

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Dated: 20th January 2010

**Present Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
 Hon'ble Mr. H.L. Bajaj, Technical Member**

Appeal No. 156 of 2009

In the matter of

1. Lanco Kondapalli Power Pvt. Ltd.
Plot No. 4, Software Units Layout,
Hitee City Madhapur,
Hyderabad-500 018

2. Lanco Infratech Limited
Plot No. 4, Software Units Layout,
Hitee City Madhapur,
Hyderabad-500 018

....
Appellant(s)

Versus

1. Haryana Electricity Regulatory Commission
Bays No. 33-36, Sector-4
Panchkula-134112

2. Haryana Power Generation Corporation Ltd.
Shakti Bhawan, Sector-6
Panchkula-134109

... Respondent(s)

Counsel for Appellant(s)

Mr. Shanti Bhushan,
Sr. Advocate
Mr. Manu Nair &
Mr. Arun Mohan

Counsel(s) for Respondent(s) Mr. Ashwani Kumar, Sr. Adv.
Mr. Ravindra Bana &
Ms. Nidhi Minocha
Mr. D.C. Arya for R-2
Mr. Anand K. Ganesan

**Per Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson**

JUDGMENT

1. M/s Lanco Kondapalli Power Pvt. Ltd. and M/s Lanco Infratech Ltd. are the Appellants 1 and 2. Haryana Power Corporation is Respondent-2.

2. The bids were invited by Haryana Power Generation Corporation Limited (Respondent-2) from various generating companies for supply of power to the Corporation. After the bid process was over, the Appellants became the successful bidder. Accordingly, the Corporation (Resp-2) issued a Letter of Intent in favour of the Appellant. Bid bond was also paid by the Appellant to the credit of the Corporation (Resp-2). However, there was a delay on the part of the Appellant to sign the Power

Purchase Agreement (PPA). In spite of the best efforts taken by the Corporation (Resp-2), the Appellants did not come forward to sign the PPA as agreed.

3. Under the circumstances, the Corporation (Resp-2) filed a petition under section 86(1)(f) of the Act before the State Commission seeking direction for the specific performance of the applicant's obligation to sign the PPA under the LOI issued to them. On receipt of notice issued in that petition the Appellants appeared before the State Commission and raised preliminary objection regarding the jurisdiction of the State Commission on entertaining the same. The State Commission took up the matter to decide the preliminary issue and heard the parties. At the end the State Commission dismissed the said petition holding that the State Commission has got jurisdiction to entertain the petition and adjourned the matter for further proceedings. This order deciding about the jurisdiction was passed by the State Commission on 31.08.2009. Aggrieved by this, the Appellants have filed this appeal.

4. Mr. Shanti Bhushan, the Ld. Senior Counsel appearing for the Appellants urged 2 points as against the impugned order.

They are as follows:

- (i) Admittedly the PPA has not been signed yet. As such, there is no concluded contract between the Appellants and the Corporation (Resp-2). The State Commission is wrong in holding that it has got jurisdiction to entertain the petition for specific performance of the contract which was not concluded; and
- (ii) The Appellants are only the bidder. They are not the generating company under the meaning of section 2(28) of Electricity Act. The State Commission can go into the dispute only between a licensee and the generating company under section 86(1)(f) of the Act. Even though the Respondent No. 2 is the licensee, the Appellants are not generating company, and so

the State Commission has no jurisdiction to enquire into the dispute between these parties.

5. In reply to same the following arguments were advanced by the Corporation (Resp-2):

- (i) The offer of the Appellant to supply power to the Corporation was made by the Appellants on 23.11.2007 and this was accepted by the Corporation (R-2) by issuance of Letter of Intent dated 17.07.2008 resulting in concluded enforceable contract. Both the documents dated 23.11.2007 and 17.07.2008 would indicate that the award of contract was issued by the Power Corporation on the basis of offer made by the Appellants and the same was accepted unconditionally to supply power and thereby the contract has been concluded.
- (ii) The bid was offered by the Appellants claiming themselves as a company generating the power.

The entire correspondence of the Appellant with the Corporation proceeds on the basis that the Appellants will generate power contracted to be purchased by the Corporation (R-2) from its one of the projects. Perusal of the correspondence and the representation made by the Appellants to the Corporation (R-2) as well as to the State Government would reveal that they claimed themselves the developers and the owners of the project through their SPV namely Lanco Babandh Power Limited. Admittedly, the Appellants were not trading company. In the capacity of generating company, the Appellants responded to the RFQ and RFP documents which have been signed by them. Therefore, the Appellants cannot escape from its obligation to sign the PPA merely by saying that it was not a generating company. That apart this is a new plea made before this

Tribunal for the first time which cannot be allowed to be raised in this Appeal.

6. The questions of law that may arise for consideration in the present case are as follows:

- (i) Whether the petition filed by the Power Corporation (R-2) before the State Commission under section 86(1)(f) of the Act is maintainable in law?
- (ii) Whether the State Commission has got a jurisdiction to grant the relief of specific performance for the contract which is said to be not concluded?
- (iii) Whether the Appellants are the generating company within the meaning of section 2(28) of the Act in respect of the project in question which alone would confer the jurisdiction on the State Commission to go into the dispute?

7. Before dealing with these questions, we deem it appropriate to refer to the minimal and basic facts of the present case to understand the broad outline of this case.

8. The Power Corporation (R-2) is involved in the development of electricity including the maintenance of power station, purchase of power etc. in accordance with National Electricity Policy to act as an agent of the Government and the private sector.

9. The Power Corporation (R-2) invited the bids for the purchase of power on long-term basis. Various bids were received from several generating companies including the Appellants. By the notification dated 17.07.2006, the State Government constituted an Evaluation Committee. The said Committee qualified 14 bidders out of the 18 bidders for issuing of request for proposal (RFP). Accordingly, the same were issued. Out of the 14 parties, 7 parties including the Appellants submitted their bids.

10. On 05.12.2007 the financial bids of all the bidders were opened and the Appellants emerged as the lowest bidder for supply of 389 MW of power to the Corporation (R-2). Then on negotiations the revised bids were submitted. Since the Appellants bid was the lowest, they once again were declared as L1 bidder.

11. On 17.07.2008, the successful bidders were issued LOI. The Appellants being one of the parties accepted the request for proposal unconditionally. As per clause 2.1.6.3 of RFP, the selected bidder shall furnish to the procurer i.e. the Power Corporation (R-2), performance Bank Guarantee and then sign the PPA within 60 days of the issue of LOI. The other parties signed the PPA. However, the Appellant did not come forward to sign even though Bank Guarantee was furnished. The Appellant gave various reasons for the delay. Ultimately, the Power Corporation (R-2) on 25.07.2008 reminded the Appellant to send its representative to sign the PPA. However, there was

no response. Therefore, a legal notice was issued by the Power Corporation (R-2) on 19.09.2008 directing the Appellants to fulfill its obligations to sign the PPA as agreed by them through the RFP documents.

12. At that stage, the Appellants filed a civil suit seeking for a mandatory injunction against the Power Corporation (R-2) and sought for a direction for the Extension of Time for signing of the PPA and other documents. During the pendency of the said suit, he also asked for interim relief for restraining the Power Corporation for encashment of the Bank Guarantee of Rs. 11.67 crore. Accordingly the civil court initially passed the order of injunction in favour of the Appellant and directed the parties to negotiate for the signing of the PPA. Against this order the Power Corporation (R-2) filed a civil appeal before the District Court. During the pendency of the appeal, the interim order passed by the Civil Court became infructuous since the bid bond was in the meantime encashed. Therefore, the Appeal was dismissed. In the meantime R-2 filed a Contempt Petition

against the Appellants for non-compliance of the civil court in the interim order. At that stage the Appellant sought permission to the civil court to withdraw the suit. Accordingly the suit was dismissed as withdrawn.

13. Even thereafter the Appellant did not come forward to sign the PPA. Under those circumstances, the Power Corporation (R-2) filed a petition before the State Commission under section 86(1)(f) seeking adjudication of the dispute with reference to the RFP project documents and sought specific direction to the Appellant to sign the PPA. This petition was entertained by the State Commission which in turn issued notice to the Appellants. The Appellants after receiving the notice appeared before the State Commission and filed a petition raising the preliminary objection as to the maintainability of the petition filed by the Power Corporation (R-2), questioning the jurisdiction of the State Commission. As mentioned above, the State Commission, after hearing the parties, disposed of the said petition by holding that the said petition is maintainable and proceeded to hear the

parties on merits. Against this order the Appellants have filed this appeal before this Tribunal.

14. In the light of the facts narrated above, let us now go into the issues raised by the Appellants.

1st Issue: According to the Learned Senior Counsel for Appellant, in regard to the first issue no PPA has been entered into yet and as such there was no concluded contract and therefore the directions sought for by the Power Corporation to supply power after signing the PPA is outside the jurisdiction and purview of the State Commission.

According to, R-2, the Power Corporation, the contract has already been concluded, the moment LOI issued by the Power Corporation on 17.07.2008 was unconditionally accepted by the Appellants and since offer made by the Appellants as successful bidder on 23.11.2007 was accepted by the award of contract namely, the LOI issued on 17.07.2008, the contract is concluded

and the signing of the PPA is a routine and ministerial act which the Appellants are obliged to do and therefore, the State Commission has got jurisdiction to grant relief sought for by the Power Corporation in the petition filed before the State Commission.

15. We have carefully considered the rival contentions in regard to the first issue. It is the stand of the Appellant that the Letter of Intent (LOI) dated 17.07.2008 issued by the Power Corporation (R-2) in favour of the Appellant, is only a statement of intent and there would not be a concluded contract till the Performance Bank Guarantee and signing of the Power Purchase Agreement, and if the selected bidder refuses to sign the PPA, the Appellants being the bidder, can only be penalised by forfeiture of the bid bond and they cannot be compelled to sign the PPA and then supply power.

16. In this case, admittedly the offer of the Appellants by furnishing the bids dated 23.11.2007 was unconditionally

accepted by the Power Corporation (R-2) by the issuance of LOI dated 17.07.2008

17. The offer made by the Appellants as successful bidders on 23.11.2007 would envisage as follows:

“We hereby and unconditionally and irrevocably agree and accept that all the decisions made by the Haryana Power Generation Corporation regarding the matter arising out of the RFP shall be binding on us. We hereby expressly waive all claims in respect of bid process”

18. Apart from this offer, the Appellant gave undertaking for bid forming part of the RFP which is as follows:

‘We give our unconditional acceptance to the RFP Project document issued by the Haryana Power Generation Corporation (R-2) as part of the RFP March 01, 2007 as amended. We shall ensure that we shall execute such RFP Project documents as per the provisions of the RFP. We have submitted the bids on the terms and conditions

contained in the RFP. We hereby confirm our acceptance of the terms and conditions of RFP”.

19. The above documents would reveal that the Appellants have unconditionally accepted the conditions of RFP and submitted the unqualified offer. The said unconditional offer was unconditionally accepted by the Power Corporation (R-2) through the LOI dated 17.07.2008. The LOI issued on 17.07.2008 reveals that it is an award of contract for the supply of power issued in favour of the Appellants. Under clause 12 of the RFP, the LOI means the letter to be issued by the procurer to the selected bidder for award for supply of power to the procurer. This means the LOI dated 17.07.2008 constitute award of contract by the Power Corporation (R-2) to the Appellants for the supply of power.

20. Now let us refer to the contents of the LOI dated 17.07.2008 issued by the Power Corporation (R-2) in favour of the Appellants.

“In this respect I am pleased to inform you that your offer has been accepted and this LOI is hereby issued to you in token of acceptance. It is further clarified that all the terms and conditions as laid down in RFP documents including, PPA shall be applicable during the subsistence of the contract.”

21. Thus the offer made by the Appellants for the supply of power as per the provisions of the PPA (forming part of the RFP Project document) had been duly accepted and conveyed to the Appellants. Therefore, it is stated that the Appellant had already accepted the RFP Project document unconditionally and the LOI was issued on 17.07.2008 and the same was accepted by the Appellants. The concluded contract came into existence from that date onwards.

22. This apart, the definition of RFP as provided in clause 40 of the RFP would show that RFP includes the Request for Proposal along with all schedules, annexures and RFP Project

documents etc. It is accepted by both the parties that all the documents i.e. PPA, Default Escrow Agreement, Agreement to Hypothecate and any other agreements entered into between the procurer and the seller would constitute the part of the RFP Project Document.

23. It is true that under clause 2.1.7 of the RFP, the invocation of the bid bond presupposes the concluded contract by way of award of contract but the real invocation or encashment of the bid bond is not at all consequential on the prior annulment of the contract. There are 3 grounds given under clause 2.12.2 of the RFP document which can be invoked by the procurer for the invocation/encashment of the bid bond. These are:

- (i) Failure to execute the PPA and other RFP Project documents;
- (ii) Failure to furnish the Performance Bank Guarantee;
and
- (iii) Submission of wrong information by the bidder or making any misrepresentation in the bids.

24. But the mere invocation or encashment of the bid bond is not necessarily consequential upon the prior annulment of the contract.

25. In this context, clause 3.4.2.3 of RFP document is relevant. The same is quoted below:

“Clause 3.4.2.2: If the successful bidder to whom the LOI has been issued does not fulfill any of the conditions specified in clause 2.1.6.3, then in accordance with the provisions of clause 2.1.7, the procurer reserves rights to annul the award for the supply of power to the procurer and cancel the LOI.”

26. The above clause provides that the annulment of the award is yet another remedy reserved to the procurer in the event of non-fulfillment of any other conditions. In this case, it is a solid stand taken by the Power Corporation that the Power Corporation has not invoked the option of annulling the award in terms of clause 3.4.2.3.

27. As a matter of fact, the Power Corporation has communicated to the Appellants encashment of the bid bond stating that the same has been adjusted in the Performance Bank Guarantee. This also would show that the encashment of the bid bond amount was not consequent to the cancellation of the contract.

28. No material has been placed by the Appellant to show that the Respondent-2 has ever resorted to the cancellation of contract. That apart, one more document would clarify that same stand has been consistently taken by the Power Corporation (R-2). The said document is the legal notice sent by the Power Corporation to the Appellant on 19.02.2008. The relevant portion is as follows:

“Kindly also note that on account of your failure to execute the PPA, despite various requests and your subsequent failure to furnish the requisite Bank Guarantee my clients are constrained to encash the unconditional and

irrevocable Bank Guarantee submitted by way of a bid bond as issued to my client for a sum of Rs. 11.67 crore which stand extended till November 02, 2008. Do also note that the encashment of this Bank Guarantee should not be construed as my clients limiting their prayers to relief for damages only but this encashment would be in addition to the relief of specific performance and damages which my client will pray for from a court of law ”.

29. Through this legal notice, the Power Corporation (R-2) has specifically demanded a specific performance of the contract subsisting between the parties and not inclined to cancel the award.

30. The Senior Ld. Counsel has cited the following decisions in order to substantiate his plea with regard to the 1st issue.:

(1) (1998) 3 SCC 471 – Tarsem Singh Vs. Sukhminder Singh Nigam Limited & Anr. Vs. MPL Mobile Cellular Limited & Others.

:12. “Contract” is a bilateral transaction between two or more than two parties. Every contract has to pass through several stages beginning with the stage of negotiation during which the parties discuss and negotiate proposals and counter-proposal as also the consideration resulting finally in the acceptance of the proposal. The proposal when accepted gives rise to an agreement. It is at this stage that the agreement is reduced into writing and a formal document is executed on which parties affix their signatures or thumb impression so as to be bound by the terms of the agreement set out in that document. Such an agreement has to be lawful as the definition of contract, as set out in Section 2(h) provides that “an agreement enforceable by law is a contract.”

(2) (1999) 1 SCC 1 – Rickmers Verwaltung GmbH Vs. Indian Oil Corporation Ltd.

“The Court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the

parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence...”

(3) (2006) 1 SCC 751 – Dresser Rand S.A. Vs. Bindal Agro Chem Ltd. & Anr.

40. It is no doubt true that a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that the detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties. But the question whether the letter

of intent is merely an expression of an intention to place an order in future or whether it is a final acceptance of the offer thereby leading to a contract, is a matter that has to be decided with reference to the terms of the letter”.

(4) (2008) 13 SCC 597 – Bharat Sanchar Nigam Limited & Anr. Vs. BPL Mobile Cellular Limited & Others.

AIR 1973 Gau 111 – Union of India Vs. Rameshwarlall Bhagchand

“Section 8 provides that performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal. According to Section 2(a) of the Contract Act when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal, and clause (b) of Section 2 states that when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal

when accepted becomes a promise. Section 2(f) enacts that promises which form the consideration or part of the consideration for each other are called reciprocal promises.”

(5) AIR 1997 AP 200 – M/s Lotus Constructions Vs. The Government of Andhra Pradesh & Anr.

“ A reading of these clauses would undoubtedly show that a letter of communication of acceptance itself if not enough unless the same is followed by an agreement and if no agreement is entered within the stipulated period shall resulting forfeiture of Earnest Money Deposit and the letter of acceptance issued to the tenderer shall be deemed to have been cancelled. Entering into an agreement, thus, is not mere formality; but, one of the necessary conditions for concluding the contract”.

(6) AIR 2007 P&H 58 – Infotech India Limited & Ors. Vs. State of Punjab & Ors.

The argument that the letter of intent could not have been issued to the petitioners (H2) after the letter of intent was issued

to the highest bidder (H1) is not tenable. The issuance of letter of intent to M/s Jindal Pipes Limited is an independent transaction though in respect of the same NIT. Admittedly the highest bidder has not accepted the terms and conditions and filed a writ petition for return of the bank guarantee. Therefore, the only consequence of failure to complete such concluded contract was forfeiture of earnest money furnished by the said bidder. With the forfeiture of earnest money of the highest bidder, the issue of offer and acceptance of the highest bidder has come to an end.

**(7) 2009 II AD (Delhi) 197 – Victor Cables Industries Ltd.
Vs. DESU**

“The proposal must be sufficiently definite to permit the conclusion of the contract by mere acceptance. Similarly, an acceptance should be final and unqualified expression of assent, to the terms of an offer. An unqualified unconditional

acceptance of the offer creates a contract when communicated to the offeror.”

“After considering the correspondence exchanged between the parties, intention of the parties show that both the parties agreed to accept the basic terms of contract reached between them in letter dated 30th November, 1989 and later on by letter dated 5th December 1989. All the subsequent events are of clarificatory nature.”

“Therefore, we cannot accept the contention of the learned counsel for the Appellant that vide letter dated 5th December, 1989, there was no concluding contract between the parties. Both the parties were well aware about the letter and correspondences exchanged between them which is in reference to the concluding contract dated 5th December, 1989,”

31. On the other hand, the Ld. Senior Counsel of R-2 Mr. Ashwani Kumar has cited the following authorities:

(1) (1999) 1 SCC 1 – Rickmers Verwaltung GmbH Vs. Indian Oil Corporation Ltd.

“The Court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence...”

(2) (1998) 3 SCC 471 – Tarsem Singh Vs. Sukhinder Singh Nigam Limited & Anr. Vs. MPL Mobile Cellular Limited & Others.

“12. “Contract” is a bilateral transaction between two or more than two parties. Every contract has to pass through several stages beginning with the stage of negotiation during which the parties discuss and negotiate proposals and counter-

proposal as also the consideration resulting finally in the acceptance of the proposal. The proposal when accepted gives rise to an agreement. It is at this stage that the agreement is reduced into writing and a formal document is executed on which parties affix their signatures or thumb impression so as to be bound by the terms of the agreement set out in that document. Such an agreement has to be lawful as the definition of contract, a set out in Section 2(h) provides that “an agreement enforceable by law is a contract.”

(3) (2006) 1 SCC 751 – Dresser Rand S.A. Vs. Bindal Agro Chem Ltd. & Anr.

40. It is no doubt true that a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that the detailed contract would be drawn up later. If such a letter is issued to the

contractor, though it may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties. But the question whether the letter of intent is merely an expression of an intention to place an order in future or whether it is a final acceptance of the offer thereby leading to a contract, is a matter that has to be decided with reference to the terms of the letter”.

(4) 2009 II AD (Delhi) 197 – Victor Cables Industries Ltd. Vs. DESU

“The proposal must be sufficiently definite to permit the conclusion of the contract by mere acceptance. Similarly, an acceptance should be final and unqualified expression of assent, to the terms of an offer. An unqualified unconditional acceptance of the offer creates a contract when communicated to the offeror.”

“After considering the correspondence exchanged between the parties, intention of the parties show that both the parties agreed to accept the basic terms of contract reached between

them in letter dated 30th November, 1989 and later on by letter dated 5th December 1989. All the subsequent evens are of clarificatory nature.”

“Therefore, we cannot accept the contention of the learned counsel for the Appellant that vide letter dated 5th December, 1989, there was no concluding contract between the parties. Both the parties were well aware about the letter and correspondences exchanged between them which is in reference to the concluding contract dated 5th December, 1989,”

32. The guidelines which could be culled out by the Supreme Court and other courts in regard to this issue are summarised as follows:

- (I) It is the duty of the court to study the entire correspondence exchanged between the parties, with a view to arrive at a conclusion whether there was any meeting of the minds between the parties which could create a binding contract between them.

- (II) The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it show there had been meeting of minds between the parties and they had acted to reach an agreement upon all material terms then it can be said that a binding contract was capable of being spelt out from the correspondence.
- (III) The contract is a bilateral transaction between the two parties. Every contract has to pass through several stages beginning with the stage of negotiation resulting finally in the acceptance of the proposal. The proposal, when accepted, gives rise to an agreement. It is at this stage that the agreement is reduced in writing and formal document is executed.

(IV) It is true that a LOI may be construed as a letter of acceptance. It is common in contracts involving detailed procedure in order to save time, LOI is issued communicating the acceptance of the offer and asking the contractor to start the work. If such a letter had been issued to the contractor, it may amount to acceptance of the offer resulting in a concluded contract between the parties. The question as to whether the LOI is merely an expression of intention to place order in future or whether it is a final acceptance of the offer leading to a contract is a matter which has to be decided with reference to the terms of the said letter.

(V) The proposal must be sufficiently defined to promote the conclusion of a contract by mere acceptance. Similarly, the acceptance should be final and unqualified expression of assent to the terms of the offer. An unqualified, unconditional acceptance of the offer creates a contract.

33. Keeping in mind all these guidelines, if you look at the facts of the case, the correspondence exchanged between the two parties would clearly show the intention of the parties which agree to accept the basic terms of the contract by issue of a LOI dated 17.07.2008.

34. In this case, as indicated above, it is the Appellant who approached the civil court requesting for extension of time to execute the PPA. It never sought a relief to the effect that they are not agreeable for the contract and, therefore, they cannot be compelled to sign the PPA. On the other hand, the details of the various documents referred to above, pursuant to the LOI, and various steps which have been taken by the Appellant to start the power project by approaching the Orissa Government requesting for necessary sanctions would clearly indicate that there were meeting of the minds between the parties in regard to the contract. Therefore, it cannot be said that the contract has not been concluded. As indicated above, the contents of the LOI and

its subsequent developments taken place in pursuance of the LOI would clearly show that contract had already been concluded and whatever else was required to be done thereafter was a mere signing of the PPA which is only a ministerial and formal act.

35. The authorities cited by the Learned Senior Counsel for the Appellant would not be of any help to the Appellant in the light of the present facts of this case and the observations made by various courts, pointed out by the Learned Senior Counsel for the Appellant were made only in the light of the facts of those cases and on the strength of the various provisions of different Acts and as such the same may not apply in this case.

36. At the risk of repetition, we are to state that the documents and the correspondence available on record would clearly indicate that the contract has come into existence on the date when the LOI dated 17.07.2008 was issued, received and accepted by the Appellants and in pursuance of the same, the Appellants started the “process” of constructing the project

plant in Orissa by getting appropriate sanctions from the Orissa Government. Therefore, it can be safely concluded that a legally enforceable contract in terms of the relevant provisions of the Contract has already come into existence and it continues to exist. Therefore, the first ground urged by the Ld. Senior Counsel for the Appellant would fail.

Second Issue

37. With regard to the second issue, it is the case of the Appellant that the State Commission has no jurisdiction to go into the dispute between the licensee and the bidders under section 86(1)(f) of the Act and that it can enquire into the dispute only between generating companies and the licensee and not otherwise and that since the Appellants are not a generating company within the meaning of section 2(28) of the Electricity Act, the Commission has no jurisdiction.

38. Admittedly, the bid was invited by the Power Corporation (R-2) for the supply of power from generators or traders under

clause 1.2 of RFQ. It cannot be disputed that the Appellants are not traders. The entire correspondence of the Appellants with the Power Corporation (R-2) would show that the Appellants have given a categorical undertaking that they will generate the power contracted to be purchased by the Power Corporation (R-2) in one of their projects. It is now contended that the Appellants are not the generating company and one Lanco Babandh Power Limited alone is a generating company. This contention is not tenable for the following reasons:

39. From the beginning there is a lot of correspondence only between the Appellants and the Power Corporation (R-2). That the RFQ was responded by the Appellant in July, 2006. At that point of time Lanco Babandh Power Limited which is alleged to be a generating was never in existence. In July 2006 the Appellants in the capacity of generators of power had responded to RFQ whereas Lanco Babandh Power Limited was incorporated on 30.05.2007. In other words, only subsequent to the response to the RFQ the Appellants promoted Lanco

Babandh Power Limited and brought its existence by the Appellants to generate the power to be supplied to the Power Corporation. On account of existing structure of Lanco Babandh Power Limited, the day-to-day control of the company remains with the Appellants. This fact had been admitted by the Appellant in writing, in their response to the RFQ. In the letter dated 01.09.2008 sent by the Appellants to the Power Corporation, they clearly admitted that they are the project developer and the owner. The relevant portion is as follows:

“LANCO ONDAPALLI POWER PRIVATE LIMITED
Regd. Office: Plot # 4, Software Units Layout, Hitee City,
Madhapur, Hyderabad-500 081, A.P. (India)

Ref: LKPPL-MD(HPGCL)/324/03 Dated: 01 September
2008

The Managing Director
Haryana Power Generation Corporation Limited
Shakti Bhawan, Sector-6
Panchkula-134 109 Fax 0172-2560136/2560805

Kind Attention: Mr. Sanjeev Kaushal, IAS
Purchase of Power on Long-germ basis for UHBVNL
DHBVNL

Sir,

**Re: HPGCL – Case 1 Tariff Based Competitive
Bidding
Purchase of Power on Long-Term Basis for
UHBVNL & DHBVNL**

.....The impact on project development due to constraints, decisions or actions of any agency of the Appropriate Government(s) is unavoidable and beyond control of the Project Developer/Owner and therefore, the Project Developer/Owner should not be held liable or penalized for the acts of omissions beyond its control and should be safeguarded against any additional financial liability, which may accrued due to such reasons.

.....As you are kindly aware, Section 4(1) is the start of process for acquisition only. The issues relating to Land Acquisition only. The issues relating to Land Acquisition are already in the knowledge of everyone, including the recent controversies in Eastern Region for TATA and Posco Projects, who after 3 years are facing appropriate Government inaction.

Under these circumstances, as a Project Developer, it is not fair and justifiable to pay penalties to one Government Authority (HPGCL) under the contract for non-performance and under-performance of another Government Authority.

In view of the aforesaid circumstances, despite your request we do not have any other option but to reiterate and express our inability to submit Performance Bank Guarantee and sign the RFP Project Documents now.

Sincerely,

For LANCOI Kondapalli Power Private Limited

Pradeep Lenka

Authorized Signatory”

40. The above letter shows that they have taken a stand from the beginning that they are engaged in the power generation and they are power developer.

41. Now the Appellants has taken a new stand and tried to escape by saying that the Appellants are not the generating company and that only Lanco Babandh Power Limited was the generating company. Therefore, the State Commission has no jurisdiction

42. As a matter of fact, it was specifically contended before the State Commission that the Appellants cannot be treated as a generator for the purpose of contract. At that stage the State Commission was constrained to lift the corporate veil and found that the Appellants have overall control over the said company Lanco Babandh Power Limited and the same was incorporated to generate the power to supply the same to the Power Corporation (R-2) through this project. It is also noticed from the documents available on record that Lanco Babandh Power Limited is an arm of the Appellants set up for the development of the project in Orissa from where the Appellants had promised to supply 389 MW of power to the Power Corporation (R-2).

43 The consistent stand taken by the Appellants while corresponding with the Power Corporation(R-2) and the State Government that they were developers and the owners of the Orissa Project through their SPV namely Lanco Babandh Power Limited, as indicated above, the Appellants responded to RFQ/RFP not in the capacity of a trader but in the capacity of a generating company. In their bid and letter dated 23.11.2007 the Appellants have claimed themselves as generator and developers of the project and in that capacity they have agreed to be bound unconditionally and irrevocably by any decision taken by the Power Corporation. It has never been the case of the Appellant even before the State Commission that the Appellants were not generating company. On the other hand, it was contended before the State Commission that they are not the generator. Even before the Civil Court where they had filed a suit against the Power Corporation, they claimed themselves as generating company. In this suit the Appellants sought for a mandatory injunction for giving direction to the Power Generation Corporation (R-2) to extend the date of signing the Power

Purchase Agreement pursuant to the LOI dated 17.07.2008. In that suit they have specifically admitted that they are the power generating company. The following is an extract from the plaint filed in the suit.

“1. That the plaintiff is registered under the Companies Act, 1956, and is a subsidiary Company of Lanco Infratech Limited. It is inter alia engaged in power generation and sale through its Power Plant located at IDA, Kondapalli, Ibrahimpatnam Mandal, Krishna District, Andhra Pradesh (India).”

“..... The plaintiff acting as a leader in a consortium comprising of the Plaintiff and Lanco Infratech Ltd., submitted their evident interest in response to the RFQ and participated in the process along with the other bidders.

“Thus there is a clear admission made by the Appellants as a Plaintiff before the Civil Court that they approached the Civil Court in the capacity of a generating company and that they are the leader of the consortium with Lanco

Group of Companies and sought for relief of Extension of Time to execute the PPA as a generating company. The reason given in the plaint by the Appellants for Extension of Time is in view of the delay in getting final sanctions for the acquisition of land from the Orissa Government. It was never the case of the Appellants before the Civil Court that it is not a generating company and as such, the Appellants cannot be compelled to sign the PPA

44. As stated above, the stand taken by the Appellants as Plaintiff before the Civil Court is that they are generating company and engaged in the power generation/sale. On the contrary, the stand taken before the State Commission by the Appellants while objecting to the jurisdiction of the State Commission pleaded that they are not the generators.. Strangely the Appellants now before this Tribunal have been trying to project a new plea that though they are the generators, they are not the generating company.

45. The above facts would clearly expose the Appellants' attitude which shows that the Appellants is bent upon making a new plea at every stage, at every quarters and at every forum to suit his convenience.. As correctly pointed out by the Learned Counsel for respondent-2, the Appellants are to be estopped from changing their stance at various stages to suit their convenience, as laid down by the Supreme Court in (2006) 133 CC 794 – Jainarain Parasrampurua (Decd.) and others V. Pushpa Devi Saraf and others. In our view, the State Commission is correct in coming to the conclusion that it is a generating company on the basis of which LOI was issued to him on the strength of his undertaking through the bid submitted by him on 23.11.2007.

46. The State Commission has also correctly found that the project through which power has to be generated is one of the projects belonging to the Appellants who are the developers and owners of the project by lifting the Corporate Veil.

47. There is one other aspect of the matter. The Ld. Counsel for the Respondent-2, the Power Corporation has relied upon the following clauses in RFP. Those classes are quoted as below:

Clause 19: Definition of Project (Pg. 109 Vol. I)

“PROJECT” shall mean the power plant from which the Bidder proposes to supply power to the Procurer.

Clause 41: Definition of Seller (Pg. 111 Vol. 1)

“Seller” shall mean the Selected Bidder or an SPV that owns the Project, provided the Selected Bidder maintains equity stake in the Special Purpose Vehicle as per the Clause 1.7.5.

Clause 43: RFP: Definition of selected Bidder (Pg. 111 Vol. 1)

“Successful Bidder or “Selected Bidder” shall mean the Bidder or Bidders selected pursuant to this RFP to supply power to the Procurer as per the terms of PPA and other RFP Project Documents.

48. The above clauses would indicate that the Appellants being the successful bidders are to fulfill the conditions given in the RFP as a leader of consortium or its successors as they (Appellants) are the seller who owns the project to supply power generated through its SPV procurer, Respondent 2.

49. The correspondence as referred to above between the parties and conduct of the Appellant in approaching the Orissa Government to start the power project to generate power to supply power to the Power Corporation (R-2) would all show reveal that it was the Appellants who claimed themselves as generating company and who gave undertaking that they would supply power to the Power Corporation by generating the power through one of its projects. The State Commission is perfectly right in holding that the developers and owners of Lanco Babandh Power Limited who are the beneficiaries under this contract are the Appellants alone.

50. As indicated above, the State Commission after lifting the Corporate Veil found out the real relationship of these Appellants who have agreed to supply power to Power Corporation as a generating company.

51. In view of the above, the second ground also would fail.

52. Before parting with this case we deem it appropriate to refer to one other aspect which has been pointed out by the learned senior counsel for Respondent No. 2. According to him it is the settled law that the contracts for generating and supply of electricity are governed by the statute and have an overarching public law and public interest which needs to be safeguarded in the balancing of equity in all circumstances. On the basis of this concept, it is contended by the learned senior counsel for the Respondent No. 2 that the act of Appellant suddenly going back from his obligation to perform the contract would highly affect the public interest as well as public law. He cited the following authority to substantiate this plea:

(1991) a SCC 492 in the matter of Raunaq International Ltd. Vs. I.V.R. Construction Ltd and Others.

The relevant observations are as follows:

“..... Even when the state or a public body enters into a commercial transaction, consideration which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the state enters into such a contract, there could be in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfillment of the contract so that the services become

available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work-thus involving larger outlays of public money and delaying the availability of services, facilities or goods. e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.”

53. In the submissions made by the learned senior counsel for the Respondent NO. 2 on the strength of the above decision rendered by the Hon’ble Supreme Court, we find force. Under those circumstances we are to conclude that the Appellant cannot be allowed to make a plea that too in the form a fresh plea before this Tribunal just to escape from its obligation to

sign the PPA and supply power as agreed by the Appellants as a generating company.

54. Ultimately our conclusions are as follows:

- (i) The State Commission has the jurisdiction to entertain the petition filed by the Power Corporation to give suitable direction to the Appellants since there is a concluded contract between the Appellants and the respondents.
- (ii) The State Commission can go into the dispute between the licensee and the generating company under section 86(1)(f) of the Act and the State Commission jurisdiction cannot be questioned since in this case there are lot of records to show that the Appellants claimed themselves as generating company within the meaning of section 2(28) read with section 10 of the Electricity Act.

55. In view of the above conclusions, the order impugned is valid in law and the same is liable to be confirmed.

56. Hence the appeal is dismissed as devoid of merits.

No costs.

(H.L. Bajaj)
Technical Member

(Mr. Justice M. Karpaga Vinayagam)
Chairperson

Dated : 20th January, 2010

INDEX: REPORTABLE/NON-Reportable