

Lvs Power Ltd. Vs. Transmission Corporation of A.P., Limited, Hyderabad and ors.

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Court : Andhra Pradesh

Decided On : Jul-09-2002

Reported in : 2002(4)ALD784; 2002(6)ALT582

Judge : B.S.A. Swamy and ;G. Yethirajulu, JJ.

Acts : [Evidence Act, 1872](#) - Sections 115; Andhra Pradesh Electricity Reforms Act, 1998 - Sections 11(1) and 21(4)

Appeal No. : AAO No. 1576 of 2002

Appellant : Lvs Power Ltd.

Respondent : Transmission Corporation of A.P., Limited, Hyderabad and ors.

Advocate for Def. : K.N. Jwala, SC for Respondent No. 1 and ;P. Sri Raghuram, SC for APERC for Respondent No. 3

Advocate for Pet/Ap. : B. Adinarayana Rao, Adv.

Judgement :

G. Yethirajulu, J.

1. This appeal is directed against the order of the Andhra Pradesh Electricity Regulatory Commission, Hyderabad ('the Commission' for brevity) dated 23-4-2002 in O.P. No. 70-A(LVS)/2001 holding that under Section 21 (4) of the A.P. Electricity Reform Act, 1998 ('Reform Act' for brevity) the Commission can only grant or withhold the Power Purchase Agreement (PPA) submitted to the Commission for the sale of electricity generated by the appellant to APTRANSCO, that if the APTRANSCO does not wish to enter into PPA with the appellant, there is no way the Commission can compel APTRANSCO to do the same, and in the circumstances, there is no need to pass any order under Section 21(4) of the Reform Act, either granting or withholding consent. The appellant company being aggrieved by the order of the Commission preferred this appeal challenging its validity and legality.

2. In the pre-independent India, the generation, supply and transmission of electricity used to be regulated under the provisions of Indian Electricity Act, 1910. Since India is a developing country, the need for more and more electricity was increasing for establishment of industries, factories etc. 4.1 BKWH of the power that was being generated in 1947 was not meeting the requirements of the country. At the time of independence, the country in its quest for increasing production of electricity adopted a blend of thermal, hydal and nuclear sources and give priority for non-conventional energy sources like solar, wind and tidal power. At the same time, the Indian Electricity (Supply) Act, 1.948 was passed paving way for the State monopoly in electricity trade and for constitution of the Central Electricity Authority, the State Electricity Boards, Generating Companies, State Electricity Consultative Councils etc. Over the years, these authorities failed to give the required results. It has become highly impossible to achieve all-round development of the country with the limited resources at their command. Mobilization of resources for achieving self-sufficiency in the power sector assumed high priority. At present, we have energy shortage of about 8% and 19% in peek hours. Since mobilization of additional resources to bridge the gap in production and supply of energy has become the need of the hour to meet the ever increasing requirements in the electricity sector, the Central Government, having held a series of deliberations with all the States, adopted a Common Minimum National Action Plan for Power (CMNAPP) on 22-10-1991 to relieve the

Central, State and, Public Sector Companies from the paucity of resources and to encourage private investment by private entrepreneurs to bridge the gap between the growing demand of electricity and supply. Under the scheme, the electricity generation, supply and distribution systems were thrown open to the private entrepreneurs with attractive package incentives by making profitable investment. As per this policy, private sector can set up power projects of any size and any type and thermal projects of conventional fuel, hydal projects, non-conventional energy sources like solar, wind and tidal power. The private enterprises are given the option of operating either as licensees for distributing electricity in a specified area or as generating companies. Licences for longer duration of 30 years at the first instance and a renewal for 20 years more has been prescribed, instead of 20 and 10 years respectively, as it was before.

3. To achieve the desired results of this policy, the Government of India created the Industrial Promotion Cell (IPC) in 1991 in the Ministry of Power as a Nodal Agency to provide information and assistance to prospective entrepreneurs who are desirous of establishing power generation plants. IPC facilitates clearance of private sector projects and on priority basis provides supply, information and assistance regarding the procedures for obtaining necessary clearance.

4. The policy to encourage private sector has been welcomed by all the State Governments without exception. Since electricity being a subject in the concurrent list of the Indian Constitution, the policy to encourage private investments has been welcomed by the private sector in all these fields. To give effect to this policy. Sections 3, 28 and some other sections in the Indian Electricity Act, 1910 were amended. Sections 15-A, 43-A, 57-A and 78-A were incorporated and Sections 37;49, 57, 70, 78 and 79 and the VI Schedule were suitably amended in the Electricity(Supply) Act, 1948. The changed policy of the Central and the State Governments received tremendous response from private agencies, both Indian and foreign, and various States issued large number of LoCs for establishment of generation projects in private sector. Subsequently the Central Government felt that because of the State control over the electricity trade the results were not so encouraging, despite the amendments in 1991. With a view to divest the Government of its powers in power sector and to create an autonomous body with

all powers that are required to give effect to the national policy, the Electricity Regulatory Commission Act, 1998 (Act No. 14 of 1998) was enacted to achieve the desired results effectively through the reforms envisaged in the policy. Under Section 17 of the above Act, the State Governments are given option to constitute State Regulatory Commissions and in pursuance of that, the Government of Andhra Pradesh passed the A.P. Electricity Reform Act, 1998 (for brevity) and the same was brought into force from 1st February, 1999. The Electricity Regulatory Commission constituted under this Act is given all the powers of autonomous statutory body to promote healthy growth of the power sector in the State by issuing and enforcing licences for transmission and distribution of electrical energy in the State and, to strive for optimization of cost and improvement in consumer service by promoting competition in the power sector.

5. In contrast to the policy of the Government of India to encourage private sector investments, the testimony of raw deal by the A.P. State Electricity Regulatory Commission can be witnessed in the cases like the one on hand.

6. The factual matrix leading to the dispute covered by this appeal is as under:

The Government of Andhra Pradesh in pursuance of the liberalization policy in respect of industrial economy considered the power position in the State of Andhra Pradesh and having felt that it is likely to take considerable time in obtaining statutory licences from the Central Electricity Authority etc., for establishing large sized power plants took a series of measures for augmenting power through participation of private sector with a view to privatize the electricity trade in a phased manner. It has opened the flood gates for establishment of many new projects in private sector: The State Government considered that the power plants costing less than 100 crores do not require Central Electricity Authority's clearance and such projects can be cleared at State level at the earliest. The State Government therefore thought that it would be appropriate to set up Mini Power Plants (MPPs) with residual fuels in the industrial estates to relieve the burden of the Industrial Load Centres and tail end areas which are suffering from stress on account of transmission and distribution problems: The Government has also felt that it is necessary to take up Mini Power Plants (MPPs) of 30 MW capacity, which

can be commissioned within a period of 12 to 18 months at suitable locations where industries are concentrated, and they can meet the demand of the industries without any interruption.

7. Accordingly the Government issued G.O. Ms. No. 116, Energy (Power I) Department, dated 5-8-1995, laying down policy for establishment of MPPs. After issuance of the said G.O. the policy of the Government was published for the benefit of the prospective generators and consumers. Subsequently, the Government of Andhra Pradesh issued G.O. Ms. No 152, Energy (Power I) Department, dated 29-11-1995 in modification of G.O. Ms. No. 116, dated 5-8-1995 by promulgating revised policy framework for establishment of Mini Power Plants. The above modification was done by the State Government with a view to attract private investment in short gestation power plants that are essentially expected to supply power to industrial consumers at an investment of less than 100 crores. The policy to the extent of relevancy to the facts of the case is referred in this judgment.

8. In the modified scheme covered by G.O. Ms. No. 152 dated 29-1.1-1995 it was mentioned that the energy from MPPs can be supplied to identified consumers using either APSEB's existing distribution network or setting up a dedicated transmission network after obtaining licence under Section 3 of the Indian Electricity Act, 1910.

9. The Government Order further envisages that in the event of the MPPs generating power in excess of the requirement of their consumers, the same can be purchased by the APSEB up to 15% of the capacity of the mini power plant. The APSEB may also purchase the power beyond 15% capacity at its option, without conferring any preemptive right of sale on the mini power plant.

10. In pursuance of the Government Orders, the Energy Department of the Government of Andhra Pradesh invited applications for setting up of Mini Power Plants. M/s. L.V.S. Power Limited, the appellant herein made an application on 27-3-1996 expressing its willingness to establish a mini power plant in Visakhapatnam District. The Government of Andhra Pradesh having examined the proposal made by the appellant, approved the same under Section 18-A(a) of the Electricity

(Supply) Act, 1948 to establish, operate and to maintain a generating station of 55 MW capacity Mini Power Plant in Visakhapatnam District basing on multi-fuels (LSHS/Furnace Oil/Naptha) along with tie-line and substation connected therewith to supply power to the four industrial consumers mentioned in the annexure to the order viz., Hindustan Ship Yard, Visakhapatnam, Hindustan Zinc Limited, Visakhapatnam, Essar Steels Ltd., Visakhapatnam and Andhra Cements Ltd., Visakhapatnam through its letter No. 1089/Pr. 1/1/96 dated 24-7-1996. The Government of Andhra Pradesh through the said letter accorded permission under Section 28(1) of the Indian Electricity Act, 1910 for supplying energy to the above industrial consumers as well as permission under Section 43(A) of the Electricity (Supply) Act, 1948 for entering into a contract for the sale of electricity generated by the company to the above consumers, subject to certain conditions mentioned therein.

11. The Energy Department of the Government of Andhra Pradesh informed the appellant through its letter No. I543/Pr.I/ 1/97 dated 9-7-1997 that the Government agreed to reduce the capacity of the mini power plant from 55 MW to 46-08 MW as requested by the appellant. All these events took place prior to the Reform Act coming into force and the Regulatory Commission constituted under the Reform Act.

12. The appellant and other mini power project developers could not complete the establishment of the generating units within the time stipulated by the Government since the required permission and licences from the authorities concerned could not be obtained and the Government from time to time extended time by way of revalidation of permits for completion of the projects. In the said process of revalidation, even the APSEB till 1-2-1999 and its successor APTRANSCO during the subsequent period were actively associated in the correspondence and was recommending to the Government for extension of time. A letter No. CE/IPC/411/F&P;/D.N0.805/97 dated 20-10-1997, letter No. CE/IPC/311/F&P;/D.N0.708/99 dated 18-5-1999 of the Chief Engineer, APSEB are some of the letters indicating active involvement of APSEB in granting extension of the period for the construction of MPPs, including the plant of the appellant. The Government of Andhra Pradesh through its letter No. 1644/Pr.II/2001 dated 21-8-2001 granted

extension of time for launching the project till 31-10-2001 and a copy of the said letter was also marked to APTRANSCO.

13. When the project was getting ready for commercial operation, the appellant on 24-1-2000 made an application to the Commission for exemption from Electricity Supply Licence in the State of Andhra Pradesh. While keeping the said application in abeyance, the Commission passed an order on 4-5-2001 observing that the Commission is not inclined to permit third party sales on the ground that by allowing third party sales by mini power plants at the same rate at which the licensee (APTRANSCO) supplies to H.T. consumers will result in either unjust enrichment of the developers which is neither contemplated nor permissible in a regulatory industry, or in supply of power at lower prices than prescribed, resulting in differential prices for the same categories of consumers leading to discriminatory treatment. The Commission accordingly directed the developers, including the appellant herein to sell the power generated by it to APTRANSCO and to approach it for negotiation of sale price of power on the basis of their project cost and if there is no agreement between APTRANSCO and the mini power plants on supply terms within a month's time, the Commission will hear the MPPs. and APTRANSCO on 4-6-2001 for further orders.

14. In pursuance of the above order, the appellant terminated the agreements of sale of power entered with industrial concerns and approached the APTRANSCO for negotiations. After deliberations on several occasions, APTRANSCO informed the Commission that it is unable to purchase power on the ground that the plant may have to be backed down in the merit order despatch due to high variable cost. The appellant approached the Commission on 27-2-2002 requesting to give necessary direction to APTRANSCO to purchase the power. The Commission after hearing both parties passed the impugned order on 23-4-2002 observing that there is no way the Commission can compel APTRANSCO to purchase the power from the appellant.

15. The appellant being aggrieved by the said order questioned the validity of this order on the ground that it is illegal, arbitrary and the action of the Commission is nothing but abdicating statutory functions vested in it, apart from failure to adhere

to the role of a Regulator. Hence the order is liable to be set aside.

16. Sri B. Adinarayana Rao, the learned Counsel for the appellant, found fault with the conduct of APTRANSCO by contending that the conduct of the 1st respondent (APTRANSCO) is blameworthy as it went on changing its stand on one pretext or the other refusing to buy the power from the appellant, in the light of the order of the Commission preventing the generating companies to sell power to third parties. Next, the 1st respondent cannot refuse to obey the direction of the Commission being a party to the proceedings and say that it will not purchase the power from the generating company. Such a conduct of the 1st respondent is hit by the principle of estoppel and the 1st respondent cannot be allowed to go back on its promise to buy power generated by the appellant. The claim of the 1st respondent that they have surplus power do not mitigate against their obligation to buy power from the appellant who established the power plant at a cost of Rs. 135 crores out of which 104 crores was taken as a term loan from various financial institutions and the interest component itself is working out to Rs. 8 lakhs per day. He further submitted that the 1st respondent-company (APTRANSCO) cannot crush the industry for no fault of it and raise inconsistent pleas from time to time in support of its unjust action. Hence a direction be given to the 1st respondent to work out the power purchase price as per the norms given by the Central Electricity Authority (CEA) and to present the Power Purchase Agreement to the Commission for its approval, with a further direction to the Commission to approve the same under Section 24(1) of the Reform Act.

17. The learned Counsel further submitted that the action of the Commission is contrary to the provisions of the Reform Act and it defeats the very object of the Reform Act whose principal objective is to encourage private investment in the electricity industry in a phased manner and the Commission which is an autonomous body vested with the powers of development and management of electricity industry in an efficient, economic and competitive manner by divesting the Government of all its power, except to the extent of giving policy directions, cannot shirk its responsibility in exercising power to adjudicate tariffs and related issues.

18. In the light of the above facts and contentions, the following are the points taken up for consideration by this Court:

(1) Whether the APTRANSCO having expressed its readiness to purchase power can go back and refuse to purchase the same?

(2) Whether the Commission has no power to fix the tariff and direct the APTRANSCO to purchase the power, instead of expressing its helplessness on refusal by APTRANSCO to purchase the same?

Point No. 1 :

19. Section 2 (b) of the A.P. Electricity Reform Act, 1998 defines the word 'APTRANSCO', as under:

'APTRANSCO' means the Transmission Corporation of Andhra Pradesh Limited incorporated as a Transmission Company under the Companies Act, 1956 (Act I of 1956) and referred to in Section 13 of this Act.

20. Section 13 of the Reform Act enumerates the constitution and functions of the APTRANSCO. Under Section 13 (1), APTRANSCO is incorporated with the principal object of engaging in the business of procurement, transmission and supply of electric energy Under Section 13 (4), APTRANSCO shall undertake the functions specified in Section 13 and such other functions as may be assigned to it in the licence to be granted to it by the Commission under the Reform Act. Under Section 13(5), the APTRANSCO shall discharge such functions and duties of the APSEB. including those under the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or the rules framed thereunder, as the Commission may specify in the licence, and it shall be the statutory obligation of the APTRANSCO to undertake and duly discharge the powers, duties and functions so assigned.

21. Under Section 23(1), the properties, interest in the properties, rights and liabilities of the A.P. State Electricity Board immediately before the Reform Act came into force vested with the State Government. Under Section 23(2), the above properties, rights and liabilities vested in the State Government were re-vested by the State Government in the APTRANSCO in accordance with the

transfer scheme, Under Section 23(7), all debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by the APSEB shall to the extent specified in the relevant transfer scheme be deemed to be entered into by the transferee i.e., the APTRANSCO.

22. In view of Section 23 (7) of the Reform Act, the obligations of the APSEB towards the appellant stood transferred and bind APTRANSCO since they are deemed to be continued by APTRANSCO.

23. On 24-1-2000 the appellant made an application to the, Commission for exemption from electricity supply licence by marking a copy to the Chief Engineer, APTRANSCO, and it was lodged by the Commission directing that it may renew the application after four months. On 5-3-2001 the appellant renewed the request for exemption. The Commission, instead of passing an order on the said application, passed a comprehensive order in respect of all MPPs. on 4-5-2001 in O.P.No.70-A/2001.

24. In para 15 of the above order it was observed that in response to a notice issued by the Commission for hearing of the matter, in O.P.No.70-A/2001, which was taken on file by the Commission suo motu, the Chief Engineer of APTRANSCO submitted that they would buy power from any Mini Power Plant as long as the purchase price was affordable by APTRANSCO and the purchase comes within the merit order. It was further submitted to the Commission that if the Commission decides to permit third party sales, APTRANSCO should be granted higher wheeling charges at Rs. 1/- per unit, The order further indicates in para No. 17 that six developers have approached APTRANSCO to/negotiate the price for purchase of power by APTRANSCO and it has sent a report about the results of negotiations with those third parties and a separate order was passed by the Commission regarding those six developers. Para 18 of the order indicates that the remaining Mini Power Plants, including the, appellant, did not negotiate with APTRANSCO for sale of power. The Commission observed in para No. 20 that if APTRANSCO and developers can negotiate and mutually agree on the price for the power to be supplied and other conditions, a Power Purchase Agreement may be drawn up and submitted to the Commission for its approval under Section 21 of

the Reform Act. If, on the other hand, they are not able to agree on the price and other terms and conditions, they may apply to the Commission for appropriate orders.

25. The Commission accordingly directed the appellant and seven other developers to send specific proposals in writing, basing on the existing Central Government Notifications, on the basis of their project costs to APTRANSCO within a fortnight after receipt of the order and the APTRANSCO shall within another fortnight respond by communicating its view on the offer of the MPPs. to the Commission. It was further mentioned in the order that if APTRANSCO and MPPs. agree on the ties and other terms and conditions, fresh power purchase and wheeling agreements may be drawn up and sent to the Commission for its consent. The above order of the Commission indicates that as on 4-5-2001 APTRANSCO was willing to purchase the power generated by the appellant and other developers as long as the purchase price was affordable by APTRANSCO and purchase comes within the merit order.

26. On 18-5-2001 the appellant addressed a letter to the Chairman and Managing Director, APTRANSCO intimating that the Commission through its order in O.P.No.70-A/2001 dated 4-5-2001 stipulated that the appellant company should offer the entire power to APTRANSCO at the tariff calculated as per the norms fixed by the Central Electricity Authority. It was further mentioned that the appellant was directed to make an offer to APTRANSCO regarding the price fixed and the APTRANSCO should convey its decision regarding its power purchase from the company within 15 days of the said offer. The appellant accordingly offered its price at Rs. 2.794 per unit and requested APTRANSCO to take a decision at theearliest.

27. Again on 29th June, 2001 the appellant addressed another letter to the Commission along with a detailed note with a request to direct APTRANSCO to finalise PPA for purchase of the entire power as per Central Electricity Authority norms. It was mentioned in the note enclosed to the letter, that APTRANSCO sought the appellant through its letter dated 31st May, 2001 to furnish the information along with a detailed project report to arrive at the cost of the project

and the offer from the appellant for sale of power to APTRANSCO for the period of agreement with terms of payment and supporting tariff calculations. The appellant accordingly submitted those details on 6-6-2001. The appellant also conveyed its consent to the changes suggested by APTRANSCO in the tariff, if necessary, as desired by APTRANSCO to avoid any. delay in finalisation of the proposal. It was further mentioned in the note that APTRANSCO called for a meeting with the appellant on 19th June, 2001 to discuss on the tariff proposal given by the appellant on 6-6-2001 for sale of power to the APTRANSCO and there were discussions between the appellant and the APTRANSCO on the above aspects. It was also mentioned therein that APTRANSCO also requested the appellant to furnish :the year-wise particulars of the firm fixed price per unit and the appellant submitted the same on 22nd June, 2001. APTRANSCO deputed its representative for inspection of the project of the appellant and he visited the same oil 24th June, 2001.

28. On 14th August, 2001 the APTRANSCO addressed a letter to the Commission informing that since the power tariff of the appellant's MPP is on the higher side, it is unable to purchase power from such MPP and if the Commission approves the APTRANSCO's inability to purchase power from the appellant and other MPPs., the Government of Andhra Pradesh may consider permitting them to sell the power outside the State, subject to the consent of the Commission.

29. On 17th August, 2001 the appellant once again addressed a letter to APTRANSCO informing the Director (Finance) of, APTRANSCO in the meeting held on 16th August, 2001 at 11-30 a.m., expressing its willingness as desired by him, to peg its fixed cost on par with the cost being paid to M/s. Kondapalli Power Project, which was selected through open bid competition. Subsequently, on the same day at about 8-00 p.m. a meeting was held in the Chambers of the Chief Engineer-IPC and in the said meeting it was made clear that the levelised tariff is only indicative and that the project will be paid fixed charges from the highest of Rs. 1.493 ps. to the lowest of 79 ps. over a period of 15 years. It was further mentioned that the appellant clarified to APTRANSCO that the rate offered by it is the lowest as compared to any other project and requested to take an early decision to avoid losses to the project @ rupees six lakhs per day.

30. On the same day the APTRANSCO addressed a letter to the Commission expressing its willingness to purchase the power from the appellant's project and proposed to purchase the power produced by the appellant firm at the rates mentioned in the letter, subject to consent of the Commission and requested the Commission to communicate its consent for the proposal as mentioned in para No. 6.

31. In pursuance of the said letter of APTRANSCO the Commission passed the following order on 18th August, 2001:

In view of the fact that the Developer is ready to generate power and taking into account the views of APTRANSCO as stated in para 6 of their letter mentioned above, purely as an interim measure. APTRANSCO is permitted to purchase power from M/s. LVS Power Ltd., at the rate specified in para 5 of (their letter cited above till 31-10-2001 subject to the extension of time for completion of the Project of Government of AP. This is without prejudice to the rights of the Commission to pass any further order in this behalf.

The APTRANSCO is directed to send firm proposal with the approval of the Competent Authority for the Project Cost, not later than 30-9-2001, for the Commission to pass appropriate orders.

32. Through the above order, the Commission accorded permission to APTRANSCO to purchase power from the appellant's project till 31-10-2001 and APTRANSCO was directed to send PPA not later than 30-9-2001 to the Commission for passing necessary orders. A copy of the said order was marked to the appellant for favour of information.

33. On 20th August, 2001 the appellant terminated the PPAs. with private consumers in view of the decision of the Commission not to permit third party sales and in view of the decision of APTRANSCO to purchase power from the appellant.

34. On 30th October, 2001 and on 9th November, 2001 APTRANSCO made applications to the Commission for extension of time for power purchase from the

appellant's MPP till 30th November, 2001 as an interim arrangement is. awaiting approval of the State Government, and on 26-11-2001 the Commission passed an order permitting APTRANSCO to purchase power from the appellant from 31-10-2001 to 30-11-2001 and directed APTRANSCO to submit PPA latest by 30-11-2001.

35. On 3-12-2001 APTRANSCO made an application to the Commission seeking permission to purchase power from the appellant from 30-11-2001 to 31-1-2002, awaiting approval from the State Government. When the Commission posted the matter for hearing on 7-2-2002 for finalisation of all the documents by APTRANSCO and for submission of PPA with supporting material, the appellant submitted a detailed note furnishing all the facts relating to the matter. On 13-2-2002 the APTRANSCO addressed a letter to the appellant informing that in the absence of any PPA it will not be possible for it to take cognizance of the power availability declaration and clearance from the Commission.

36. When the State Government sought for clarification regarding the capital cost of the appellant's MPP, the Central Electricity Authority addressed a letter to the State Government on 26-2-2002 informing that the capital cost of the appellant's plant is lesser than the project cost of similar industries of the range of 3.62 crores to 3.82 crores per MW while the appellant's project cost is 3.42 crores per MW.

37. On 9-4-2002 the State Government addressed a letter to the APTRANSCO fixing the capital cost at Rs. 125.33 crores making the capital cost per MW at Rs. 3.41 crore and directed the APTRANSCO to proceed with the exercise of PPA.

38. The above sequence of events and the correspondence between the Commission, the APTRANSCO and the appellant amply establish that the APTRANSCO was consistently expressing its willingness to purchase the power from the appellant's plant, though they could not enter into a Power Purchase Agreement awaiting information from the State Government regarding the capital cost of the project. In fact on 17-8-2001 the APTRANSCO addressed a letter to the Commission to communicate its consent for purchase of the power at the rates mentioned in the letter of the appellant of even date, and as per the orders of the Commission dated 18-8-2001 which are extracted supra, the Commission not only

accorded permission to APTRANSCO to purchase power from the appellant till 30-10-2001, but also directed to send PPA before 30-9-2001 for passing necessary orders. After finalisation of the price for purchase of power by the APTRANSCO, and after receiving the approval of the Commission only the appellant terminated the PPAs entered into with the private consumers on 20-8-2001. In fact, the Government in its letter to APTRANSCO dated 9-4-2002 fixed the capital cost at Rs. 125.33 crores instead of working out the sale price of the power after fixing the capital cost of the project. For reasons best known to APTRANSCO, it took a round about turn and on 13-2-2002 the appellant was informed that it will not be possible for it to purchase the power in the absence of any PPA. What are the intervening circumstances and what made the APTRANSCO to go back on its earlier stand are not available on record.

39. From the inception the APTRANSCO was expressing its inclination to purchase the power and the process went on in finalizing the cost of the power and in entering into Power Purchase Agreement. The APTRANSCO made the appellant to believe from the day one that it is ready to obey the direction of the Commission and purchase the power from the appellant's plant.

40. On 11-4-2002 the APTRANSCO has written a letter to the Commission mentioning that as desired by the APTRANSCO the appellant agreed for the capital cost of Rs. 125 crores and submitted the revised proposals basing on the capital cost. It was also mentioned therein that the appellant also floated three proposals regarding the fixing of the tariff and the second proposal made by the appellant is advantageous to APTRANSCO and in the event of backing down of the appellant in the merit order despatch in view of the high variable cost, the APTRANSCO may have to pay fixed charges to the appellant and the project can be despatched only if it is considered as a must run station irrespective of the variable cost by a regulatory order.

41. More so, having agreed to the capital cost of the project arrived at by the Government at Rs. 125 crores and though the appellant agreed to forego various components of the price to be arrived at as per the norms fixed by the CEA, after much water has flown in finalizing the terms and conditions of PPA, the

APTRANSCO surprisingly for (he first time in para No, 8 of the said letter conveyed to the Commission that in the context of surplus power situation, the despatch from the power station poses a serious problem and in the event of its inability to despatch the power from the station, it may lead to payment of fixed charges irrespective of generation by the appellant's power station and requested the Commission to pass appropriate orders.

42. On 23-4-2002 APTRANSCO addressed another letter to the Commission reiterating its stand regarding its inability to purchase the power from the appellant's plant.

43. In this context, it is to be noticed that while the Commission directed the appellant to sell the energy only to APTRANSCO by prohibiting private sales, the APTRANSCO, being a party to those, proceedings and having continuously promised to purchase the power, as directed by the Commission, and having sought for the permission of the Commission to purchase the power in its letter dated 17-8-2001 and having received the consent of the Commission also in its order dated 18-8-2001, started expressing apprehension over the cost index initially. All of a sudden it resiled from the said promise on the pretext of availability of surplus power without furnishing any details regarding the availability of surplus power and the sources from which there was overnight supply. The APTRANSCO failed to explain as to how the power situation so dramatically improved by 11-4-2002 when it was not indicated at any time prior to the said date. The power cannot be generated by a magic wand and at least it will take a couple of years from the date of estimation and assessment of the required energy. The APTRANSCO, a mighty organisation being ably assisted by technical and economic experts, must be in a position to assess the power position much ahead of the need viz., the production, the demand and the supply on the basis of the licences granted by the Government of Andhra Pradesh to various public undertakings and private sectors. When the policy of the Government is so clear to attract private investments and when specific legislations were made to meet the future challenges, with a thrust on private sector, it is unjust on the part of APTRANSCO to avoid its obligation to keep up its promise in not taking necessary steps to see that the appellant's power plant is brought to operation. When

APTRANSCO repeatedly expressed its intention to purchase power from the Appellant, and the appellant was made to believe those promises are true and acted upon such belief to its detriment, the APTRANSCO is estopped from raising a plea before the Commission that it is unable to purchase the power from the appellant due to availability of surplus power, which was not its case till 11-4-2002. The APTRANSCO, having made the appellant to act upon its promise and representation, by making it to terminate the contracts with the third parties, cannot make the appellant to suffer for no fault of it by acting detrimental to its interest. The action of APTRANSCO is therefore hit by breach of promise on the basis of the principle of promissory estoppel, under Section 115 of the Indian [Evidence Act, 1872](#).

44. In *M.P.Sugar Mills v. State of UP.*, : [1979]118ITR326(SC) , the Supreme Court held that a party by, his wordy or conduct made to the other a clear unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it.

45. The APTRANSCO knowing fully well that the appellant was prevented from selling its power to private consumers, is not expected to go back from its promise and make appellant to suffer huge losses in payment of interest for the loans taken from various financial institutions. In the light of the above discussion we hold that the APTRANSCO is not entitled to say that it is unable to purchase the power on the pretext of surplus power situation in the State and it cannot wriggle put of its promise given to the appellant. We have no mariner of doubt in observing that the APTRANSCO acted/arbitrarily and capriciously and without realising the devastating results that will flow from its action i.e. the unit has to be closed and the public money, invested by the financing institutions will go to drain. This point is accordingly answered in favour of the appellant and against APTRANSCO, the 1st respondent herein.

Pbint No. 2:

46. The Andhra Pradesh Electricity Regulatory Commission owes its existence to the Electricity Reform Act, 1998 as an autonomous statutory body to balance the interest of all the shareholders in the electricity industry and to promote healthy growth of the power sector in the State. Due to the creation of the Commission, the Government of Andhra Pradesh was divested of its regulatory functions except retaining the power to issue policy directions and overall planning and co-ordination on the matters concerning electricity in the State. The Commission is expected to act as a body, which issues and enforces the conditions of licences for transmission and distribution of electrical energy in the State, which strives for optimization of costs and improvement in consumer service by promoting competition. The Commission is also vested with authority to prevent monopoly, abuse and regulate and adjudicate on tariffs and related issues and also to act as a body to resolve or to set up machinery for speedy, resolution of disputes between the licensees.

47. Section 3 of the Reform Act provides for establishment and constitution of the Commission. Powers and functions of the Commission are enumerated in Sections 10 and 11. Under Section 11(1)(e) the Commission shall be responsible to regulate the purchase, distribution supply and utilization of electricity, the quality of service, the tariff and charges payable, keeping in view the interests of the consumers and adequate levy and collection of charges for the maintenance of electricity supply and distribution. Under Section 11(1)(f), the Commission shall be responsible to promote competitiveness and participation of private sector. Under Section 11(2) the Commission shall always act consistent with the objectives and purposes for which it has been established as an independent statutory body to achieve such objectives and purposes.

48. By virtue of G.O. Ms. Nos. 116 and 152, the appellant established the Mini Power Plant proposing to sell the power to private consumers identified by it even before the Commission came into existence. The appellant entered into agreements with private consumers to supply the power from the date of commercial operation of the plant and was hoping to get some returns in the said business.

49. The troubles of the appellant started with an application made to the Commission on 24-1-2000 seeking exemption from obtaining electricity supply licence under Section 16 of the Reform Act. The Commission lodged the said application intimating the appellant that it will be considered four months before the date of commissioning of its Mini Power Plant. The troubles of the appellant further aggravated on its making an application renewing its request for exemption on 5-3-2001. In the meantime, the Commission in its suo motu proceedings in OP No. 70-A/2001 poured water into the hopes of the appellant and other MPPs. which were established with heavy investments by raising loans from various financial institutions, by refusing third party sales and directing the appellant to sell the power only to APTRANSCO. Thereafter, the Commission directed the appellant and other MPPs to negotiate with the APTRANSCO and to arrive at an agreement regarding the terms for the sale of power from the appellant and other MPPs. The Commission further mentioned in its order dated 4-5-2001 that it will hear the MPPs and APTRANSCO on 4-6-2001 on the issue of terms of supply, if they could reach no agreement. The suo motu order of the Commission is said to be the outcome of the representation said to be made by some associations of Electricity Engineers and other staff working in Electricity Board. It is not known how the employees of APTRANSCO can assume the role of public and can make a representation of this nature. It is further surprising to note that the Commission initiated suo motu proceedings on such a frivolous petition and passed the order directing the MPPs. not to sell the power to third parties. It is rather astonishing to note how the engineers working in APTRANSCO are interested in the sale of power by the power generation plants to third parties and what locus standi they have in an issue of this nature. Be that as it may, the Commission acted upon such a frivolous petition and having initiated suo motu proceedings passed the order directing the power generating plants not to sell the power produced by them to the third parties.

50. When the appellant and the APTRANSCO could not fix the price for supply of energy, the appellant made a request to the Commission to issue necessary directions to APTRANSCO to purchase the power by fixing the tariff for the same. In pursuance of the said representation the Commission took up the matter for consideration in O.P.No.70-A (LVS)/2001 and passed the impugned order on 23-

4-2002.

51. When the learned Counsel for the appellant questioned the legality and validity of the impugned order, Sri P. Sri Raghuram, the learned Standing Counsel for the Commission, and Sri K.N. Jwala, learned Standing Counsel for the APTRANSCO submitted that since the Commission passed the impugned order under Section 21(4) of the A.P. Electricity Reform Act and the appellant is not entitled to question its validity and legality.

52. In order to test the correctness of the impugned order, we wish to refer to the contentions of the respective parties made before the Commission at the time hearing of the matter.

53. The appellant represented to the Commission that it has fulfilled all the directions of the Commission by furnishing necessary documents, apart from approaching the APTRANSCO for negotiations. In view of the vulnerable position and distress the appellant had agreed to limit the project cost to Rs. 125 crores, to reduce return on equity from 16% to 14%, to forego foreign exchange variation on RoE of foreign equity and adopt 80% ELF instead of 75% norm fixed by CEA. The appellant further represented to the Commission that the 1st respondent has already exercised option on 17-8-2001 to purchase power from it, and obtained consent of the Commission. The delay in finalizing the PPA was only due to awaiting of capital cost approval which is now understood to have been obtained. Therefore, the appellant requested the Commission to direct APTRANSCO to submit PPA to avoid further idling of the plant which was established with the assistance from the financial institutions, promoters and foreign investors.

54. The 1st respondent-APTRANSCO submitted to the Commission that the Government of Andhra Pradesh approved the proposal of APTRANSCO on 9-4-2002 for fixation of capital cost at Rs. 125.33 crores, subject to receipt of audit report and requested APTRANSCO to proceed with the exercise for arriving at PPA and submit the same to the Commission for approval. The 1st respondent also submitted to the Commission that the appellant has agreed to bring down the levelised fixed charge from Rs. 1.154 per KWH generated as approved by the Commission to Rs. 1.097 per KWH. The corresponding first year tariff is Rs. 1.363

per KWH generated. The variable cost as projected by the appellant will be Rs. 1.79 per KWH. The 1st respondent further submitted to the Commission that the total cost per unit generated will be Rs. 3.15 and works out to Rs. 3.298 per KWH delivered. The 1st respondent further submitted to the Commission that the increase in variable cost is due to increase in the basic cost of the fuel and the prevailing sales tax. It has also submitted to the Commission that in the context of surplus power, the despatch from the appellant's power station poses a serious problem and if APTRANSCO is not able to despatch the power from the station, it will lead to the payment of fixed charges irrespective of generation by the appellant's plant.

55. After considering the contentions of APTRANSCO and the appellant, the Commission observed that it authorised APTRANSCO by letter dated 18-8-2001 to purchase power from the appellant at the rates specified in para 5 of their letter dated 17-8-2001 till 31-10-2001 as a purely interim measure and subject to the extension of time for completion of the project by the Government of A.P., and without prejudice to the rights of the Commission to pass any further orders in the matter. APTRANSCO was directed to send a final proposal with the approval of the competent authority for the project cost not later than 30-9-2001 for Commission to pass appropriate orders. The Commission permitted extension up to 30-11-2001 and posted the matter for hearing on 7-2-2002.

56. The Commission in para 6 of its order observed that on 7-2-2002 during the course of hearing APTRANSCO apprehended that they may not be able to despatch the power offered by LVS in view of the high cost, but agreed to discuss with LVS for bringing down the cost. On 25-2-2002, during the course of further hearing of the matter, LVS (appellant) offered to make further concessions and informed that it was amenable for discussion on all conditions and the APTRANSCO through its letter dated 11-4-2002 informed the Commission that though LVS had conceded some of the points during the discussion and had made the rate more attractive, even then they are unable to accept the offer by LVS in the context of surplus power situation and APTRANSCO's proposal to surrender the Eastern Region Power and Central Generation Stations on account of merit order requirements.

57. From the above, it is seen that while the appellant was expressing its desire to bring the unit to commercial operation by acceding to various demands that are being made by the APTRANSCO in contravention of the formula for fixing of price for sale of power to the APTRANSCO, as envisaged in the national policy, the APTRANSCO went on trying to wriggle out all its obligations by inventing new pleas from time to time and with the result, the plant that is ready for commercial operations remained idle since December, 2001. Instead of exercising its powers under Section 11(1)(e) of the Reform Act and adjudicate the dispute on tariff, the Commission simply observed that after careful consideration of the records and after hearing arguments on both sides it is of the opinion that under Section 21(4) of the Reform Act it can only grant or withhold consent for a PPA submitted to the Commission, that if APTRANSCO do not wish to enter into PPA with the appellant, there is no way the Commission can compel APTRANSCO to do the same and there is no need to pass any order either granting or withholding consent.

58. The Commission being a regulatory authority is expected to resolve and adjudicate the disputes on tariff, as contemplated under Section 11(1)(e) of the Reform Act. It, however, simply washed of its hands by observing that there is no way the Commission can compel APTRANSCO to purchase the power, having prevented the appellant from selling power to third parties and getting the agreements entered into by the appellant with third parties terminated. We, therefore, have no option except to observe that the order of the Commission is unconscionable, unjust, and unreasonable putting the appellant to untold miseries.

59. Section 21(4) of the A.P. Electricity Reform Act reads thus:

21. Restrictions on licensees and Generating Companies:

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(4) A holder of a supply or transmission licence may, unless expressly prohibited by the terms of its licence, enter into arrangements for the purchase of electricity from,--

- (a) the holder of a supply licence which permits the holder of such licence to supply energy to other licensees for distribution by them; and
- (b) any person or Generating Company with the consent of the Commission.

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60. The provisions of the above section empower the Commission to impose certain restrictions on licensees and Generating Companies for establishment of power plants, and regulating the generation and distribution of the power, keeping in view the demand and supply etc.

61. The Commission has to discharge its functions enumerated in Section 11 of the Andhra Pradesh Electricity Reform Act, 1998. Sub-section (1)(a), (e), (f), (g) and (h) of Section 11 of the Reform Act read as under:

//. Functions of the Commission:--(1) Subject to the provisions of this Act, the Commission shall be responsible to discharge amongst others, the following functions, namely :--.

(a) to aid and advise, in matters concerning electricity generation, transmission, distribution and supply in the State;

(b) xxx

(c) xxx

(d) xxx

(e) to regulate the purchase, distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected;

(f) to promote competitiveness and progressively involve the participation of private sector, while ensuring fair deal to the customers:

(g) to collect data and forecast on the demand and use of electricity and to require the licensees to collect such data and forecast;

(h) to require licensees to formulate prospective plans and schemes in coordination with others for the promotion of generation, transmission, distribution and supply of electricity;

(i) xxx

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62. Under Part X of the Reform Act, the Commission has power to pass orders and to enforce decisions. Section 29 empowers the Commission to pass final orders for securing compliance of the interim orders passed by exercising power under Section 28. Section 31 empowers the Commission to impose fines and charges for non-compliance or violation on the part of the licensees. The Commission is entitled to direct compensation to be paid by the person guilty of violation or non-compliance to the person affected by such violation or non-compliance. Section 41 provides for imposition of penalties for contravention of any direction given to any licensee without reasonable excuse to comply with such direction. In the light of the powers vested in the Commission, being a statutory body created under a statute with the avowed objective and purport of giving effect to the liberalised policy envisaged under the Reform Act with the thrust on the private sector, it cannot express its inability when its own licensee refuses to comply with the directions given by it in exercise of its statutory power.

63. Though the APTRANSCO did not place any material before the Commission about the surplus position of the power, the Commission's reaction to a passing remark of APTRANSCO that there is surplus energy without reference to its earlier order, the letters addressed to it by APTRANSCO from time to time and correspondence that has taken place between the APTRANSCO and the appellant gives us an impression that the Commission did not realise the importance of its powers under the statute. The Commission having prevented the appellant from selling the power to third parties did not consider as to what happens to the appellant if the stand of APTRANSCO refusing to purchase the power is accepted.

64. The order of the Commission suffers from the following infirmities:

- (1) The Commission did not consider the justness, fairness and reasonableness in the reversing stand of APTRANSCO in refusing to purchase the power.
- (2) The Commission did not assess the surplus power position by requiring the APTRANSCO to furnish the entire data to convince it on the said aspect.
- (3) The Commission failed to hold that the APTRANSCO cannot go back on its promise and put the appellant to irreparable loss.
- (4) The Commission failed to take note of the attractive price offered by the appellant i.e., less than the price as per the norms of the CEA and direct the 1st respondent-APTRANSCO to purchase the power.
- (5) The Commission failed to fix the terms for sale of energy by requiring both parties to furnish the data regarding the reasonable price to be arrived at, as per its own order.
- (6) The Commission failed to keep in mind that the policy of the Central Government and the orders issued by the State Government.
- (7) The Commission failed to note that the public monies invested in hundreds of crores will go to drain if the Mini Power Plants are not allowed to function.
- (8) The Commission failed to investigate about the ways and means in utilizing the power for the public good by tapping the energy from all sources, including Mini Power Plants.
- (9) The Commission failed to realise that it is a supreme body constituted under the statute to regulate electricity trade and it should not give an impression to the public that it is acting to the tunes of APTRANSCO.

65. In the light of the above infirmities, the order of the Commission is liable to be set aside and we are of the opinion that there are sufficient grounds to allow the appeal.

66. In the result, the appeal is allowed with costs by setting aside the order of the A.P. Electricity Regulatory Commission in OP No. 70-A(LVS)/2001 dated 23-4-2002 holding that APTRANSCO cannot go back from its promise and refuse to purchase the power on the pretext of surplus power position in the State. We direct the Commission to consider the matter afresh as per the norms of Central Electricity Authority and the directions given in the appeal and to direct the APTRANSCO to enter into Power Purchase Agreement and purchase the power from the appellant.

67. Now the further question that falls for consideration by this Court would be, what should happen to the generation plant which is ready for commercial operation till the Commission decides the issue as per law, in the light of the directions given by us?

68. It is not in dispute that apart from the investment made by the private entrepreneur, about 104 crores of rupees of public money was invested by various financial institutions, under the leadership of Industrial Development Bank of India (IDBI) and everyday the appellant has to suffer a loss of about rupees 8 lakhs towards interest component itself. If we allow the situation to continue, the losses of the unit will be mounting up and it may reach a point of no return and the public monies invested will go waste. The burden will again fall on the man with loin cloth in the shape of indirect taxes. Hence, we cannot allow the situation to continue further, more so, in the light of the permission given by the Commission on 18-8-2001 to the APTRANSCO to purchase the power from the appellant. We therefore direct the APTRANSCO to purchase the power at the rate at which it purchased during the trial operations, subject to the final orders to be passed by the Commission, or to takeover the plant from the appellant and to perform the duties of a generating company, as provided under Section 18-A(2) of the Electricity (Supply) Act, 1948, until it enters into Power Purchase Agreement with the appellant after fixation of the terms by the Commission. The above arrangement made to save the plant will be subject to final orders to be passed by the Commission in the matter.

69. Before we part with the case, we place on record our displeasure over the unhelpful and unco-operative attitude of APTRANSCO in accepting a reasonable suggestion made by this Court i.e., the power generated by the appellant may be purchased at the rate at which it is purchasing from other units, pending disposal of the appeal, since we are pre-occupied in hearing a batch of electricity appeals preferred against the orders of the A.P. State Electricity Regulatory Commission regarding Wheeling Charges and Grid Support Charges wherein the senior Advocates from other States are advancing arguments and granted sufficient time to think over the matter and report to the Court. The learned senior Counsel appearing for APTRANSCO expressed his inability to convince his client in accepting the suggestion made by the Court. Therefore, in order to dispose of this matter, we were made to take up this appeal by stopping arguments in those cases and complete the hearing by sitting in the Court beyond Court hours.

70. Advocates fee is fixed at Rs. 5,000/-.

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