

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 90 of 2011

Dated: 10th Aug, 2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. V.J Talwar, Technical Member,**

In The Matter Of

**M/s Spectrum Power Generation Limited
Plot No.231, 8-2-293/82/A/231,
3rd Floor, 36, Jubilee Hills,
Hyderabad-500 033**

... Appellant(s)

Versus

- 1. M/s. Transmission Corporation of
Andhra Pradesh Limited,
Vidyut Soudha,
Khairtabad,
Hyderabad-500 004**
- 2. Central Power Distribution Company
Of AP Limited
11-5-423/1/A, First Floor,
Singareni Collieries Bhawan,
Lakdi-Ka-Pul,
Hyderabad-506 001**
- 3. Southern Power Distribution Company of
AP Limited
Upstairs, Hero Honda Showroom,
Reningunta Road,**

Tirupati-517 501

- 4. Norther Power Distribution Company
Of AP Limited
11-5-423/1/A, First Floor,1-7-668,
Postal Colony,
Hanamkonda, Warangal-506 001**
- 5. Eastern Power Distribution Company
Of AP Limited
Sai Shakti, Opp Saraswati Park,
Daba Gardens,
Visakhapatnam-530 020**
- 6. AP Power Co-Ordination Committee
Vidyut Soudha, Khairatabad,
Hyderabad-500 004**
- 7. Andhra Pradesh Electricity Regulatory
Commission,
4th & 5th Floor,
Singareni Bhawan,
Red Hills,
Hyderabad-54**

....Respondent(s)

Counsel for Appellant(s): **Mr. M.G. Ramachandran,
Mr. Tarun Johri,
Mr. Ankur Gupta,**

Counsel for Respondent(s):Mr. A Subba Rao

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON

The short question raised in this Appeal is as follows:-

“Whether the State Commission is right in dismissing the Petition filed by the Appellant on the ground that it was barred by limitation, while denying the benefit of Article 14 (2) of the Limitation Act, 1963?”

1. M/s Spectrum Power Generation Ltd., a Generating Company in the State of Andhra Pradesh is the Appellant.
2. M/s Transmission Corporation of Andhra Pradesh, a State Transmission Utility (STU) in the state of Andhra Pradesh, is the 1st Respondent. Respondents No. 2 to 5 are the Distribution Licensees in the state of Andhra Pradesh and 6th Respondent is the Power Co-Ordination Committee. Andhra Pradesh Electricity Regulatory Commission (State Commission) is the 7th Respondent.

3. The Appellant filed a Petition before the State Commission challenging the letter issued by Transmission Utility(R-1) proposing to adjust excess of amount paid to the Appellant towards the Return as Equity from future Bills. However, this petition was dismissed by the State Commission by the order dated 13.6.2011 on the ground that the claim was barred by limitation. Aggrieved by this Order, the Appellant has filed this Appeal before Tribunal.
4. Brief facts of the case are as under:
5. The Appellant, Generating Company had established a combined cycle gas based generating station with an installed capacity of 208 MW in Kakinada District in the state of Andhra Pradesh.
6. For the purpose of selling power generated from this generating station, the Appellant entered into a Power Purchase Agreement (PPA) with Andhra Pradesh State Electricity Board (APSEB) on 20.06.2003.

7. Government of Andhra Pradesh enacted the Andhra Pradesh Electricity Reforms Act, 1998 (AP Act) on 31st July 1998. In accordance with the provisions of this Reforms Act, the integrated AP State Electricity Board was unbundled into one Transmission Company and Four Distribution Companies under various transfer schemes of the State Government.
8. All the rights and obligations of erstwhile AP State Electricity Board under the PPA were transferred to the Respondents no. 2 to 5.
9. As per terms of the PPA, the tariff was to be determined in accordance with the Government of India Notification 30.03.1992 issued under Section 43(2) of Electricity (Supply) Act, 1948. The Appellant raised the bills as per tariff determined in accordance with 1992 Notification and accordingly the Respondents paid such bills until 20.08.2003.
10. At that stage the Respondent no. 1 , the Transmission company sent a letter dated 20.08.2003 informing the

Appellant, that Comptroller and Accountant General had noted in its audit report that the effective rate of Return on Equity(RoE), works out to be 17.17% as the payments to the Appellant were made on monthly basis and as per this report Appellant was entitled for annual rate of RoE fixed at 16% in the PPA and so the excess amount earlier paid to the Appellant on account of RoE being paid on monthly basis, which was estimated to be Rs 8,51,36,123/- from 1st year to 31st March 2003 would be adjusted from future bills.

11. Aggrieved by this threatening letter of Transmission Utility(R-1), the Appellant filed a Writ Petition being No. WP (C) 18165/2003 before Hon'ble High Court of Andhra Pradesh on 25.08.2003 challenging the letter dated 20.8.2003 and obtained the order of the stay of the operation of the said letter.
12. The said Writ Petition was pending in the High Court. Ultimately the Writ Petition was taken up for hearing on 9th June 2009. On that day the Ld Counsel for the Writ Petitioner sought permission to withdraw the writ petition in

view of judgment of the Hon'ble Supreme Court in the case of Gujarat Urja Nigam Ltd. Vs Essar Power Ltd holding that these disputes should be decided by only the Appropriate Commission and requested for the liberty to approach the Andhra Pradesh Electricity Regulatory Commission for seeking for the same relief. Accordingly, the High Court of Andhra Pradesh dismissed the writ petition as withdrawn and permitted the Appellant to approach the State Commission by the order dated 9.6.2009. In this order the High Court extended the stay order for another six weeks to enable the Appellant to obtain appropriate orders from the State Commission.

13. Thereupon, the Appellant filed a petition before the State Commission on 7.7.2009 being O.P. No. 39/2009 praying for the following reliefs:
 - I. To pass an order declaring the letter dated 20.8.2003 of the 1st Respondent as bad and illegal.
 - II. To pass an order directing the Respondent to implement and give effect to Government of India Notification dated

30th March 1992 in so far as it provides for a Return on Equity of 16% and not to deduct any amount on this account from future bills.

14. The 1st Respondent, Transmission Utility appeared before the State Commission and questioned the maintainability of the petition as the ground of limitation and raised other issues with regard to the merits as well. The State Commission framed three issues in regard to limitation point as well as other points. However, the State Commission in the impugned order dated 13.6.2001 did not deal with the issues which relate to the merits but dealt with only the issue relating to the point of limitation raised by the 1st Respondent.
15. In conclusion, in the impugned order dated 13.6.2011, the State Commission dismissed the Petition filed by the Appellant, holding that the Petition was not filed within three years from the date of the letter as per Article 58 of the Limitation Act. It further held that the period of pendency of the Writ Petition before the High Court cannot be excluded

under Section 14(2) of the Limitation Act as the proceedings before the High Court were not instituted in good faith with due diligence.

16. Aggrieved by this Order of the State Commission dated 13.6.2011, the Appellant, Generating Company has filed the present appeal before this Tribunal.
17. Mr. M G Ramachandran, the learned counsel for the Appellant urged that when the letter dated 20.8.2003 was received by the Appellant, the only remedy available to him at that time to go to the Hon'ble High Court for seeking declaratory relief, therefore, it approached the High Court bonafidely and sought the relief and when the Appellant came to know about the judgment of the Hon'ble Supreme Court delivered during the pendency of the Writ Petition holding that the disputes between the generators and licensees would be decided only by the Appropriate Commission, he withdrew the said Writ Petition after getting the liberty from the High Court to approach the State Commission for the said relief and thereupon he filed

petition before the Commission as such, the period during which the Writ Petition was pending before the High Court has to be excluded under section 14 (2) of the Limitation Act and if it is excluded, the Petition filed before the State Commission was well within time.

18. On the other hand, Mr. A. Subba Rao, the Learned Counsel for the Respondent vehemently contends that Section 14 (2) of the Limitation Act cannot be invoked in the present case as the Appellant could not be said to be prosecuting before the Hon'ble High Court with due diligence in good faith, particularly when the remedy was available for the Appellant as provided under AP Electricity Reforms Act, 1998 at that time to approach the Commission itself but even after knowing the same, the Appellant has deliberately approached a wrong forum namely the High Court and obtained the interim order in his favour.
19. In the light of the rival submissions made by the parties, the question that arises for our consideration is as follows:-

20. **Whether the State Commission was right in dismissing the petition of the Appellant on the ground that it was barred by limitation, while denying the benefit under Article 14 (2) of the Limitation Act, 1963 without going into the merits?**
21. We have carefully considered the rival contentions urged by the both the parties on the question framed above.
22. The Respondent in its counter-affidavit has submitted that on the date of the issuance of this letter i.e. dated 20.8.2003, the State Commission had got power under section 11 (1)(e) of AP Reforms Act 1998 to adjudicate upon the said dispute between the Appellant, the Generating Company and the 1st Respondent, the Licensee but even after knowing the same, the Appellant deliberately approached the wrong forum and as such the Appellant was not bonafide and it cannot invoke 14(2) of the Limitation Act.
23. Let us quote 11(1)(e) of AP Reforms Act 1998.

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

(e) to regulate the purchase, distribution, supply and utilisation 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;

24. Bare reading of the Section 11(1)(e), reproduced above, would reveal that the contention of the Respondent is totally misplaced. Section 11(1)(e) of AP Reforms Act, 1998 does not cast any responsibility or jurisdiction upon the State Commission to adjudicate or arbitrate. It simply gives power to regulate the purchase, distribution, supply and utilization of electricity, the tariff and charges payable etc.
25. As a matter of fact, the Respondent-1, Transmission Company filed the Petition to vacate the stay order passed in the Writ Petition before the High Court Contending that the Writ Petition was not maintainable on the very same ground that the proper remedy available to the Appellant was under section 11 (e) of the Andhra Pradesh Act, 1998

before the State Commission. Actually, this objection raised by the 1st Respondent was taken into consideration by the High Court which ultimately over ruled the said objection regarding the maintainability of the Writ Petition and passed order 03.09.2003 by making the stay order absolute in favour of the Appellant. Therefore, it cannot be contended that the Writ Petition was filed without good faith.

26. In order to appreciate the finding on this point given by the State Commission in the impugned order, it will be necessary to set out the findings of the State Commission in the impugned order along with various statutory provisions referred to therein. Relevant portion of the State Commission's finding in the impugned order read as under:

“22. The Apex Court has already held way back in 1998 and 2004 in respect of Section 37 (1) of AP Electricity Reforms Act and Section 22 (2)(n) of Electricity Regulatory Commissions Act giving power to the Commission to appoint an arbitrator in the respective Acts are also akin to the provision incorporated in Section 86(1)(f) of the Act. So, the prosecution of the proceedings ignoring specific provision in the Act itself cannot be said that it is done

in good faith. At the same time, ignorance of law is also not an excuse to start the lis in a wrong court which has no jurisdiction. Moreover, the AP Electricity Reforms Act is not repealed u/s 185 of the said Act even if the action is arisen prior to the Act and it continuously follows even after the advent of the Act, the same cannot be wiped out

23. It is not a concurrent remedy and party has offered one remedy and availed one remedy and he becomes unsuccessful, he cannot get the benefit of Section 14 when instituting the alternate remedy. When the Act has specifically confined to approach the Commission u/s 86(1)(f) of the Act which is a special Act to make any claim and the Commission itself can decide or arbitrate by appointing an arbitrator. So it has specifically debarred the jurisdiction of any other forum much less Arbitration Act which is a general enactment, since special Act overrides the provisions of general Act.

24. In the light of above said discussions, we are of the opinion that the claim made by the petitioner is debarred by limitation and the petition filed is liable to be dismissed.”

27. From the above findings of the State Commission, it is clear that the State Commission has relied on Section 37(1) of AP Electricity Reforms Act 1998, Section 22(2)(n) Electricity Regulatory Commission Act 1998 and Section 86(1)(f) Electricity Act 2003. These provisions are reproduced below for ready reference:

28. The AP Electricity Reforms Act 1998 was enacted by the Government of Andhra Pradesh on 29th October 1998. Section 37(1) of the this Act provides

37. (1) Notwithstanding anything contained in the Arbitration and Conciliation Act, 1996, *any dispute arising between licensees* shall be referred to the Commission. The Commission may proceed to act as arbitrator or nominate arbitrator or arbitrators to adjudicate and settle such dispute. The practice or procedure to be followed in connection with any such adjudication and settlement shall be such as may be prescribed by regulations.{emphasis added}

29. At first glance over these sections, it is clear that both these sections dealt with disputes between licensees only. The term licensee has been defined in section 2 (e) of the AP Electricity Reforms Act 1998 as

"(e) licensee" or "licence holder" means a person licensed under [section 14](#) of the Act to transmit or supply energy including APTRANSCO.

30. From the above provisions, it is clear that the State Commission did not have jurisdiction to resolve any dispute between a Generating Company and Licensee under

section 37(1) of AP Electricity Reforms Act 1998. This section empowers the State Commission to adjudicate upon disputes between licensees only.

31. Andhra Pradesh Electricity Regulatory Commission was constituted on 31.03.1999 under AP Electricity Reforms Act,1998. As such provisions of Electricity Regulatory Commission Act 1998 were not applicable to this State Commission. However, in order to remove any doubt, we would deal with this aspect also. Section 22 of ERC Act 1998 provides for the functions of the State Commissions established under this Act. Section 22 of the Act read as under:

“22. Functions of the State Commission.-(1) Subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely:-

.....

(2) Subject to the provisions of Chapter III and without prejudice to the provisions of sub-section (1), **the State Government may**, by notification in the Official Gazette, confer any of the following functions upon the State Commission, namely:-

.....

(n) to adjudicate upon the **disputes and differences between the licensees and utilities** and to refer the matter for arbitration; {emphasis added}

32. Wording of sub section 2 would make it clear that the functions enumerated in this sub-section can be performed by the State Commission only when the appropriate State Government confer any of such function upon the State Commission by notification in the Official Gazette. Since Andhra Pradesh State Government preferred to enact its own Electricity Reform Act few months after enactment of ERC Act 1998, there is no possibility of it having conferred any function enumerated in section 22(2) of ERC Act, 1998 upon State Commission.

33. In this context, it would be appropriate to refer to one more interesting aspect. Clause 15 of PPA dealing with Arbitration was amended on 31st July 1999, after enactment of both the 1998 Acts. Amended Clause 15.2 of the PPA provides that the disputes between the parties shall be resolved by arbitration in accordance with the Arbitration and Conciliation Act, 1996. As such, amended

Clause did not mention that the disputes would be resolved by the State Commission in accordance with AP Electricity Reforms Act, 1998, as claimed by the Respondent. It is also to be noticed that one of the signatories to the amended Clause of PPA was the Managing Director of 1st Respondent, the Transmission Corporation of Andhra Pradesh. These facts would disclose that 1st Respondent was aware that under AP Electricity Reforms Act, 1998 and Electricity Regulatory Commission Act, 1998 the State Commission did not have any jurisdiction over the disputes between the Appellant Generating Company and 1st Respondents, the Licensee. Such being the situation, the 1st Respondent cannot be allowed to contend that Commission had the jurisdiction during the relevant time.

34. Now let us examine the provisions of Electricity Act 2003 along with the Judgments of Hon'ble Supreme Court.

35. Section 86 of the Electricity Act 2003 deals with the functions of the State Commission. Relevant portion of Section 86(1)(f) is reproduced below:

“86. Functions of State Commission.—(1) The State Commission shall discharge the following functions, namely:—

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;”

36. Thus, in terms of Section 86(1)(f) of the Electricity Act 2003 the State Commission has jurisdiction to adjudicate upon the disputes between the licensees and generating companies by itself or refer such dispute for arbitration. However, Section 175 of the Electricity Act 2003 provides that the provisions of the Electricity Act 2003 are in addition to and not in derogation of any other law for the time being in force. Section 175 of the Electricity Act 2003 read as under:

“175. Provisions of this Act to be in addition to and not in derogation of other laws.—The provisions of this Act are in addition to and not in derogation of any other law for the time being in force.”

37. This provision of the 2003 Act, somewhat blurred the situation in regard to jurisdiction of the State Commission under Section 86(1)(f) of the 2003 Act. One of the views

earlier taken was that in view of Section 175 of the Electricity Act, 2003, Section 11 of the Arbitration and Conciliation Act, 1996 is also available for arbitrating disputes between licensees and generating companies. Where the Arbitration Clause in PPA provide for arbitration as per provisions of Arbitration and Conciliation Act 1996, arbitration of disputes arising out of such PPAs would have to be done as per the provisions of Arbitration and Conciliation Act 1996. Some authorities considered that State Commission had jurisdiction under Section 86(1)(f) only over the matters arising out of disputes under Sections 9, 20 and 29 of the 2003 Act.

38. As a matter of fact, the Hon'ble Supreme Court in the decision reported in 2006 1 SCC 540 Transmission Corporation of AP Ltd Vs. M/S. Lanco Kondapalli power Limited has held that *“ As to whether Section 86 (1) (f) of the 2003 Act confers an exclusive jurisdiction to decide all disputes and differences between a licensee and a generating company is open to question”*.

39. Thus it is clear that the legal position on the date of the Writ Petition was not clear. Under those circumstances, it cannot be stated that the Appellant approached the High Court without good faith or without due diligence. On the other hand, the Appellant correctly decided to approach the Hon'ble High Court as the validity of the letter could be challenged only under Article 226 of the Constitution of India.
40. The issue in regard to jurisdiction of the State Commission under section 86(1)(f) of 2003 Act remained open till it was finally settled by the Judgement of Hon'ble Supreme Court in "Gujarat Urja Vikas Nigam Vs Essar Power Ltd rendered on 13.8.2008. The relevant extracts of this judgment of Hon'ble Supreme Court dated 13.8.2008 is reproduced below:

"26. It may be noted that Section 86(1)(f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word 'and' in Section 86(1)(f) between the

words 'generating companies' and 'to refer any dispute for arbitration' means 'or'. It is well settled that sometimes 'and' can mean 'or' and sometimes 'or' can mean 'and' (vide G.P. Singh's 'Principle of Statutory Interpretation' 9th Edition, 2004 page 404.)

27. In our opinion in Section 86(1)(f) of the Electricity Act, 2003 the word 'and' between the words 'generating companies' and the words 'refer any dispute' means 'or', otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some Arbitrator. Hence the word 'and' in Section 86(1)(f) means 'or'.

28. Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation.

29. This is also evident from Section 158 of the Electricity Act, 2003 which has been quoted above. We may clarify that the agreement dated 30.5.1996 is not a part of the licence of the licensee. An agreement is something prior to the issuance of a licence. Hence any provision for arbitration in the agreement cannot be deemed to be a provision for arbitration in the licence. Hence also it is the State Commission which alone has power to

arbitrate/adjudicate the dispute either itself or by appointing an arbitrator.

31. We may now deal with the submission of Mr. Fali S. Nariman that in view of Section 175 of the Electricity Act, 2003, Section 11 of the Arbitration and Conciliation Act, 1996 is also available for arbitrating disputes between licensees and generating companies.

32. Section 175 of the Electricity Act, 2003 states that the provisions of the Act are in addition to and not in derogation of any other law. This would apparently imply that the Arbitration and Conciliation Act, 1996 will also apply to disputes such as the one with which we are concerned. However, in our opinion Section 175 has to be read along with Section 174 and not in isolation.

33. Section 174 provides that the Electricity Act, 2003 will prevail over anything inconsistent in any other law. In our opinion the inconsistency may be express or implied. Since Section 86(1)(f) is a special provision for adjudicating disputes between licensees and generating companies, in our opinion by implication Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes i.e. disputes between licensees and generating companies. This is because of the principle that the special law overrides the general law. For adjudication of disputes between the licensees and generating companies there is a special law namely 86(1)(f) of the Electricity Act, 2003. Hence the general law in Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes.

34. It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner, vide Chandra Kishore Jha vs. Mahavir Prasad, AIR 1999 SC 3558 (para 12), Dhananjaya Reddy vs. State of Karnataka, AIR 2001 SC 1512 (para 22), etc. Section 86(1)(f) provides a special manner of making references to an arbitrator in disputes between a licensee and a generating company. Hence by implication all other methods are barred.”

41. This judgment of Hon'ble supreme Court has removed all the doubts in regard to the jurisdiction of the State Commission under section 86(1)(f) of the 2003 Act. After 13.3.2008 i.e. the date of pronouncement of this judgment by the Hon'ble Supreme Court, it has become a settled law that only State Commissions have jurisdiction to adjudicate upon the disputes between generating companies and licensees. But, prior to 13.3.2008 the issue was open to question as held by Hon'ble Supreme Court in Lanco Case (supra).

42. In view of the above fact and legal situation, it has to be held that the Appellant approached the High Court with due diligence and in good faith to challenge the letter which had

been issued on 20.8.2003. In fact, the Appellant rushed to the High Court immediately and filed a Writ Petition on 25.8. 2003 and obtained the stay order on 28.8.2003 and got the stay order made absolute on 3.9.2003, despite the objection raised by the 1st Respondent.

43. In view of the above, we are of the considered opinion that the Appellant had acted with due diligence and in good faith in filing the Writ Petition being WP (c) No. 18165/2003 before Hon'ble High Court of Andhra Pradesh.
44. The incidental question arises in this context, as to whether the Appellant was entitled to exclude the whole period of prosecution before the Hon'ble High Court of Andhra Pradesh under section 14(2) of the Limitation Act 1963.
45. Sub-section 2 of section 14 of the Limitation Act 1963 read as under:

*“14 (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting **with due diligence** another civil proceedings, whether in a court of first instance or of appeal or revision, **against the same party for the same relief** shall be excluded, where such proceeding is prosecuted **in good faith** in a court which, from*

defect of jurisdiction or other cause of a like nature, is unable to entertain it.”

46. The following pre-requisite conditions have to be satisfied before invoking S. 14 (2) of the Act:

- I. Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;
- II. the prior proceeding had been prosecuted with due diligence and good faith;
- III. the failure of the prior proceeding was due to defect or jurisdiction or other cause of like nature;
- IV. the earlier proceeding and the later proceeding must relate to the same matter in issue, and
- V. both the proceedings are in a court”

47. Now let us examine whether all these ingredients were available in the present case. Admittedly the contesting parties in Writ Petition being WP (c) No. 18165/2003 before the High Court and in OP No. 39 of 2009 before the State Commission were the same. Prayer before the High Court as well as before the State Commission was also for same relief. As observed by us in the earlier paragraphs, the prosecution before the High Court was with due diligence

and was in good faith. Therefore, the Appellant is entitled for exclusion of period of pendency of the Writ Petition before the High Court while computing the period of limitation under the Limitation act 1963.

48. Ld Counsel for the Respondent made one more faint attempt to show that the Appellant was not bonafide since the judgment in Essar Power case was delivered by Hon'ble Supreme Court on 13.3.2008 but the Appellant withdrew its Writ Petition from the High court only on 9.6.2009. According to the Respondent, this action on part of the Appellant who kept quiet till 9.6.2009 was with a malafide intention to get benefit of interim order of the High Court dated 25.8.2003, and the prosecution before the High Court cannot be said to be in good faith and therefore the Appellant is not entitled for exclusion of any period what so ever under section 14(2) of the Limitation Act.

49. The Learned Counsel for the Respondent further argued that the very fact that the Appellant came to know about the judgment dated 13.3.2008 of the Hon'ble Supreme Court

and even then, the Appellant did not take any immediate steps to withdraw the Writ Petition and on the other hand, the Appellant waited for one year three months to withdraw the Writ Petition without giving any explanation as to why the Appellant kept quiet all along would show that action of the Appellant was not bonafide.

50. We are not impressed with this argument. As mentioned earlier, immediately on receipt of the letter dated 25.8.2003, the Appellant filed a Writ Petition on 28.8.2003 and obtained stay of the operation of the letter dated 28.8.2003 itself. Further, the matter was argued at length before the Hon'ble High Court in the application to vacate the stay and the High Court was ultimately satisfied with the arguments advanced by the Appellant in the Writ Petition and made the order of stay absolute by rejecting the objections raised by the Respondent.

51. The very fact that the Hon'ble High Court entertained the Writ Petition and passed interim orders in favour of the Appellant, would reveal that the Appellant proceeded with

the matter bonafidely which action was endorsed by the Hon'ble High Court by virtue of interim order being passed in favour of the Appellant. Therefore, the action taken by the Appellant cannot be construed to be action which was without good faith or without due diligence.

52. That apart, the order of the High Court dated 9.6.2009 clearly indicates that the Appellant voluntarily sought for the permission to withdraw the Writ Petition with a liberty to approach the Commission in view of the Supreme Court's judgment. Though it is not clear as to when the Appellant came to know about the judgment of the Hon'ble Supreme Court dated 13.3.2008, the Appellant decided to withdraw the same the moment the matter was taken up for final disposal on 9.6.2009.

53. Section 14 (2) would clearly provide that in computing period of limitation, the time during which the applicant has been prosecuting with due diligence and in good faith in the other forum has to be deducted. Here in this case, the Appellant approached the High Court for prosecuting the

proceedings in 2003 itself i.e. immediately after receipt of the letter as per existing law then. Therefore, it cannot be contended that the Appellant was not diligent for the period prior to filing of the petition before the State Commission.

54. As a matter of fact, the Writ Petition was withdrawn on 9.6.2009 and without any further delay, the Appellant filed the Petition before the State Commission on 07.07.2009.

55. Therefore, we are not able to agree with the contention of the Respondent especially for the reason that the Respondent was also party to the said Writ Petition. The Respondents could have approached the High Court by filing the necessary application immediately after the pronouncement of judgment in Essar Power case for dismissal of the Writ Petition citing the said judgment of Hon'ble Supreme Court in Essar Power case. This was not done promptly. There was no reason as to why he also kept quiet. If it is stated that the Appellant was negligent in approaching the High Court for withdrawal of Writ Petition immediately, the same can be attributed to the Respondent

also in not approaching in High Court immediately for getting the Writ Petition dismissed on the same ground.

56. This could be viewed from one other angle. Even assuming that during the period between 13.3.2008, i.e. the date of the Supreme Court judgment and 9.6.2009 i.e. (date of withdrawal of Writ Petition), there was no diligence on the part of the Appellant, it cannot be stated that due diligence was not shown for the period between the date of writ petition i.e. 25.8.2003 challenging the letter dated 20.8.2003 and the date of the judgment of the Supreme Court i.e. 13.3.2008. When that being the case, atleast, the said period i.e. between the 25.8.2003 (date of Writ Petition) and 13.3.2008 (date of Judgment of Supreme Court) has to be excluded u/s 14 (2) of the Limitation Act. If that is excluded, the period between 14.3.2008 and 7.7.2009 (date of filing of petition before the Commission) has alone to be calculated and if it is so, the filing of the petition was in time i.e. within 3 years.

57. In the light of above discussions we are of the considered opinion that the findings rendered by the State Commission on the limitation point is not legally sustainable and on the other hand it has to be held that the petition filed by the Appellant before the Commission, was filed within a period of limitation in the light of the fact that Appellant is entitled to the benefit as available under section 14 (2) of the Limitation Act.

58. Before parting with this case, we would like to refer to the one more observation of the State Commission in the impugned order dated 13.6.2011 relating to the aspect of Return as equity under the notification dated 30.3.92. The relevant extracts of those observations in the impugned order are reproduced below:

27. The Commission has to conduct an enquiry and adjudicate on the aspect of ROE, while looking into the statutory notification dated 30.03.1992 and arrive at a conclusion, whether the payment is made in excess or otherwise. So, the question of enquiry at this stage does not arise as the very relief claimed by the petitioner is to declare the letter dated 20.08.2003 as bad, illegal, arbitrary and unenforceable. Since the approach is made long after serving the letter dated

20.08.2003. If at all if any adjustment in practical is made, then only it may give fresh cause of action, but the petitioner now cannot ask for a declaratory relief in above said forum. Furthermore, we have already arrived at a conclusion that the relief now sought is barred by time while answering issue no.3; there is no need for us to discuss and give a finding on issues 1 & 2. Hence, answered accordingly.

28. The petitioner herein filed the above said I.A to pass an interim order to implement and to give effect to the statutory notification of the 1st respondent No. S.O. 251 E dated 30th March 1992. No interim order is passed by the Commission. However the relief claimed in the interlocutory application is also merged in the very issue of limitation in the main O.P. itself. Since the main O.P. is liable to be dismissed, the petition is also liable to be dismissed.

59. Perusal of above observations of the State Commission would reveal that the State Commission has failed to appreciate that issues involved were related not only for the recovery of past dues, which were according to the State Commission were time barred, but also for the future payments to be made by the Respondents to the Appellant for the power supplied by the Appellant to the Respondents. The State Commission could have gone into the merits of the case in regard to permissible rate of RoE in terms of PPA read with Government of India's 1992

Notification for the future payments. But this was not done. However, in view of our above conclusion , it would be appropriate to direct the Commission to conduct enquiry and decide the issues on merits comprehensively and dispose of the matter as expeditiously as possible.

60. **Summary of Our Findings:**

We are of the view that the findings rendered by the State Commission on the limitation point is not legally sustainable and on the other hand it has to be held that the petition filed by the Appellant before the Commission, was filed within a period of limitation in the light of the fact that Appellant is entitled to the benefit as available under section 14 (2) of the Limitation Act.

61. In view of our above finding, we set aside the impugned order of Andhra Pradesh Electricity Regulatory Commission dated 13.06.2011 and remand it back to the State

Commission to decide the issues on merits as expeditiously as possible.

62. Hence, the Appeal is allowed. However, there is no order as to cost.

63. Pronounced in the open court today the 10th August, 2011.

(V J Talwar)
Technical Member

(Justice M Karpaga Vinayagam)
Chairperson



INDEX: REPORTABLE/~~NON-REPORTABLE~~

