filing an application to dispense with the earlier Consultant as the respondents appointed their own Consultant. Hence, for further response of the respondents and rejoinder of the petitioner to the counter filed by tile respondents and for further hearing on the question of Consultant including on the application for dispensing with the earlier Consultant. Posted to 03-10-2015 at 11 AM. Both the learned counsel also represented that there is no issue of jurisdiction involved in the matter."

60. It is also not in dispute that the first unit of the power project of HNPCL (520 MW) was declared COD on 11th January, 2016.

61. Further, it is not in dispute that the State Commission by an order dated 1st March, 2016, directed the appellants – DISCOMS to pay an interim tariff at the rate of Rs.3.61 per unit to HNPCL. By the said order, the State Commission also clarified that such interim tariff was without prejudice to the rights and contentions of both parties in the main petition, i.e., O.P. No.21 of 2015.

62. After the bifurcation of the erstwhile State of Andhra Pradesh into the State of Andhra Pradesh and the State of Telangana, on 28th April, 2016, a Continuation Agreement came to be signed between the appellants – DISCOMS and HNPCL. A perusal of the recital in the said Continuation Agreement dated 28th April, 2016 would reveal that the Government of Andhra Pradesh represented by the erstwhile APSEB had expressed the desire to establish a coal-based Thermal Power Project at Visakhapatnam and had selected the consortium of Ashok Leyland Limited, a company incorporated in India and Mission Energy Company, a California, USA corporation, to set up a joint venture for establishing a thermal power station. The said Continuation Agreement dated 28th April, 2016, also refers to the MoU of 1992 (dated 17th July, 1992), PPA of 1994 (dated 9th December, 1994), the Amended and Restated PPA of 1998 (dated 15th April, 1998), the correspondence between the State of Andhra Pradesh and HNPCL, and MoA between the erstwhile State of Andhra Pradesh and HNPCL dated 17th May, 2013. It will be relevant

to refer to the following part of the Continuation Agreement dated 28th April, 2016:

"3) The Parties acknowledge and agree that the Procurers have replaced the APSEB in all respects with regard to the 1998 PPA and shall execute such other or further documents and/or take such steps, as are necessary and/or incidental, in order to give full and complete effect to such transfer of contracts, deeds, agreements and other instruments of whatever nature to the Procurers.

4) The Procurers hereby agree that they are jointly and separately liable for all obligations under the Agreement.

5) Subject to Clause 3 hereof and pending the execution of such other or further documents as envisaged under Clause 3 hereof, the Parties hereto are entering into this Continuation Agreement to the 1998 PPA and confirm, agree to the following:

(a) The 1998 PPA shall stand amended as mentioned hereunder and as indicated in the Annexure attached hereto, which Annexure shall constitute an integral part of this Continuation Agreement.

(b) The 1998 PPA and the MoA shall stand modified or amended to the extent provided herein. All other terms and conditions of the 1998 PPA including the obligations of the Parties as stated thereunder shall continue to be binding on the Parties. This Continuation Agreement and the 1998 PPA shall together constitute one and the same agreement and the provisions of this Continuation Agreement shall form an Integral part of the 1998 PPA. However, notwithstanding the foregoing, should any provisions of this Continuation Agreement be at variance or in conflict with any of the provisions of the 1998 PPA or the MoA, the provisions of this Continuation Agreement shall prevail."

63. It could thus clearly be seen that the appellants – DISCOMS have clearly represented that they had replaced the APSEB in all respects with regard to the 1998 PPA and had agreed to execute all further documents and take such steps as are necessary in order to give full and complete effect to such transfer of contracts, deeds, agreements, etc.

A The appellants – DISCOMS have also clearly agreed that the 1998 PPA (i.e. the Amended and Restated PPA dated 15th April, 1998) shall stand amended as mentioned in the said Continuation Agreement dated 28th April, 2016. It has been specifically averred that the Continuation Agreement and the 1998 PPA shall together constitute one and the same agreement.

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64. Immediately after the said Continuation Agreement was entered into between the appellants – DISCOMS and HNPCL, the appellants – DISCOMS filed an application being O.P. No.19 of 2016 under Section 86(1)(b) of the Act of 2003 for grant of approval of PPA. The said application contained the entire history narrated herein above leading up to the execution of the Continuation Agreement dated 28th April, 2016. The prayer clause in the said application reads thus:

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"**PRAYER**

32. Therefore, it is prayed that the Hon'ble Commission may be pleased to grant approval/consent for the initialed Continuation Agreement to the PPA dated 15.04.1998 together with Amended & Restated PPA dated 15.04.1998 of HNPCL."

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65. The State Government vide order dated 1st June, 2016, accorded approval for purchase of 100% power from HNPCL. On 3rd July, 2016, the second unit of HNPCL (520 MW) was declared COD. Vide order dated 6th August, 2016, the State Commission, after hearing the counsel for the parties, directed the appellants – DISCOMS to pay an interim tariff at the rate of Rs.3.82 per unit to HNPCL from 1st August, 2016 for the power received by them. This was to operate until further orders passed by the State Commission.

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66. It is also not in dispute that after elaborate hearing in both the petitions i.e. O.P. No.21 of 2015 and O.P. No.19 of 2016, the State Commission reserved the matters for orders on 15th May, 2017. It is also not in dispute that in an appeal between the parties arising out of interlocutory proceedings, the APTEL had directed the State Commission to decide O.P. No.19 of 2016 and O.P. No.21 of 2015 expeditiously and on or before 14th August, 2017. The said period came to be extended from time to time, the last of such extension was granted till 31st January, 2018, vide order dated 10th January, 2018.

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67. At this juncture, the appellants – DISCOMS filed two Interlocutory Applications on 4th January, 2018, viz., (i) I.A. No.1 of

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2018 in O.P. No.19 of 2016 for withdrawal of O.P. No.19 of 2016 together with initial PPA; and (ii) I.A. No.2 of 2018 in O.P. No.21 of 2015 for disposal of O.P. No.21 of 2015.

68. Vide order dated 31st January, 2018, passed by the State Commission, which was impugned before the APTEL, the State Commission allowed withdrawal of O.P. No.19 of 2016 filed by the appellants - DISCOMS and consequently dismissed O.P. No.21 of 2015 filed by HNPCL.

69. As discussed herein above, being aggrieved, HNPCL filed Appeal No.41 of 2018 before the APTEL, which came to be admitted by the APTEL on 26th February, 2018. It is also not in dispute that the APTEL passed an interim order dated 16th March, 2018 in I.A. No.211 of 2018 in Appeal No.41 of 2018, on an ad hoc arrangement basis, thereby directing the parties to maintain status quo as prevalent prior to 31st January, 2018. It is also not in dispute that both the orders passed by the APTEL, i.e., order dated 16th March, 2018 directing maintenance of status quo as prevalent prior to 31st January, 2018 and order dated 26th February, 2018, admitting Appeal No.41 of 2018, were assailed before the High Court of Andhra Pradesh by way of Writ Petitions being Writ Petition No. 10814 of 2018 and Writ Petition No.13689 of 2018 respectively. However, the same were dismissed by the High Court of Andhra Pradesh by order dated 2nd May, 2018.

70. It is also not in dispute that in the meantime, Execution Petition No. 3 of 2018 was filed by HNPCL before the APTEL seeking execution of order dated 16th March, 2018, passed by the APTEL in I.A. No.211 of 2018 in Appeal No.41 of 2018.

71. The appellants – DISCOMS had also approached this Court by way of Civil Appeal No.5772 of 2018, challenging the interim order passed by the APTEL dated 16th March, 2018. However, this Court refused to interfere with the said order and directed the APTEL to decide the appeal pending before it expeditiously without taking into consideration the observation in the impugned order as conclusive.

72. Vide the impugned judgment and order dated 7th January, 2020, the Appeal No.41 of 2018, filed by HNPCL has been allowed by the APTEL, the correctness of which is under challenge in the present proceedings.

A 73. It could thus clearly be seen that though HNPCL had initially proposed to revive its project in the year 2007 as a Merchant-power plant and had proposed to give the Government of Andhra Pradesh first right of refusal, in the MoU, to purchase 25% of the power at regulated tariff, it was at the instance of the State of Andhra Pradesh that it had agreed to supply 100% power to the State through APDISCOMS. It could clearly be seen from the record that though HNPCL had participated in the bidding process conducted by the APCPDCL in the year 2011-2012 and though HNPCL had successfully emerged as L-2 bidder in the said bidding process, it was on account of the decision of the Bid Evaluation Committee, that HNPCL was discarded from the bidding process since the entire generation capacity of HNPCL was encumbered to the State of Andhra Pradesh/APDISCOMS. The minutes of the meeting dated 28th September, 2012 of the Bid Evaluation Committee, as has been noticed in the order of the State Commission dated 13th August, 2013, clarify this position.

D 74. It is the State of Andhra Pradesh, which had expressed its interest in purchasing 100% power from HNPCL, as could be seen from the various documents placed on record. The communication addressed by the Principal Secretary to the Government of Andhra Pradesh, Energy Department, to HNPCL dated 26th December, 2012, clearly reiterates the intention of the Government of Andhra Pradesh in purchasing 100% power (through DISCOMS) from the project of HNPCL. The said communication would also show that the State has assured to take all necessary steps for commissioning the project at the earliest including execution of PPA and for making provision of Transmission system for start-up power and power evacuation. The said communication would clearly show that the parties had agreed to abide by the conditions mentioned in the Amended and Restated PPA dated 15th April, 1998, except to the extent they may stand modified due to impact of change in laws/rules and regulated standards guiding such power projects post 1998.

G 75. No doubt, that the documents placed on record would show that though HNPCL had given its estimation of project cost on the basis of the guidelines issued by the CERC, the same was received by the appellants – DISCOMS without prejudice to their rights to contest the same on every component before the State Commission. The documents placed on record would clearly show that the State of Andhra Pradesh

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has, on more than one occasion, expressed that it was interested in buying 100% power from the project of HNPCL. The MoA signed between the appellants – DISCOMS and HNPCL dated 17th May, 2013, would clearly show that it was agreed between the parties that the entire capacity of HNPCL project and all the units of the power stations shall, at all times, be for the exclusive benefit of the DISCOMS and the DISCOMS were to have the exclusive right as well as obligation to purchase the entire capacity from the project. Not only this, but after the Reorganisation Act came into effect and the erstwhile State of Andhra Pradesh was bifurcated into the State of Andhra Pradesh and the State of Telangana, the State of Andhra Pradesh, on more than one occasion, reiterated its stand of procuring 100% power from the project of HNPCL. Perusal of the orders of the State Commission dated 26th September, 2015 and 6th August, 2016, would clearly reveal that the appellants – DISCOMS also stood by the position that the 100% power generated in the power plant of HNPCL was to be purchased by them. Not only this, but after the bifurcation of the erstwhile State of Andhra Pradesh, the appellants – DISCOMS entered into a Continuation Agreement dated 28th April, 2016, reiterating their stand.

76. After the Continuation Agreement was entered into on 28th April, 2016, the appellants – DISCOMS filed O.P. No.19 of 2016 for approval of the Continuation Agreement with the Amended and Restated PPA of 1998 on 11th May, 2016. The State Government again on 1st June, 2016, accorded its approval for purchase of 100% power generated by HNPCL. It could thus be seen that right from the year 2012 till January, 2018, it was the consistent stand of the State of Andhra Pradesh as well as the appellants – DISCOMS and its predecessors that the appellants - DISCOMS were to purchase 100% power generated by HNPCL.

77. It is also not in dispute that in pursuance of the MoA, executed on 17th May, 2013, HNPCL had also entered into FSA dated 26th August, 2013 with Mahanadi Coalfield Limited for supply of coal for the project.

78. It is thus clear that the consistent stand of the appellants - DISCOMS from the year 2012, for the first time, changed on 4th January, 2018, when they filed Interlocutory Applications before the State Commission for withdrawal of O.P. No.19 of 2016 and disposal of O.P. No.21 of 2015.

79. As already observed hereinabove, in the open bidding process, conducted in the year 2011-2012, HNPCL emerged as the successful

A L-2 bidder. It is however on account of the stand taken by the Bid Evaluation Committee, that it was discarded from the bidding process. As such, the stand of the appellants – DISCOMS, that the revival of the project of HNPCL was as a Merchant-power plant and therefore, the appellants – DISCOMS cannot be compelled to purchase power from it, is self-contradictory. On one hand, HNPCL was discarded from the B open bidding process, though it was the successful L-2 bidder, on the ground that 100% power generated by HNPCL is encumbered to the State of Andhra Pradesh/APDISCOMS whereas, on the other hand, it is now sought to be urged that the appellants – DISCOMS cannot be compelled to purchase the power from HNPCL, since it was a merchant-C power plant. We have no hesitation to hold that the APTEL has rightly held that, on account of the assurance given by the State of Andhra Pradesh/APDISCOMS, HNPCL had altered its position and as such, it was not permissible for the appellants – DISCOMS to withdraw O.P. No.19 of 2016. The grounds, which are sought to be urged in I.A. No.1 of 2018 in O.P. No.19 of 2016 and I.A. No.2 of 2018 in O.P. No.21 of D 2015, were very much available when the appellants – DISCOMS had entered into MoA on 17th May, 2013 and the Continuation Agreement dated 28th April, 2016. It is difficult to appreciate how it is permissible for the appellants – DISCOMS to withdraw the application for grant of approval of PPA on the ground that it could procure the power only E through the competitive bidding process, when in the facts of the present case, it was the State of Andhra Pradesh, which had discarded HNPCL from the open bidding process of 2011-2012, though it had successfully emerged as L-2 bidder in the said bidding process.

80. Various authorities have been cited at the Bar in support of F the proposition that withdrawal of an application could not be permissible when such a withdrawal amounts to frustration of a contract and thereby defeats the rights of the defendant and that the right of withdrawal is not absolute. In this respect, we will refer to the observations made by this Court in the case of ***Arjun Singh v. Mohindra Kumar & Ors.***[15]. Though G the issue involved in the said case is distinct than the issue involved in the present case, we find that it will be apposite to seek guidance from the observations made by this Court, while construing the provisions of Order IX and Order XX of the Code of Civil Procedure, 1908 (CPC). The relevant extract reads thus:

H [15] (1964) 5 SCR 946

" ….In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit: (1) where the hearing is adjourned or (2) where the hearing is completed. ***Where, the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that Order XX. Rule 1 permits judgment to be delivered after interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by Order IX. Rule 7 is passed the next stage is only the passing of a decree which on the terms of Order IX. Rule 6 the Court is competent to pass.*** And then follows the remedy of the party to have that decree set aside by application under Order IX. Rule 13. ***There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of Order IX. Rule 7.*** We are, therefore, of the opinion that the Civil Judge was not competent to entertain the application dated May 31, 1958 purporting to be under Order IX. Rule 7 and that consequently the reasons given in the order passed would not be res judicata to bar the hearing of the petition undo Order IX. Rule 13 filed by the appellant."

[emphasis supplied]

81. It can be seen that this Court has held that CPC contemplates two stages of the trial in the suit: (1) where the hearing is adjourned; and (2) where the hearing is completed. It has been held that where the hearing is completed, the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that Order XX rule 1 permits judgment to be delivered after an interval after the hearing is completed. It has been held that there is no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of Order IX rule 7.

82. The other judgments of various High Courts relied upon by Shri Ramachandran, follow the line laid down by this Court in ***Arjun Singh*** (supra).

83. Insofar as the reliance placed by Shri Vaidyanathan, learned Senior Counsel, on the judgment of Court of Appeal in the case of ***Boal***

A ***Quay Wharfingers Ltd.*** (supra) is concerned, the said case arose out of an application made by the appellant therein to the Licensing Authority for grant of a license. It was not an application in a quasi-judicial proceeding where the withdrawal of an application would adversely affect the rights of the other party. In the said case, it has been observed that if a person applies for a license, there is no prohibition as to why he is not
B entitled to withdraw his application, unless, of course, there is some provision in law, which would prevent him from doing so. The proceedings in the aforesaid case did not arise from a lis between the two parties, but arose out of an application made by a party to a licensing authority under the Docks and Harbours Act, 1966.

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84. Insofar as the reliance placed on the judgment of this Court in the case of ***Hulas Rai Baij Nath*** (supra) is concerned, the respondent therein had instituted a suit for rendition of accounts against the appellant-firm, alleging that the appellant-firm was the commission agent of the respondent and that the accounts between respondent as the principal
D and appellant as the agent were not settled. The claim of the respondent was resisted by the appellant therein, stating that the claim of the respondent was fully settled and that the suit was not fit to proceed in accordance with law. In the said suit, after a considerable amount of evidence had been recorded, an application was presented on behalf of
E the respondent-plaintiff for withdrawal of the suit. The same was objected to. The trial court overruled the objection of the appellant-defendant, holding that the plaintiff had a right to withdraw the suit and that right could be exercised at any time before judgment. The defendant could only claim an order for costs in his favour. The suit was therefore dismissed awarding costs of the suit to the appellant-defendant. The
F appellant-defendant filed revision in the High Court. The High Court dismissed the revision. Being aggrieved, the appellant-defendant had approached the Apex Court. In this factual background, this Court observed thus:

> "**2.** The short question that, in these circumstances, falls for
G decision is whether the respondent was entitled to withdraw from the suit and have it dismissed by the application dated 5th May, 1953 at the stage when issues had been framed and some evidence had been recorded, but no preliminary decree for rendition of accounts had yet been passed. The language of order 23 Rule 1
H sub-rule (1) CPC, gives an unqualified right to a plaintiff to

withdraw from a suit and, if no permission to file a fresh suit is sought under sub-rule (2) of that Rule, the plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in respect of that subject-matter under sub-rule (3) of that Rule. There is no provision in the Code of Civil Procedure which requires the Court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it. It is, of course, possible that different considerations may arise where a set-off may have been claimed under order 8 CPC, or a counter claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit. In the present case, the pleadings in paras 8 and 11 of the written statement mentioned above, clearly did not amount to a claim for set-off. Further, there could be no counter-claim, because no provision is shown under which a counter-claim could have been filed in the trial court in such a suit. There is also the circumstance that the application for withdrawal was moved at a stage when no preliminary decree had been passed for rendition of account and, in fact, the appellant was still contending that there could be no rendition of accounts in the suit, because accounts had already been settled. Even in para 11, the only claim put forward was that, in case the Court found it necessary to direct rendition of accounts and any amount is found due to the appellant, a decree may be passed in favour of the appellant for that amount. In this paragraph also, the right claimed by the appellant was a contingent right which did not exist at the time when the written statement was filed."

85. It could thus be seen that the facts in the aforesaid case are totally different from the facts in the present case. This Court in the aforesaid case held that there is no provision in the CPC, which requires the Court to refuse permission to withdraw the suit and compel the plaintiff to proceed with it. However, this Court itself has clarified that different considerations could arise where a set-off may have been claimed under order VIII of CPC, or a counter claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit. It was found that from the pleadings in the written statement, it could be clearly seen that there is no claim for set-off. It was further found that there could be no counter-claim, since no provision was shown under which a counter-claim could have been filed in the trial court in such a

A suit. It was further found that the right claimed by the appellant was a contingent one and did not exist at the time at which the written statement was filed.

86. The facts in the present case are totally different, wherein, after execution of various agreements, an application being O.P. No.19 B of 2016 came to be filed for grant of approval of PPA. Not only this, but the said O.P. No.19 of 2016 was clubbed along with O.P. No.21 of 2015, which was filed for determination of capital cost of the project as well as for determination of tariff. It can further be seen that in the aforesaid case, an application for withdrawal of the suit was filed at the stage of C leading of evidence. It is not as if the application was filed after the suit was closed for judgment.

87. In any case, we are of the considered view that the conduct of the appellants – DISCOMS, in the present case, would disentitle them to withdraw the application.

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88. Another argument, that on account of increase of the capital cost of the project, the appellants – DISCOMS would be required to purchase power at much higher rate, also does not hold water. The State Commission while determining the tariff would be guided by various factors as are required to be taken into consideration in view of the E provisions of Section 61 of the Act of 2003. In any event, the appellants – DISCOMS have themselves reserved their right to contest the correctness of the cost on every component at an appropriate stage before the State Commission. As already stated hereinabove, the State Commission, while approving the cost of the project and determining the tariff at which the electricity would be purchased by the APDISCOMS F from HNPCL, would be required to look into various factors as are stated in Section 61 of the Act of 2003, so also under the Regulations notified for that purpose. While doing so, the State Commission would be required to take into consideration the various aspects as well as submissions to be made by the appellants – DISCOMS and HNPCL. G Merely because, the cost of the project is estimated by HNPCL at a particular amount, the State Commission is not bound to accept the same. The State Commission would only approve the cost as it would feel appropriate, as guided by the provisions under Section 61 of the Act of 2003 and the Regulations. In that view of the matter, the argument in this regard also, is without substance.

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89. The appellants – DISCOMS have heavily relied on the judgment of this Court in the case of ***Tata Power Company Limited v. Reliance Energy Limited and others***[16], and particularly, on paragraph 106 thereof, which reads thus:

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

90. No doubt, that this Court has held that a generating company may also supply directly to consumer wherefor no licence would be required, however, this Court itself observed that the said provision has to be read with Regulation 24 and with regard to the grant of approval of PPA, the procedures laid down in Regulation 24 are required to be followed.

91. It will also be relevant to refer to paragraph 119 of the said judgment.

> "**119.** The 2003 Act even permits the generating company to supply electricity to a consumer directly. For the said purpose what is necessary is to comply with the provisions of the Act, the Rules and the Regulations. Section 14 of the Act categorically provides for grant of licence to any person who is transmitting electricity or distributing supply or undertaking trading therein, indisputably, however, the generator of an electrical energy, although is not subject to the grant of licence but while supplying electrical energy to a distributing agency, in turn would be subject to approval and directions of the Commission."

92. It can thus clearly be seen that this Court has held that though the Act of 2003 permits the generating company to supply electricity to a consumer directly, and that the generator of an electrical energy is not subject to the grant of license, but while supplying electrical energy to a distributing agency, in turn, it would be subject to approval and directions of the Commission.

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[16] (2009) 16 SCC 659

93. We are, therefore, of the view that the said judgment is of no assistance to the case sought to be advanced by the appellants – DISCOMS. On the contrary, we find that the view that is being taken by us is fortified by the following observations of this Court in the case of ***Tata Power Company Limited*** (supra):

> "**87.** …. The agreement of distribution (PPA) being subject to approval, indisputably the Commission would have the public interest in mind. It has power to approve an MoU which subserves the public interest. It, while granting such approval may also take into consideration the question as to whether the terms to be agreed are fair and just.
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> **111.** Section 86(1)(*b*) provides for regulation of electricity purchase and procurement process of distribution licensees. In respect of generation its function is to determine the tariff for generation as also in relation to supply, transmission and wheeling of electricity. Clause (*b*) of sub-section (1) of Section 86 provides to regulate electricity purchase and procurement process of distribution licensees including the price at which the electricity shall be procured from the generating companies or licensees or from other sources through agreements. As a part of the regulation it can also adjudicate upon disputes between the licensees and generating companies in regard to the implementation, application or interpretation of the provisions of the said agreement."

94. It is thus trite that, while considering grant of approval to the PPA, the State Commission will have to keep in mind the public interest. It will have to consider, as to whether the PPA, which is subject to approval, sub-serves the public interest. It will also be required to take into consideration, as to whether the terms agreed are fair and just while granting approval. While exercising power under Section 86(1)(b) of the Act of 2003, the Commission will have to regulate the price at which the electricity would be procured from the generating companies. Undoubtedly, while doing so, the Commission will be guided by the factors mentioned in Section 61 of the Act of 2003 and the Regulations concerning the same. Under Section 86(1)(f) of the Act of 2003, the Commission is also empowered to adjudicate upon the disputes between the licensees and generating companies, and to refer any such dispute for arbitration.

95. Another argument made on the basis of Section 21 of the Reform Act is also not tenable. Much reliance is placed on sub-section (5) of Section 21 of the said Act, which reads thus:

> "(5) Any agreement relating to any transaction of the nature described in sub sections (1), (2), (3) or (4) unless made with or subject to such consent as aforesaid, shall be void."

96. It could thus be seen that any of the agreements mentioned in sub-sections (1), (2), (3) or (4) of Section 21 would be void unless they are made with the consent of the Commission or subject to such consent. Undisputedly, understanding this legal position, O.P. No.19 of 2016 came to be filed by the appellants – DISCOMS, so as to obtain approval of the State Commission for the PPA entered into by them with HNPCL.

97. Insofar as the reliance placed on the provision of Regulation 5.2 of the Tariff Regulations is concerned, the same deals with approach to determination of tariff. It could be seen that, whereas Regulation 5.1 of the Tariff Regulations provides that where tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government, the Commission shall adopt such tariff in accordance with the provisions of the Act; Regulation 5.2 of the Tariff Regulations provides that the provisions specified in Part-II of the said Regulation shall apply in determining tariff based on capital cost for supply to a Distribution Licensee. Part-II of the Tariff Regulations deals with 'Filing Details' and 'Tariff Determination'. Regulation 9 requires that each application where tariff is to be determined based on capital cost shall include various details duly accompanied by supporting data and documentary and other evidence regarding Fixed Costs, Variable Costs and Norms of operation, etc. Regulation 10 of the Tariff Regulations requires the tariff to be determined in accordance with the norms specified under the said Regulations, guided by the principles and methodologies specified in CERC (Terms and Conditions of Tariff) Regulations, 2004, as amended from time to time. The Regulations contain detailed guidelines, as to what shall be the component of tariff and as to how the capital cost and tariff is to be determined.

98. We find that such an argument at the behest of a party, which has discarded HNPCL from the bidding process, though it had emerged as the successful L-2 bidder, does not hold water and we have no hesitation to say that the appellants – DISCOMS' approach is of approbate and reprobate.

A 99. In any event, we find that the State Commission has totally erred in dismissing O.P. No.21 of 2015 filed by HNPCL. Perusal of Section 64 of the Act of 2003 would reveal that even a Generating Company is entitled to make an application for determination of tariff under Section 62 of the Act of 2003. As such, irrespective of the question, as to whether an application for withdrawal of O.P. No.19 of 2016 filed B by the appellants - DISCOMS could have been entertained, the State Commission was wholly unjustified in dismissing O.P. No.21 of 2015 filed by HNPCL. In any case, we have held that in the facts of the present case and, particularly, taking into consideration the conduct of the appellants – DISCOMS, the APTEL has rightly held that the C appellants – DISCOMS could not have been permitted to withdraw O.P. No.19 of 2016.

100. Undisputedly, the appellants – DISCOMS are instrumentalities of the State and as such, a State within the meaning of Article 12 of the Constitution of India. Every action of a State is required to be guided by D the touch-stone of non-arbitrariness, reasonableness and rationality. Every action of a State is equally required to be guided by public interest. Every holder of a public office is a trustee, whose highest duty is to the people of the country. The Public Authority is therefore required to exercise the powers only for the public good.

E 101. We may gainfully refer to the following observations of this Court in the case of ***Kumari Shrilekha Vidyarthi and others v. State of U.P. and others***[17]*:*

> "**27.** Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may F result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant G to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of

H [17] (1991) 1 SCC 212

the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14."

102. It will also be apposite to refer to the following observations of this Court in the case of ***Food Corporation of India v. M/s Kamdhenu Cattle Feed Industries***[18]***:***

"**7.** In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the

[18] (1993) 1 SCC 71

A decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

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8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

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F 103. Recently, this Court in the case of ***Indian Oil Corporation Limited and others v. Shashi Prabha Shukla and another***[19], after referring to earlier judgments of this Court on the present issue has observed thus:

"**33.** Jurisprudentially thus, as could be gleaned from the above legal enunciations, a public authority in its dealings has to be fair, objective, non-arbitrary, transparent and non-discriminatory. The discretion vested in such an authority, which is a concomitant of its power is coupled with duty and can never be unregulated or unbridled. Any decision or action contrary to these functional

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H [19] (2018) 12 SCC 85

precepts would be at the pain of invalidation thereof. The State and its instrumentalities, be it a public authority, either as an individual or a collective has to essentially abide by this inalienable and non-negotiable prescriptions and cannot act in breach of the trust reposed by the polity and on extraneous considerations. In exercise of uncontrolled discretion and power, it cannot resort to any act to fritter, squander and emasculate any public property, be it by way of State largesse or contracts, etc. Such outrages would clearly be unconstitutional and extinctive of the rule of law which forms the bedrock of the constitutional order."

104. In the present case, though initially, HNPCL had revived its project in the year 2007 as a Merchant-power plant and offered 25% of electricity to the State, it was the State, which offered to purchase 100% power from HNPCL. HNPCL agreed for the said offer of the State Government. It is clear from the record and, particularly, the letter dated 26th December, 2012, that the State had given various facilities/ concessions to HNPCL for execution of its power project. The documents on record would reveal that the State has also allotted thousands of acres of land for the project to HNPCL. It is not in dispute that in pursuance of the MoA of 2013 (dated 17th May, 2013) and the Continuation Agreement of 2016 (dated 28th April, 2016), the entire project has been erected and is operational. Not only this, but from the year 2016 till 14th July, 2020, the power has been purchased by the appellants – DISCOMS from HNPCL. It could thus be seen that after investment of huge resources including the land belonging to the State, the project is complete and has become operational. The question, at this juncture, would be, whether to discard such a project is in the public interest or against it. At the cost of repetition, it may be reiterated, that the determination of the capital cost of the project and the rate of tariff at which the power has to be purchased would always be subject to regulatory control of the State Commission. What has been done by the APTEL is only directing the State Commission to determine the same.

105. The record would clearly reveal that from the year 2012 onwards till 4th January, 2018, it was the consistent stand of the State of Andhra Pradesh as well as the APDISCOMS that it would be purchasing 100% power generated from the project of HNPCL. Not only an application being O.P. No.21 of 2015 was filed by HNPCL for determination of capital cost, but also O.P. No.19 of 2016 was filed by

A the appellants – DISCOMS for grant of approval to the Continuation Agreement dated 28th April, 2016 with the Amended and Restated PPA of 1998. The matters were heard finally on 15th May, 2017 and closed for orders. For some unknown reasons, exclusively within the knowledge of the appellants – DISCOMS, things turned topsy-turvy between 15th May, 2017 and 4th January, 2018, on which date, the appellants – DISCOMS did a somersault and filed applications for withdrawal of O.P. No.19 of 2016 and disposal of O.P. No.21 of 2015. As already discussed hereinabove, every decision of the State is required to be guided by public interest and the power is to be exercised for public good. For reasons unknown, the appellants – DISCOMS took a decision to resile from their earlier stand, due to which, not only the huge investment made by HNPCL would go in waste, but also valuable resources of the public including thousands of acres of land would go in waste. As already discussed hereinabove, the reasons/grounds, which are sought to be given in I.A. No. 1 of 2018 in O.P. No.19 of 2016 and I.A. No.2 of 2018 in O.P. No.21 of 2015, filed on 4th January, 2018, were very much available between 2011 till 15th May, 2017. It is not as if something new has emerged between 15th May, 2017 and 4th January, 2018, which would have entitled the appellants – DISCOMS to resile from their earlier stand. We have no hesitation to hold that the appellants – DISCOMS could not be permitted to change the decision at their whims and fancies and, particularly, when it is adversarial to the public interest and public good. The record would clearly show that the change in decision is arbitrary, irrational and unreasonable.

106. We may also gainfully refer to the following observations of this Court in the case of ***Kalabharati Advertising v. Hemant Vimalnath Narichania and others***[20]:

> **"25.** The State is under obligation to act fairly without ill will or malice— in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power

[20] (2010) 9 SCC 437

for "purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide *ADM, Jabalpur* v. *Shivakant Shukla* [(1976) 2 SCC 521 : AIR 1976 SC 1207] , *S.R. Venkataraman* v. *Union of India* [(1979) 2 SCC 491 : 1979 SCC (L&S) 216 : AIR 1979 SC 49], *State of A.P.* v. *Goverdhanlal Pitti* [(2003) 4 SCC 739 : AIR 2003 SC 1941], *BPL Ltd.* v. *S.P. Gururaja* [(2003) 8 SCC 567] and *W.B. SEB* v. *Dilip Kumar Ray* [(2007) 14 SCC 568 : (2009) 1 SCC (L&S) 860] .)

26. Passing an order for an unauthorised purpose constitutes malice in law. (Vide *Punjab SEB Ltd.* v. *Zora Singh* [(2005) 6 SCC 776] and *Union of India* v. *V. Ramakrishnan* [(2005) 8 SCC 394 : 2005 SCC (L&S) 1150] .)"

107. We have no hesitation to hold that I.A. No.1 of 2018 in O.P. No.19 of 2016 and I.A. No.2 of 2018 in O.P. No.21 of 2015 filed by the appellants – DISCOMS, are acts, which have been done wrongfully and wilfully without reasonable and probable cause. It may not necessarily be an act done out of ill feeling and spite. However, the act is one, affecting public interest and public good, without there being any rational or reasonable basis for the same.

108. Though serious allegations of *mala fide* have been made by HNPCL, we do not find it necessary to go in those allegations. However, in our view, the present case would squarely fit in the realm of 'legal malice' or 'malice in law'.

109. In any case, we find that the judgment impugned before us cannot be said to be of such a nature, which can be said to be prejudicial to the interests of any of the parties. What has been done by the APTEL is only to direct the State Commission to dispose of O.P. No.21 of 2015 filed for determination of capital cost and O.P. No.19 of 2016 filed for approval of Amended and Restated PPA (Continuation Agreement) on merits. On remand, the State Commission would be bound to take into consideration all the relevant factors and the contentions to be raised by both the parties before deciding the said O.Ps.

110. We therefore find no reason to interfere with the impugned judgment. However, before parting with the judgment, it is necessary to

A place on record the conduct of the appellants – DISCOMS. Though vide order dated 14th July, 2020, this Court had stayed the impugned judgment passed by the APTEL, vide order dated 21st August, 2020, this Court had clarified that there shall be no stay of the order dated 16th March, 2018 passed by the APTEL. It is not in dispute that in pursuance of the interim order dated 16th March, 2018, passed by the APTEL, the B appellants – DISCOMS were purchasing the power at the rate of Rs.3.82 per unit from HNPCL till 14th July, 2020. It is thus clear that in view of the order passed by this Court on 21st August, 2020, the appellants – DISCOMS were required to continue to purchase the power from HNPCL at the rate of Rs.3.82 per unit. Undisputedly, this has not been C done. The reason given for the same is that the appellants - DISCOMS had already filed an application for vacation of the order dated 21st August, 2020. By merely filing an application, the appellants – DISCOMS could not have avoided abiding with the order of the APTEL dated 16th March, 2018, as maintained by this Court vide order dated 21st August, 2020. It D is brought to our notice that though the appellants – DISCOMS could have purchased the power from HNPCL at the rate of Rs.3.82 per unit in view of the orders passed by the APTEL and by this Court, they have chosen to purchase the power at higher rate from various generators including KSK Mahanadi from whom the power is being purchased at the rate of Rs.4.33 per unit.

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111. We ask a question to ourselves, as to whether public interest, which is so vociferously pressed into service in the present matter by the appellants – DISCOMS, lies in purchasing the power at the rate of Rs.3.82 per unit from HNPCL or by purchasing it at the rate of Rs.4.33 per unit from KSK Mahanadi. We strongly deprecate such a conduct of F the appellants – DISCOMS, which are instrumentalities of the State. The appellants – DISCOMS, rather than acting in public interest, have acted contrary to public interest. For defying the orders passed by this Court, we could very well have initiated the action against the officials of the appellants – DISCOMS for having committed contempt of this Court, but we refrain ourselves from doing so.

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112. In the result, the present appeal is dismissed with costs, quantified at Rs.5,00,000/- (Rupees Five lakh only). Pending I.As., if any, shall stand disposed of.

113. Taking into consideration that the issue before the State H Commission is pending since long, we direct the State Commission to

decide O.P. No.21 of 2015 and O.P. No.19 of 2016, as expeditiously as possible, and in any case, within a period of six months from the date of this judgment. A

114. Needless to say that till O.P. No.21 of 2015 and O.P. No.19 of 2016 are decided by the State Commission, the appellants – DISCOMS shall forthwith start purchasing the power from HNPCL at the rate of Rs.3.82 per unit as per the orders passed by the APTEL dated 16th March, 2018 and by this Court dated 21st August, 2020. B

Bibhuti Bhushan Bose Appeal dismissed.
(Assisted by : Neha Sharma, LCRA)