

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.22 of 2013

Dated: 10th July, 2013

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR.V J TALWAR, TECHNICAL MEMBER**

In the Matter of:

**Tamil Nadu Generation and Distribution Corporation Ltd.,
144, Anna Salai
Chennai-600 002**

...Appellant

Versus

- 1. M/s. LANCO Tanjore Power Company Ltd.,
3rd Floor, 25 GN Chetty Road,
T Nagar, Chennai-600 017**
- 2. Tamil Nadu Electricity Regulatory Commission
TIDCO Office Building
No.19 A, rukmini Lakshmi pathy Salai
Egmore,
Chennai-600 008**

..... Respondent(s)

Counsel for the Appellant(s) : Mr. S Vallinayagam

**Counsel for the Respondent(s): Mr. Vijay Narayan Sr Adv.
Mr. P Vinod Kumar for R-1
Mr. R Selvakumar For R-2**

J U D G M E N T

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

1. Tamil Nadu Generation and Distribution Corporation Limited is the Appellant herein. M/s. LANCO Tanjore Power Company Limited is the First Respondent. The Tamil Nadu Electricity Regulatory Commission (State Commission) is the Second Respondent.
2. The Appellant, in this Appeal, has challenged the order passed by the State Commission dated 28.9.2012 holding in favour of the First Respondent that the Notice of Recovery sent by the Appellant, was not maintainable.
3. The relevant facts that are required for disposal of the Appeal in short, are as under:
 - (a) M/s. LANCO Tanjore Power Company Limited earlier known as M/s. Aban Power Company Limited was selected through the process of international competitive bidding by the Government of Tamil Nadu for the establishment of 126.13 MW Naptha based Combined Cycle Power Project in Karur District Tamil Nadu.
 - (b) The Power Purchase Agreement was entered into between the Appellant and the First Respondent for the above project on 20.5.1998.

(c) Subsequently, to reduce the unit cost of generation, the First Respondent explored and selected Natural Gas available from Kuttalam Gas Fields of ONGC Limited in Thanjavur District.

(d) Due to change of Fuel Technology and Location, both the parties entered into a revised PPA on 1.9.2003 with the approval of the State Government.

(e) At that relevant point of time, the norms and factors in accordance with the Tariff for the sale of electricity by the Generating Companies to the Appellant Board were prescribed through the Notification dated 30.3.1992 issued by Ministry of Power, Central Government.

(f) As per the guidelines, the tariff payable for the Independent Power Producers were in two part system i.e. Fixed and Variable Charges.

(g) The Fixed Charges payable for different periods is specified under Schedule 29 of the PPA. The Variable Charge is the price of Fuel consumption calculated per kWh supplied at the supply point, based on the tariff heat rate. Schedule 4 of the PPA provides for the assumption used for calculating levelised tariff.

(h) The tariff agreed under the PPA however, was not adopted by the State Commission in terms of

Section 63 of the Electricity Act, 2003. But, the PPA was forwarded by the Appellant to the State Commission along with a covering letter on 6.9.2003.

(i) After completion of testing and commissioning, the Gas Turbine of the plant was synchronised with the Appellant's Grid on 18.2.2005.

(j) It was ready for commencement of Open Cycle Generation in March, 2005. The Respondent Company sent a letter on 23.3.2005 to the Appellant that it was ready to generate power on Simple Cycle Mode on firm basis and the Appellant was requested to give fixed cost also along with the variable cost.

(k) On 31.3.2005, the First Respondent informed the Appellant that the Plant had operated at a base load of 65 MW and it was ready for generating power on continuous basis in Simple Cycle Mode.

(l) After repeated requests of the Respondent Company, the Appellant in May, 2005 purchased 60 MW of power from the Respondent Company by paying the fixed charges in addition to the eligible variable charges.

(m) By the letter dated 14.5.2005, the Appellant sent information that they would generate 60 MW continuous power in Simple Cycle Mode as a special

case on the condition that the Respondent Company agrees to accept Rs.1.86 per unit for the continuous generation of 60 MW of power from the Plant into the Grid.

(n) The Respondent Company sent a reply agreeing for the above ad hoc rate instead of claiming open cycle tariff as per the PPA. On this condition, the Power was supplied by the 1st Respondent Company to the Appellant from 14.5.2005 to 14.7.2005.

(o) Accordingly, the Appellant had paid a sum of Rs.7, 17, 96,254 to the Respondent Company towards fixed charges for the power supplied from 14.5.2005 to 14.7.2005.

(p) The Accountant General, Tamil Nadu at the time of audit of the Appellant's accounts, objected to the payment of fixed charges for the infirm power supplied by the Respondent Company.

(q) Due to the above objection, the Appellant decided to recover the amount of Rs.7, 17,96,254 paid to the Respondent company towards the fixed charges for the power supplied before commercial operation.

(r) Based on the said decision, the Appellant issued a letter dated 26.7.2007 calling upon the 1st Respondent to show cause as to why a sum of

Rs.7,17,96,254 paid towards the fixed charges to the Respondent Company for the said period should not be recovered.

(s) On receipt of this notice, the 1st Respondent Company sent a reply justifying their stand for receipt of fixed charges before commercial operation.

(t) Thereafter, the officials of the 1st Respondent Company as well as the Appellant had several rounds of discussions. Despite this, the Appellant Board again on 16.5.2008, called upon the Respondent Company to refund the amount of Rs.7,17,96,254 Crores within a period of seven days.

(u) Aggrieved by this, the Respondent Company filed a Writ Petition before the Madras High Court challenging the said demand.

(v) The High Court during the pendency of the Writ Petition was pleased to grant interim stay of the operation of demand notice.

(w) The Writ Petition was taken up for final disposal on 10.01.2011. After hearing the parties, the High Court passed the final order directing the Respondent Company to approach the State Commission for the said relief. Accordingly, the Respondent Company filed

a Petition before the State Commission in DRP No.8 of 2011 seeking for the quashing of the demand notice.

(x) The State Commission, after hearing both the parties, passed the impugned order on 28.9.2012 allowing the Petition filed by the Respondent Company by holding that the demand notice was not maintainable.

(y) Aggrieved by this order, the Appellant has presented this Appeal.

4. The Appellant has urged the following grounds challenging the impugned order:

(a) The State Commission cannot pass an order holding that the Respondent company is entitled to the payment of fixed charges for the power supplied by it to the Appellant Board prior to the Commercial Date of Operation as the same is contrary to the provisions of the PPA and existing Regulations.

(b) In the present case, the Respondent Company entered into a commercial operation on 11.8.2005. The Tariff Regulations, 2005 of the State Commission has come into effect from 3.8.2005. Hence, as per the definition "Existing Generating Station", of the Regulation, 2005, the Respondent Power Company was not an "Existing Generating Station" as on

3.8.2005. Therefore, the Respondent Company has no legal right either under the PPA or under Regulations to claim for the fixed charges in respect of the electricity supplied by it before the date of commercial operation.

(c) The Government of India Notification dated 30.9.1992 which is relied upon by the State Commission, is not applicable to the present case as the amended PPA dated 1.9.2003, being negotiated PPA was entered into between the parties after enactment of Electricity Act, 2003. The tariff agreed to under the PPA entered into between the Appellant and Respondent Company to sell power, was not adopted by the State Commission u/s 63 of the Electricity Act, 2003. Similarly, arrangements between the Appellant and the Respondent Company to sell the power independent of the PPA terms and conditions, has also not been approved by the State Commission.

(d) Further, the arrangement provided for payment of fixed charges for the infirm power supplied by the Respondent Company to the Appellant before the commercial date of operation is against the Regulations. In the present case, instead of going into the question as to whether the arrangement between the parties was in line with the mandate of the Electricity Act, 2003 and whether the definition of the

infirm power in the PPA, which is the basis for dispute, is as per the mandate of relevant State Regulations, the State Commission wrongly went into the question whether the arrangement made by the parties to the PPA was binding on the parties or not.

(e) The principle of promissory estoppel would not apply in this case, since the payment made by the Appellant was contrary to the express provisions of the contract existing between the parties especially when there is no amendment to the said existing contract.

(f) Section 72 of the Contract Act specifically provides that any payment made by the parties by mistake of fact can be claimed back. The payment of fixed charges made by the Appellant to the Respondent Company in respect of power supplied by it prior to the commercial date of operation is a mistake which came to be known to the Appellant only after the objection raised by the auditor. The promissory estoppel cannot be used to compel the public authority namely the Appellant to carry out the promise which is contrary to law.

5. In reply to the above submissions, the learned Senior Counsel for the Respondent has made the following submissions:

(a) The power supplied by the Respondent Company from 14.5.2005 to 14.7.2005 was firm power and not infirm power. The infirm power has been defined in Article 1.1 of the PPA. This definition is not applicable to the power supplied from 14.5.2005 to 14.7.2005 as the supply was on the request of the Appellant Board and based on the specific despatch instructions of the Appellant.

(b) The Board had categorically stated responding to the audit objection that the power supplied from 14.5.2005 to 14.7.2005 was firm power and justified its purchase of power from the Respondent Company at Rs.1.86 per unit. So, the present stand that the supply for the above period was of infirm power is without any basis and it is only a afterthought.

(c) The letter sent by the Appellant to the Respondent Company on 14.5.2005, would show that the Appellant categorically stated in the said letter that the supply in Open Cycle Mode from 14.5.2005 to 14.7.2005 at Rs.1.86 per kWh was as a special case and the conditions mentioned therein clearly show that supply was without reference to the terms of the PPA and was an important transaction.

(d) By making a promise to pay at the rate of Rs.1.86 per unit, the Appellant Board made the Respondent Company to alter its position from PPA and to incur expenditure in generating firm power. Having made the Respondent Company to alter its position, it is not open to the Appellant to take a contrary stand.

(e) The Appellant's contention that the payment of fixed charges made by the Appellant to the Respondent Company for the power supplied during the period between 14.5.2005 and 14.7.2005 was a mistake and hence the Appellant is entitled to recover the same is misconceived. In fact, the Appellant has failed to substantiate as to what the so called mistake was and that the transaction claimed above was on account of such mistake. It is well settled law that a person claiming mistake of fact to rescind its actions is required to set out the material fact of which he claims to have been under mistaken belief and also prove that he was in fact under mistaken impression. In the absence of proof for substantiating the same, the plea of the Appellant cannot be accepted. In the present case, amounts have been rightly paid by the Appellant to the Respondent Company in terms of the PPA.

(f) The Appellant's contention that after coming into force of the Regulations, 2005 framed by the State Commission on 3.8.2005, Government of India Notification dated 30.3.1992 would not be applicable. This contention is not correct because the Respondent Company's project had been set-up pursuant to a International Competitive Bidding. In respect of competitive bid, the tariff determination has to be in terms of Section 63 of the Act and not as per the Section 62 of the Act. Therefore, the Regulations have no bearing on the project and the power supplied from the project. In any event, the Regulations 2005 which came into force on 3.8.2005 cannot have a bearing on the supply of power by the Respondent Company made to the Appellant from 14.5.2005 to 14.7.2005. Hence, the conclusion arrived at by the State Commission in the impugned order is perfectly legal.

6. Having regard to the rival contentions urged by the learned Counsel for the parties, the following questions would arise for consideration in this Appeal.

(a) Whether the State Commission was justified in holding that the Respondent Company would be entitled to fixed charges for the power supplied by the Respondent Company to the Appellant prior to the date of Commercial Operation?

(b) Whether the claim for the refund of the payment which was made contrary to what was agreed to between the parties as per the PPA was justified on the ground that the party who made payment by mistake?

(c) Whether the State Commission is justified in split-up the commercial date of operation agreed to under the PPA into separate commercial dates of operation for open cycle and combined cycle by declaring the date of synchronization as the date of commercial operation relying upon the Government of India Notification of 1992 after the enactment of the Electricity Act, 2003 contrary to the terms of the PPA?

7. The Appellant has strenuously argued that the State Commission cannot hold that the Respondent Company is entitled to the payment of fixed charges for the infirm power supplied by the Respondent Company prior to the commercial date of operation as the same is contrary to the provisions of the PPA as well as the existing Regulations.
8. Before dealing with this point urged by the Appellant in the light of the questions framed above, we would refer to the findings rendered by the State Commission on the questions framed by the State Commission in the impugned order.
9. The three questions which were framed by the State Commission in the impugned order would be relevant for

understanding the analysis and conclusion made by the State Commission in the impugned order. Those questions are as follows:

“(i) Whether the power generated and sold to the TNEB during the period from 14-5-2005 to 14-7-2005 in simple cycle operation should be treated as infirm power or firm power, in accordance with the notifications dated 30-3-1992 issued by the Government of India and the PPA entered into between the parties.

(iii) Whether the Respondent Board is estopped from pleading against the petitioner company when they in their letters dated 7-7-2006 and 2-9-2006 addressed to the Deputy Secretary to the Government of Tamil Nadu (Energy Department) justified their actions in paying the said amount.

(iv) Whether the payment of the said amount by the Respondent can be said to be a mistake on the part of the Respondent Board.

10. The findings of the State Commission on the question on the first issue are as follows:

“Finding of the Commission on the First issue:

(a) This power project has one gas turbine generator and one steam turbine generator. Gas turbine is capable of operating in simple cycle mode and when the exhaust gases are passed through a waste heat boiler, steam would be generated and the steam turbine generator would generate additional electricity.

(b) PPA was initially signed on 20-5-1998 and it was amended on 1-9-2003. PPA was further amended on 6th August, 2005. Addendum No.2 to the amended PPA was entered into on 21st July 2006. It is strange that neither the licensee TNEB/TANGEDCO nor the generator, the petitioner herein, deemed it appropriate to place the Power Purchase Agreement before the TNERC for approval. Such an action on both the

parties is viewed seriously by the Commission and the actions of the parties are condemned by the Commission.

(c) PPA is entered into for the project and the contracted capacity is indicated as 113.2 MWs. Date of Commercial Operation is defined as the date on which project achieves entry into commercial operation.

Infirm power is defined as follows:-

'Infirm Power' means the electricity produced by the project and delivered to the Board prior to the date of Commercial Operation at the supply point, not on any request or dispatch instructions of the Board, in respect of which the Board shall pay to the company variable charges calculated as per the formula pursuant to section 7.3 of the PPA.

(d) Project has been defined as multi fuel power station based on gas based combined cycle gas turbine technology. Section 4.2 of the PPA indicates that the project shall be deemed to have achieved entry into Commercial Operation on the date of issue by the company to the Board of the Certificate of project completion.

(e) Clause 5.3 of the PPA envisages that the Board shall purchase and pay for all infirm power produced by the company and delivered to the Board prior to the date of Commercial Operation. The Board shall pay to the company, variable charges calculated as per the formula pursuant to Section 7.3.

(f) Clause 6.1 of the PPA relates to operation of the project. Sub-clauses (a), (b) and (c) are relevant and are extracted below:-

"(a) Supply of electricity from the project by the company to the Board shall be in accordance with the instructions of the load dispatch centre. The difference in the delivered capacity at the supply point and instructed capacity shall in no case be more than 2% of the instructed capacity.

(b) The company shall be required to operate and maintain the project in accordance with prudent utility practices, within the

technical limits as stipulated in schedule 3, and as per the dispatch procedures stipulated in schedule 6.

(c) The company shall daily submit availability declaration for the project pursuant to schedule 6 to the Board".

(g) Clause 17.1 of the PPA envisages that no variation, waiver or modification of any of the terms of this Agreement shall be valid unless reduced into an Agreement in writing signed by the parties.

(h) Schedule 1 regarding capacity test procedure refers to gross power generated at Gas turbine generator terminals and steam turbine generator terminals.

(i) Schedule 4 of the PPA relates to calculation of levelised tariff. The Table in this Schedule refers to the first year, which has been indicated as October 2004 to September 2005 with COD as 30th September, 2004. Weights for the first year tariff between Simple Cycle and Combined Cycle has been indicated as approximately 0.4 and 0.6 respectively. Tariff figures for various components have also been indicated separately for simple cycle and combined cycle during the first year. Heat rate and auxiliary consumption have also been indicated separately for simple cycle and combined cycle during the first year of operation.

(j) Schedule 6 to the PPA refers to availability declarations and dispatch Declarations and formats have been prescribed.

(k) Schedule 29 to the PPA deals with tariff Table specifying individual tariff component. During the first year of operation tariff for both simple cycle and combined cycle have been agreed to.

(l) Schedule 34 indicates the tariff heat rate of 1936.5 Kilo Cal per Kwhr. This seems to be applicable for combined cycle operation only.

(m) Addendum 1 to the amended and restated PPA, which was entered into on 6th August, 2005 includes schedule 18. Item 'c' of this schedule 18 is relevant and extracted below:-

“Company shall deliver to TNEB, Availability notice as per PPA, schedule-6 at 10 hours daily. TNEB will give dispatch notice as per PPA schedule 6 at 11 hours daily.”

(n) The petitioner vide his letter dated 23rd March 2005 has indicated that they would be able to generate around 60 MW (gross) on a continuous basis in simple cycle mode and the entire power can be supplied to the TNEB grid and requested its confirmation of acceptance of taking power from the power station and pay fixed and fuel charges as per schedule 29 of PPA. The acceptance letter of TNEB was sent on 14-5-2005 wherein the TNEB had considered acceptance of 60 MW continuous power from this plant in simple cycle mode before declaration of commercial operation as a special case subject to the following conditions and without prejudice to the PPA conditions:

(i) Continuous generation of 60 MW power will be accepted into the grid at the rate of approximately Rs. 1.86 per unit (i.e. variable charge for the unit delivered into the grid + the proportionate fixed charge with respect to 74.4 MW) apparently, 74.4 MW is the Gas turbine generator capacity.

(ii) Petitioner shall comply with backing down instruction from load dispatch centre / TNEB during high frequency and other critical conditions in the grid.

(iii) Petitioner is not eligible for deemed generation, on any account, during this period.

(iv) No gas transmission charges will be paid by the Board.

(v) This purchase of power has no bearing on COD and should not be quoted as reference.

(vi) This does not absolve the petitioner of his responsibilities to comply with PPA conditions.

(o) The letter also conveyed that if the above terms are acceptable, availability may be declared to the Chief Engineer / Operation with a copy to the TNEB for arranging the schedule by Superintending Engineer / LD & GO/ Chennai and payment

by Chief Financial Controller accordingly. In the light of the provisions of the PPA as extracted above and the correspondence exchanged between the parties, let us now examine the provisions of the Regulations relating to the operation of the combined cycle power station. This power station is stated to be through international competitive bidding. When the bids were invited in the late 90s the applicable Regulation was the one which was issued by the Government of India on 30th March 1992. It is necessary to look into this notification, a copy of which was filed by the Respondent in his counter affidavit.

(p) Para 4 of the notification relates to thermal power generating station awarded through competitive bidding. This notification stipulates the availability of combined cycle plant gas turbines (in combined cycle mode) as 85 to 90% and steam turbines in combined cycle mode as 60 to 65% during stabilization period and 85 to 90% during subsequent period. Further stabilization period commencing from the date of first synchronization of the unit shall be reckoned as follows:-

- (a) Gas turbines (in simple cycle mode) - Nil
- (b) Steam turbines (in combined cycle mode) - 90 days

(q) This implies that commercial operation date of gas turbine in simple cycle is from the date of first synchronization. The PPA entered into between the parties talks of only the commercial operation date of the project. When the intent of the parties was not clearly brought out in the PPA, the Commission had no choice but to go into the conduct of the parties during the period in question. The definition of infirm power, as contained in the Government of India notification dated 30th March 1992 in para 1.3 of the notification is extracted below:-

"In respect of infirm power, i.e. the sale of electricity prior to commissioning of the unit, any revenue from such sale (other than the fuel cost) shall be taken as reduction in capital expenditure and in as need revenue."

(r) It is important to note that Government of India Notification talks of commercial operation of the unit and not of the commercial operation of the project. In accordance with the notification there can be two commercial operation date for a combined cycle power plant viz., one for the gas turbine

generator unit and another for the steam turbine generator unit. We have already discussed about the PPA mentioning only about the COD of the project and not COD of individual units. In this context it is necessary to discuss about the infirm power and the payment therefor. While the petitioner argues that the power delivered by him is on a continuous basis from the gas turbine generator and is on specific request of TNEB as confirmed by them in their letters and he has also accepted the total price of Rs.1.86 per Kwhr as offered by TNEB and further followed all the procedure of declaration of availability and complied with the dispatch instructions given by the TNEB and therefore TNEB at a later stage, consequent to an audit objection, cannot attempt to recover this payment of fixed charges for open cycle operation, especially when they have tried to defend their action of paying the fixed charges of simple cycle operation to the audit on two occasions. Per contra the Respondent TNEB / TANGEDCO argued that in accordance with the PPA there is only one commercial operation date for the entire project and power generated before the commercial operation of the project, is infirm power and will only be eligible for payment of energy charges.

(s) From the above discussion, it is observed that:

(i) In the case of competitively bid project, during the time period in which the project was undertaken, para 4 of the Government of India tariff notification dated 30th March 1992, should apply.

(ii) While the notification talks of two commercial operations date one for the gas turbine generator and another for steam turbine generator, the PPA talks of only the COD of the project.

(t) Schedule 4 of the PPA relating to calculation of levelised tariff indicates operation of the project both in simple cycle and combined cycle mode in the first year of operation with weightage of approximately 40% for simple cycle operation and 60% for combined cycle operation.

(u) Schedule 29 of the PPA which deals with the tariff, specifically provides separate tariff for simple cycle and combined cycle operation. This Table also provides for

separate heat rate and auxiliary consumption for operation in simple cycle and combined cycle modes.

(v) When the petitioner was ready for continuous operation of the gas turbine, sought the approval of TNEB, the Respondent, in March 2005 to which a specific approval was conveyed by TNEB on 14-5-2005 duly indicating a rate which is not as per schedule 29 of PPA. The petitioner has declared availability as claimed in his letter dated 14th May 2005 and the Respondent TNEB had allowed them to dispatch power into the grid. Further, the approval letter dated 14-5-2005 stipulates that this purchase of power has no bearing on COD and should not be quoted as reference.

(w) From the foregoing, the Commission comes to the conclusion that as per the notification of Government of India dated 30th March, 1992, as applicable for competitively bid projects, there are two commercial operation dates one for the gas turbine generator unit and another for the steam turbine generator unit. Further, the definition of infirm power in the PPA defines the same as electricity produced by the project and delivered to the Board prior to the date of Commercial operation at the supply point, not on any request or dispatch instruction of the Board, in respect of which the Board shall pay to the company variable charges calculated as per the formula pursuant to section 7.3. In the instant case it has been clearly established that (i) the gas turbine generator unit was commissioned in simple cycle mode and the steam turbine generator unit was commissioned later thereby making it combined cycle, as per the GOI notification; and (ii) the Respondent TNEB had specifically approved the supply of power from the open cycle gas turbine as a special case subject to certain conditions including the rate of Rs.1.86 per unit which included the variable charge for the units delivered into the grid + the proportionate fixed charge with respect to 74.4 MWs. Schedule 29 of the PPA indicates that two different rates of tariff exist in the PPA itself for open cycle and combined cycle operation. Since power is supplied on the request of TNEB, the power supplied from open cycle gas turbine cannot be treated as infirm power even in accordance with the definition of infirm power as contained in the PPA. Accordingly, the Commission holds that fixed charge is payable for operation of open cycle gas turbine on various counts such as the provision in notification dated 30th March

1992 as discussed above, definition of infirm power in the PPA which envisages payment of only variable charge if the power was despatched not on any request or dispatch instruction of the TNEB, specific offer made by TNEB in May 2005 for dispatch of power at per unit rate of Rs.1.86 per Kwhr which was accepted by the petitioner, and the payment already made by TNEB thereby clearly confirming their intent of purchasing power from the simple cycle gas turbine on payment of both fixed and variable charges.

11. The finding of the State Commission on the Second Issue is as under:

“Finding with regard to the Second issue:-

(a) The Petitioner Company in para 12 of its reply to the counter has contended that the Respondent in the letter dated 07-07-2006 addressed to the office of the Accountant General and in letter dated 02-09-2006 addressed to the Government of Tamil Nadu (Energy Department) justified their action in paying the amount and as such the Respondent cannot now retreat from the stand and that the Respondent is estopped from raising the contention as they did in the counter affidavit.

(b) The Respondent Board in its rejoinder did not meet the above contention of the Petitioner with regard to the plea of estoppel.

(c) It is noted that the Chairman of the Tamil Nadu Electricity Board in Letter No.CE/IPP/AEE4/F.Aban/D.182/05, dated 14-05-2005 addressed to the Petitioner Company has written as follows:-

“Sub: M/s .Aban Power Company Ltd – Consent for purchase of power from the plant (113.2 MW) of M/s. Aban – Approval accorded with conditions-Reg.

*Ref: 1. Your Lr. No.APCL/TNEB/2005-036 dated 23-03-2005
2. Your Lr. No.APCL/TNEB/2005-037 dated 31-03-2005
3. Your Lr. No.APCL/TNEB/2005-050 dated 28-04-2005
4. Your Lr. No.APCL/TNEB/2005 dated 03-05-2005*

In response to your letters cited under reference, your request for the acceptance of 60 MW continuous power from your plant by Board in Open Cycle mode before declaration of Commercial Operation can be considered as a special case subject to the following conditions and without prejudice to PPA conditions.

- 1. Continuous generation of 60 MW power from your plant will be accepted into the Grid at the rate of approximately Rs.1.86 per unit (i.e. variable charge for the units delivered into the Grid plus the proportionate fixed charge with respect to 74.4 MW).*
- 2. You have to comply with backing down instructions from Load Despatch Centre/ TNEB during High frequency and other critical conditions in the Grid.*
- 3. You are not eligible for Deemed Generation, on any account, during this period.*
- 4. No Gas Transmission charges will be paid by the Board.*
- 5. This purchase of power has no bearing on COD and should not be quoted as reference.*
- 6. This does not absolve you of your responsibilities to comply with PPA conditions.*

Concurrence may be given for the above conditions for proceeding further in this regard. If acceptable, availability may be declared to Chief Engineer / Operation with a copy to this office for arranging the schedule by Superintending Engineer / LD & GO / Chennai and payment by Chief Financial Controller accordingly”

(d) The Petitioner Company in its letter APCL/TNEB/2005/05 dated 14-05-2005 has written as follows:-

“Dear Sir,

Sub: 120 MW Combined Cycle Power Plant at Karuppur Village, Thiruvudaimaruthur Taluk, Tanjore District, Tamil Nadu – Consent for purchase of power from the plant

(113.2 MW) of Aban Power Company Limited – Approval accorded with conditions.

*Ref: 1. Our Letter No.APCL/TNEB/2005/036 dated 23-03-2005
2. Our Letter No.APCL/TNEB/2005/037 dated 31-03-2005
3. Our Letter No.APCL/TNEB/2005/050 dated 28-04-2005
4. Our Letter No.APCL/TNEB/2005 dated 03-05-2005
5. Your Letter No.CE/IPP/AEE4/F.Aban/D.182/05, dated 14-05-2005*

We acknowledge with thanks the receipt of your above mentioned letter regarding consent for purchase of power from our plant. We confirm our acceptance of the stipulations in the above letter. However, we state this acceptance does not mean any novation, revision or modification of existing PPA conditions”.

(e) The Hon’ble Supreme Court in the case of Rickmers Verwaltung GmbH v. Indian Oil Corporation Limited (AIR 1999 SC 504) has inter-alia held that an agreement even if not signed by the parties can be spelt out from the correspondence exchanged between the parties. In view of the above decision of the Hon’ble Supreme Court it is noted that from the letters extracted above an agreement even though not signed by the parties can be spelt out in the instant case.

(f) The Respondent is therefore bound to honour the said agreement which has arisen from the correspondences referred to above. The doctrine of legal estoppel as defined in Section 115 of the Evidence Act is also applicable to the Respondent.

12. The finding of the State Commission on the third issue are as follows:

“Finding of the Commission on the third issue:-

(a) The learned Senior Counsel Thiru N.C. Ramesh during the course of his argument has cited the decision of the Hon’ble Supreme Court in the case of Sales Tax Officer Vs. Kanhaiyva Lal (AIR 1959 SCC Page 135). In the said case, the Hon’ble Supreme Court has in paras 9 and 10 observed as follows:-

“(9) Section 72 of the Indian Contract Act is in the following terms:

"A person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it"

(10) As will be observed the section in terms does not make any distinction between a mistake of law or a mistake of fact. The term "mistake" has been used without any qualification or limitation whatever and comprises within its scope a mistake of law as well as a mistake of fact. It was, however, attempted to be argued on the analogy of the position in law obtaining in England, America and Australia that money paid under a mistake of law could not be recovered and that that was also the intendment of S.72 of the Indian Contract Act".

At para (24), the Hon'ble Supreme Court has also observed as follows:-

"(24) We are of opinion that this interpretation put by their Lordships of the Privy Council on S.72 is correct. There is no warrant for ascribing any limited meaning to the word "mistake" as has been used therein and it is wide enough to cover not only a mistake of fact but also a mistake of law. There is no conflict between the provisions of S.72 on the one hand and S.21 and 22 of the Indian Contract Act on the other and the true principle enunciated is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving the same"

(b) It is to be noted that the said decision is not applicable to the facts of the present case as there is no mistake of law or mistake of fact. Further as already stated in the finding of the Commission on the second issue in para 9.2 above, in the instant case, it has been clearly established that (i) the gas turbine generator unit was commissioned in simple cycle mode and the steam turbine generator unit was commissioned later thereby making it combined cycle, as per the GOI notification; and (ii) the Respondent TNEB had specifically approved the supply of power from the open cycle gas turbine as a special case subject to certain conditions including the rate of Rs.1.86 per unit which included the variable charge for the units delivered into the grid + the

proportionate fixed charge with respect to 74.4 MWs. Since power is supplied on the request of TNEB, the power supplied from open cycle gas turbine cannot be treated to be infirm power even in accordance with the definition of infirm power as contained in the PPA.

(c) Further as already stated above, the two letters dated 14-05-2005 extracted above brings into existence, an agreement between the Petitioner Company and the Respondent Board even though it is not signed by the parties in the legal format of an agreement. The Respondent is bound by the said agreement which has come into existence by way of correspondence and also by the doctrine of legal estoppels as defined in Section 115 of the Evidence Act and also promissory estoppel as propounded by the Hon'ble Supreme Court in various decisions.

Conclusion:-

(b) The notice dated 16-05-2008 for the recovery of Rs.7,17,96,524/- from the Petitioner Company for the payment made to the Petitioner Company from 14-05-2005 to 14-07-2005 is hereby set aside.”

- 13.** The gist of the findings of the Commission given in the above three issues are given below one by one.
- 14.** The **first issue** is relating to the question as to whether the power supplied by the Respondent company to the Appellant during the period from 14.5.2005 to 14.7.2005 in Open Cycle Mode should be treated as infirm power or firm power. The crux of the findings of the Commission in this issue is as under:

(a) The PPA was initially entered into on 20.5.1998. it was amended on 1.9.2003. It was further amended on 6.8.2005. Thereafter, addendum No.2 to the

amended PPA was entered into on 21.7.2006. However, both the licensee, the Board and the Generating Company did not take steps to place these Power Purchase Agreements before the State Commission for the approval. The act of failure to get the approval by the parties is not proper and same is condemnable.

(b) As per the PPA, the date of Commercial Operation is defined as the date on which the project achieves entry into commercial operation. The infirm power is defined as the power produced by the project and delivered to the Board prior to the date of Commercial Operation and the Board to pay to the Generating Company the variable charges only.

(c) On 23.3.2005, the Generating Company sent a letter to the Board that they would be able to generate 60 MW on a continuous basis in Open Cycle Mode and the entire power could be supplied to the Board's Grid. On the basis of this indication, the Generating Company requested its confirmation of acceptance of taking power from the power station and pay the fixed and fuel charges as per Schedule 29 of the PPA.

(d) In response to this letter, the Electricity Board on 14.5.2005, sent an acceptance letter to the Generating

Company wherein the Board indicated its acceptance of 60 MW continuous power from the Generating Company in Open Cycle Mode before declaration of commercial operation as a special case subject to the various conditions and without prejudice to the PPA conditions.

(e) This power station is stated to be through International Competitive bidding. When the bids were invited in late nineties, the applicable Regulations were the one which was issued by the Government of India through the Notification dated 30.3.1992. Therefore, the said Notification has to be considered while deciding the issue.

(f) This Notification relates to Thermal Power Generating Station awarded through competitive bidding. This Notification stipulates that the availability of Combined Cycle Plant Gas Turbine as 85 to 90% and Steam Turbines in Combined Cycle Mode as 60 to 65%. So, the stabilization period commences from the date of the first synchronization of the unit for gas turbine in Open Cycle Mode and Steam Turbines in Combined Cycle Mode have been provided in the Notification. This means that the commercial date of gas turbine in Open Cycle Mode is from the date of first synchronization. The PPA entered into between the

parties refers to only the commercial operation date of the project. So, the definition of the word “infirm power” as contained in the Government of India Notification refers to Commercial Operation of the unit only and not of the commercial operation of the project. This means that there can be two commercial operation dates for a Combined Cycle Plant namely one for the Gas Turbine Generating Unit and another for the Steam Turbine Generating Company.

(g) The contention of the Generating Company is that the power delivered by it to the Board was on continuous basis from the Gas Turbine Generator and was on a specific request made by the Electricity Board offering the conditional ad hoc price of Rs.1.86 per kWh and accepting this condition, the Generating Company followed all the procedure of declaration of availability and complied with the despatch instructions given by the Board and thereafter agreed price was paid and at a later stage i.e. after two years, the Board could not attempt to recover the payment of fixed charges for Open Cycle Operation merely on the basis of the audit objection.

(h) According to the Board, there is only one Commercial Operation Date for the entire project and the power supplied before the said Commercial

Operation of the project was only infirm power and therefore, the demand for the refund of the fixed charges is proper.

(i) When the Generating Company was ready for continuous supply of power through the Open Cycle Mode in March, 2005, the Electricity Board through its letter dated 14.5.2005 gave a specific approval indicating their specific rate which is not as per the Schedule 29 of the PPA and allowed the Generating Company to despatch the power into the Grid. In this letter, it has been mentioned that the purchase of power has no bearing on the Commercial Operation Date.

(j) In the present case, it has been established that (i) the Gas turbine Generator unit was commissioned in Open Cycle Mode earlier and the Steam Turbine generator unit was commissioned later, thereby making it Combined Cycle as per the Government of India Notification and (ii) the Electricity Board had specifically approved the supply of power from the open cycle gas turbine as a special case subject to certain conditions including the rate of Rs.1.86 per unit, which included variable charges and proportionate fixed charges.

(k) Since the power was supplied on the request of the Board, the said power supplied from the Open Cycle Gas Turbine cannot be treated as infirm power even in accordance with the definition of infirm power as contained in the PPA. Since the power supplied on a specific request and despatch instructions given by the Board at the rate of Rs.1.86 per kWh, the payment for the said power made by the Board would not be treated as the payment for infirm power. On the other hand, the same has to be treated as firm power which entitled the Generating Companies to claim for fixed charges.

15. Second issue relates to the estoppels of the Board from pleadings against their own stand taken earlier to the audit objection in justifying their action in paying the said amount.

16. The gist of the finding of the State Commission on this second issue is as under:

(a) The Electricity Board on 14.5.2005, sent a letter to the Generating Company accepting for the proposal of the Generating Company for supply of 60 MW continuous power in open cycle mode before declaration of commercial operation as a special case with a condition that it will accept the supply at the rate

of Rs.1.86 per unit (fixed charges as well as variable charges).

(b) In response to this letter, the Generating Company sent a letter giving consent for this condition. Both these letters indicate that there was an arrangement between the parties through the letters even though the same was not signed as an agreement between the parties.

(c) Acting upon these letters, the Board accepted the supply of power and also paid the said amount. In fact, when this payment was objected by the audit, the Board sent two letters i.e. one on 7.7.2006 addressed to the office of Accountant General and the letter dated 2.9.2006 addressed to the Government of Tamil Nadu, Energy Department justifying their action in making the said payments. Therefore, the Board cannot retreat its stand and it's bound to honour the said agreement which had arisen from the correspondences referred to above.

(d) The doctrine of legal estoppel as defined in Section 115 of the Evidence Act is applicable in this case. Therefore, the different stand of the Board which has been taken now, cannot be accepted.

17. The gist of findings with regard to **third issue** is as under:

(a) The Electricity Board cited the judgment of Hon'ble Supreme Court in the case of Sales Tax Officer Vs Kanhaiyva Lal (AIR 1959 SCC Page 135) in order to establish their plea that money paid by mistake can be claimed for back or refund u/s 72 of the Indian Contract Act. This decision of the Hon'ble Supreme Court is not applicable to the facts of the present case, as there is no material to show that there was a mistake of law or mistake of fact.

(b) In the present case, two aspects have been clearly established (i) the gas turbine generator unit was commissioned in Open Cycle Mode earlier and the Steam Turbine generator unit was commissioned later, thereby making it Combined Cycle Mode as per Government of India notification and (ii) the Board specifically approved the supply of power from the Open Cycle Mode as a special case subject to the conditions including the rate of Rs.1.86 per kWh unit which included the variable charge as well as the proportionate fixed charges.

(c) Further, the two letters exchanged between the parties on 14.5.2005 clearly show that there was a clear agreement between these parties for the offer and acceptance of the specific rates. Hence, the Board is bound by the said agreement which came into

existence by way of correspondence as per the Doctrine of legal estoppel.

18. On the strength of these findings, the State Commission allowed the petition filed by the Respondent Company and set aside the demand notice issued by the Board on 16.5.2008 for the refund of the amount of Rs.7,17,96,524 Crores from the Generating Company.
19. Let us now discuss the issues framed by this Tribunal referred to above in the light of the findings given by the State Commission in the impugned order.
20. The main contention of the Appellant is that since the plant achieved the Commercial Operation date only on 11.8.2005, the power supplied during the period between 14.5.2005 and 14.7.2005 being prior to Commercial Operation date should be treated as infirm power.
21. Let us refer to the definition of the infirm power contained in Article 1.1 of the PPA. The same is as follows:

“the electricity produced by the Project and delivered to the Board prior to the date of Commercial Operation at the supply point, not on any request or dispatch instructions of the Board, in respect of which the Board shall pay to the Company, Variable Charges calculated as per formula pursuant to Article 7.3.”
22. As per the definition, if the power supplied to the Board prior to the date of Commercial Operation is infirm power

provided the said supply was not on any request or despatch instructions by the Board.

- 23.** The above definition would not be said to be applicable in the present case as the power supplied by the Respondent Company during the period between 14.5.2005 and 14.7.2005 was on the request of the Electricity Board and based on the specific despatch instructions of the Board.
- 24.** This request was made by the Board after it was satisfied that the Respondent Company is capable of generating and supplying 60 MW firm power on continuous basis. This is evident from the letters sent by the Respondent Company dated 23.3.2005 and 31.3.2005 stating that it was ready to generate power on Open Cycle Mode and the same could be supplied at the tariff as per Schedule 29 of the PPA which provides for payment of tariff under Open Cycle Operation. On receipt of this letter, the Electricity Board sent a reply letter dated 14.5.2005 informing the Respondent Company that it would purchase the power at Rs.1.86 per unit as a special case. Accordingly, the Respondent Company accepted the said conditions and supplied the power from 14.5.2005 to 14.7.2005 and for the said power, the amount as accepted in the letter dated 14.5.2005 has been paid to the Respondent Company.

25. At this stage we would refer to these two letters as referred to above.

“TAMIL NADUE ELECTRICITY BOARD

From
Hans Raj Verma, IAS
Chairman,
800, Anna Salai,
Chennai-600 002

To
M/s. Aban Power Company Ltd.,
25, G.N. Chetty Road,
T Nagar,
Chennai-600 017

Lr.No.CE/IPP/AEE4/F.Aban/D.182/05 *dated*
14.05.2005

Dear Sirs,

Sub: M/s. Aban Power Company Ltd-Consent for purchase of power from the plant (113.2 MW) of M/s. Aban-Approval accorded with conditions-Reg.

Ref: 1. Your Lr. No.APCL/TNEB/2005-036 dated 23.03.2005.
2. Your Lr. No.APCL/TNEB/2005-037 dated 31.03.2005
3. Your Lr.No.APCL/TNEB/2005-050 dated 28.04.2005
4. Your Lr. No.APCL/TNEB/2005 dated 03.05.2005

In response to your letters cited under reference your request for the acceptance of 60 MW continuous power from your plant by Board in Open Cycle Mode before declaration of Commercial Operation can be considered as a special case subject to the following conditions and without prejudice to PPA conditions.

- 1. Continuous generation of 60 MW power from your plant will be accepted into the Grid at the rate of approximately Rs.1.86*

per unit (i.e Variable charge for the units delivered into the Grid plus the proportionate Fixed charge with respect to 74.4 MW).

2. *You have to comply with backing down instructions from Load Despatch Centre TNEB during High frequency and other critical conditions in the Grid.*
3. *You are not eligible for Deemed Generation, on any account, during this period.*
4. *No Gas Transmission charges will be paid by the Board.*
5. *This purchase of power has no bearing on COD and should not be quoted as reference.*
6. *This does not absolve you of your responsibilities to comply with PPA conditions.*

Concurrence may be given for the above conditions for proceeding further in this regard. If acceptable, Availability may be declared to Chief Engineer/Operation with a copy to this office for arranging the schedule by Superintending Engineer/LD & GO/Chennai and payment by Chief Financial Controller accordingly.

Yours faithfully,

Sd/-

*(A.Sardar Mahaboob Jan)
Chief Engineer/IPP
For Chairman*

*Copy to Member(Generation),
Copy to Member (Distribution),
Copy to Chief Financial Controller.
Copy to Chief Engineer/IPP, Operation, Transmission,
P&C/Chennai
Copy to Chief Engineer/Distribution/Trichy*

APCL/TNEB/2005/058
14th May, 2005

*To
The Chief Engineer-Operation*

*Tamil Nadu Electricity Board,
NPKRR Maaligai,
800 Anna Salai,
Chennai-600 002
Dear Sir,*

Sub: 120 MW Combined Cycle Power Plant at Karuppur Village-Thiruvudaimaruthur Taluk, Tanjore District, Tamil Nadu- Consent for purchase of power from the Plant (113.2 MW) of Aban Power Company Limited.

Ref: Letter No.CE/IPP/AEE4/F.Aban/D.182/05 dated 14.05.2005 received from the Chairman, TNEB, Chennai

With reference to the above, please find enclosed herewith our letter of acceptance sent to the Chairman, TNEB and also our schedule for generation for 14th May, 2005. We shall submit the availability on daily basis to the Load Despatch Centre, Chennai by 10.00am.

We request you to send an intimation to the MRT, Kadalangudi Sub station for taking the initial meter reading.

Thanking you,

*Yours faithfully,
For ABAN POWER COMPANY LIMITED
Sd/-
P. PANDURANGA RAO
WHOLE TIME DIRECTOR*

Encl: as above.

CC: Chief Engineer-IPP, TNEB, Chennai”.

26. These above two letters would indicate that there was a clear offer and acceptance regarding the supply from 14.5.2005 to 14.7.2005.

27. The Appellant has taken a stand that the definition of the term “infirm power” in the PPA is not in accordance with the

Regulations of the State Commission and the Central Commission. The Regulations relied upon by the Appellant cannot be applicable to the Respondent Company since the same was selected through an International Competitive Bidding process under the Government of India Notification dated 30.3.1992. The Regulations for determination of tariff framed u/s 62 of the Electricity Act, 2003 are not applicable to the instant case.

- 28.** It is the contention of the Respondent Company that the power supplied from 14.5.2005 to 14.7.2005 was firm power. The Appellant is merely contending that the said plant had not achieved the commercial operation date as contemplated under the PPA and therefore it has to be treated as infirm power.
- 29.** This contention of the Appellant is clearly contrary to the earlier stand of the Appellant when the power was procured from the Respondent Company as a special case at Rs.1.86 per unit. Furthermore, the Appellant took a specific stand before the Auditor that the power supplied by the Respondent Company to the Appellant during the relevant period was firm power because of which the Board had benefited by saving approximately Rs.10.5 Crores.
- 30.** In this context, letters sent to the Accountant General on 16.9.2006 by the Board and the letter dated 2.9.2006 sent to

the Deputy Secretary, Energy Department in which the Board justified its purchase of power which was Firm power from the Respondent Company at Rs.1.86 per unit are quite relevant. We will refer to those letters.

31. The relevant portion of the letter dated 2.9.2006 reads as under:

“(a) to (d).....

(e) TNEB was in need of cheaper power to reduce the off-take from costlier sources. During the power from 14.5.2005 to 14.7.2005, the Board has purchased power from other IPPs at higher cost of Rs.6.08 per unit and at the lowest cost of Rs.3.24 per unit. The price paid to M/s. ABAN was lower than the lowest of the other sources. Instead of buying power from their IPPs at the higher rate (Rs.3.24 per unit), the Board has purchased power from M/s. ABAN at lowest rate of Rs.1.86 per unit thereby saving approximately Rs.10.5 Crores.

(f) This purchase of power has no bearing on COD and therefore the above power purchase was accepted as special case without prejudice to PPA conditions.

4.....

5. Before CoD, they do not have any obligation to supply continuous power to TNEB Grid except the power generated during the Testing and Commissioning activities. But, the Company has given firm power continuously on schedule during the period mentioned above, since the Board has agreed to pay fixed charges also.”

32. The letter dated 16.9.2006 reads as under:

“1 to 2

3. *The IPP stated vide their letter (23.3.2005) that they would produce and supply firm power from May, 2005 (14.5.2005) as the plant having a capacity of 60MW was put into continuous operation.*

4 to 5.....

6. *Finally as the Generator opted to produce and supply power with effect from 14.5.2005, on continuous basis and Board accepted it in view of the advantage mentioned vide 4 and 5 above, payment was made outside the purview of PPA for the period from 14.5.2005 to 14.7.2005. The IPP has produced and supplied firm power from 14.5.2005 onwards; the question of recovering the fixed charges paid to the IPP does not arise. Hence, the issue of making any excess payment and showing undue benefit to the IPP is not relevant.”*

33. In the letter dated 2.9.2006 sent by the Board to the Energy Department of Tamil Nadu Government, it has specifically stated that the purchase of power from the Generating Company has no bearing on COD and the power purchase was accepted as a special case and therefore, the Respondent Company has supplied firm power continuously on schedule during the said period since the Board agreed to pay the fixed charges also.

34. Similarly, they sent another letter dated 16.9.2006 to the Accountant General stating that in view of the benefit the Board had derived because of the fact that the Board prevailed upon the Generating Company who initially

demanded Rs.2.40 per unit ultimately reduced it Rs.1.86 per unit, the payment had been made which was outside the purview of the PPA for the said period and hence, the question of recovering the fixed charges paid to the Generating Company would not arise.

- 35.** Having taken such a stand defending the said payment through the letter dated 2.9.2006 and 16.9.2006, justifying the payment, there is no valid reason given by the Board to take a “U” turn now to contend that the Respondent Company would not be entitled for the fixed charges for the said period. Therefore, the contention of the Appellant that the power supplied during the period was infirm power, cannot be accepted.
- 36.** The above documents of the Board would clearly indicate that the arrangements made by both the parties which was outside the purview of the PPA through correspondence exchanged between these parties.
- 37.** It is settled law that the party having clearly made in the offer independent of the PPA, cannot be permitted to contest the issue based on the clauses in the PPA. This principle has been laid down in the case of Rickmers Verwaltung GmbH Vs Indian Oil Corporation reported in (1999) 1 SCC 1.
- 38.** It is also well settled principle that the sale price of any commodity is to be finalised at the time of or before the sale.

This principle has been laid down in the case of Bhupendra Singh Bhatia Vs State of Madhya Pradesh and Others reported in (2006) 13 SCC 700.

- 39.** The Appellant has contended that there has been no amendment in writing as required under the PPA in respect of the power supplied from 14.5.2005 to 14.7.2005 and hence the said arrangement was not in terms of the PPA. This has been refuted by the Respondent Company by stating that the supply from 14.5.2005 to 14.7.2005 at Rs.1.86 per kWh was outside the PPA and hence there was no need to amend the PPA.
- 40.** We find force in this contention of the Respondent Company in view of the admission made by the Board in the letter dated 14.5.2005 as well as other two letters dated 2.9.2006 and 16.9.2006 to the effect that the said arrangement was outside the purview of the PPA.
- 41.** So, these documents would clearly show that there was a clear offer and acceptance without reference to the terms of the PPA with regard to the power supplied from 14.5.2005 to 14.5.2007.
- 42.** In view of the above, the Appellant's contention on this issue would fail.
- 43. Now let us go into the issue whether the Appellant's demand is barred by Principles of Estoppel.**

- 44.** The synchronisation of the gas turbine with the grid was made on 18.2.2005. After testing of the gas turbine, the plant was capable of generating firm power in open cycle mode by the end of March, 2005. Therefore, the Respondent Company requested the Electricity Board to purchase the power generated in Open Cycle Mode and pay the tariff applicable for simple cycle operation as per Schedule 29 of the PPA.
- 45.** As referred to in the letter dated 14.5.2005, the Board responded by offering Rs.1.86 per unit instead of tariff applicable for Open Cycle Operation as per Schedule 29 of the PPA which was accepted by the Respondent Company.
- 46.** If the Board had not offered to pay variable charges and proportionate fixed charges, the Generating Company would not have generated and supplied to the Grid firm power during the period in question. By making promise to pay the rate of Rs.1.86 per unit, the Electricity Board actually made the Respondent Company to alter its position and incur expenditure in generating firm power. Having made the Respondent Company to alter its position through its promise, it is not open to the Appellant to take a contrary stand which is against the principle of the issue of estoppel.
- 47.** The learned Counsel for the Respondent has cited the judgment of in the case of Union of India Vs. Godfrey Philips

India Limited reported in (1958) 4 SCC 369. The same is as follows:

“Where one party has by his word or conduct made to the other a clear and unequivocal promise or representation which is intended to create legal relations or effect legal relationship to arise in future, knowing or intending that it would be acted upon by the other party to whom the promise of representation is made and it is in fact so acted upon by the other party, the promise or representation would be binding on the party making it and he would not be entitled to go back upon it, if it is inequitable to allow him to do so having regard to the dealings which have taken place between the parties.”

- 48.** As per this decision, while one party made the promise which is entitled to create legal relations and was acted upon by the other party, the promise made by the party would be binding on the said party and the said party would not be entitled to go back from it.
- 49.** On the other hand, the Appellant has contended that the principle of promissory estoppel is not applicable to the present case stating that in the very same judgment, it is held that promissory estoppel cannot be used to compel the Government or the public authority to carry out the promise which is contrary to law.
- 50.** The price of Rs.1.86 per unit was offered by the Appellant to the Respondent Company was based on its conscious decision. This cannot be said to be a compulsion which is

contrary to law. In fact, it is to be noted that the proposal and the decision taken by the Appellant to procure power from the Respondent Company at the aforesaid rate pending capacity test and declaration of COD date was, in fact, placed before the Board which in turn ratified the same in the meeting held on 25.6.2005.

51. In the minutes of the meeting dated 25.6.2005, it is mentioned that due to the purchase of power from the Respondent Company at Rs.1.86 per unit, the Electricity Board would stand benefited by reducing the off take from costlier sources.

52. The relevant portion of the document dated 25.6.2005 is quoted as below:

“

Under these circumstances, the company's request was considered as a special case since assured continuous generation of 60 MW power is ensured to meet part of the growing demand in the summer and TNEB stands to benefit by reducing the off take from costlier sources. The proportionate Fixed Charge and actual Variable Charge works out to approximately Rs.1.86 per unit against their demand of Rs.2.30/-per unit.

Hence, the Company was informed that their request for purchase of their power before COD will be considered subject to the following conditions without prejudice to PPA conditions.

.....

The Company accepted the above conditions and gave their consent on 14.5.2005. They also submitted their Generation Schedule and Generation is fed into the Grid from 23.4 Hrs on 14.5.2005 as per our Despatch Instruction.

Matter Placed Before Board

The action of having allowed the company, M/s. Aban Power Company Limited to generate 60 MW (Ex bus) continuously, pending capacity test and declaration of COD, and accepted the power at the rate of approximately Rs.1.86/-per unit (Proportionate Fixed Charge and actual variable charge for the energy delivered to Board), considering the requirement of power to meet the growing demand of the Grid, as discussed above, in anticipation of the approval of Board may kindly be approved and ratified.”

- 53.** The copy of the Extract of the Meeting Dated 25.6.2005 is given as under:

“24. M/s. Aban Power Company Limited- Establishment of 113.2 MW CCGTP Unit at Karuppur village – Consent for the purchase of power from them by Board before declaration of COD- Regarding.

Approved and ratified.”

- 54.** These Minutes of the Meeting would show that the decision to procure power at the rate of Rs.1.86 per unit was a well considered commercial decision taken and backed by proper approval by the Board.
- 55.** In view of the above, the said decision taken by the Board cannot be said to be in completion and contrary to the law.

- 56.** Consequently, it has to be held that the principle of estoppel laid down by the Hon'ble Supreme Court is very much applicable to the present case. Therefore, the Appellant's contention in this regard also would fail.
- 57.** Let us now deal with the issue relating to the Applicability of the Government of India Notification dated 30.3.1992.
- 58.** Relying upon the Notification dated 30.3.1992 of Government of India, the Appellant contended before the State Commission that para 1.3 of the said Notification would apply to the present case and consequently, the revenue from infirm power prior to Commercial Operation Date should be taken as reduction in capital expenditure. The State Commission, after going through the Notification has held that para 1.3 of the Notification has no application with the Respondent Company which was selected by International Competitive Bidding. In the present Appeal, the Appellant has taken a contrary stand that the said Notification is not at all applicable to the PPA in question.
- 59.** As pointed out by the State Commission, the project selected under the International Competitive Bidding are governed under para 4 of the Notification dated 30.3.1992 and in respect of the project selected under International Competitive Bidding Process, there is no provision dealing

with revenue from infirm power before the Commercial Operation Date.

- 60.** On the strength of this Para 4 of the Notification, the State Commission has held that under the said Notification of the Government of India, it is possible to have two separate Commercial Operation Dates one for Open Cycle Operation and the other for the Combined Cycle Operation.
- 61.** In view of the payment of the fixed charges by the Appellant for the power generated and supplied under Open Cycle is in conformity with the Government of India Notification dated 30.3.1992. The Appellant itself as indicated above, has placed reliance on the said Notification of the Government of India.
- 62.** Now in the present Appeal, the Appellant has contended that after coming into force of the TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005 on 3.8.2005, the Government of India Notification dated 30.3.1992 would not be applicable. This contention is not tenable. The guidelines given in the Regulations, 2005 would be applicable for determination of tariff by the State Commission u/s 62 of the Electricity Act, 2003.
- 63.** As mentioned above, the Respondent Company's project had been set-up pursuant to an International Competitive Bidding. For the said project, the tariff determination shall

be in terms of Section 63 of the Act and not as per Section 62 of the Act.

- 64.** Therefore, the Regulations, 2005, which would relate to the tariff determination u/s 62 of the Electricity Act, 2003 have no bearing on the present project and the power supplied from the said project.
- 65.** In any event, the said Regulations which came into force on 3.8.2005 cannot have a bearing on the supply of power by the Respondent Company to the Appellant from 14.5.2005 to 14.7.2005.
- 66.** According to the Appellant, in the present case, the State Commission ought not to have relied upon the Notification dated 30.3.1992 of the Government of India in coming to the conclusion that there are two Commercial Operation Dates. This is quite contrary to the stand taken by the Appellant before the State Commission. It was the Appellant which had placed reliance on the said Notification before the State Commission and the State Commission after going through the provisions of the PPA had made reference to the said Notification in view of the PPA stipulating only one Commercial Operation Date but clearly providing for tariff including fixed charges during Open Cycle Operation of the Plant.

- 67.** In any event, the offer and acceptance having been clearly spelt out by the parties in the letters exchanged between them with regard to the rate at which the power would be purchased from the Respondent Company from 14.5.2005 to 14.7.2005, the question as to whether there would be only one Commercial Operation Date or there could be two Commercial Operation Dates, would be of no relevance as the same will have no bearing on the price of Rs.1.86 per unit which was agreed to by the parties and accordingly paid by the Appellant to the Respondent.
- 68.** As discussed above, the Appellant has failed to establish that the payment was made under mistake so as to invoke Section 72 of the Contract Act. In fact, the Hon'ble Supreme Court has held in 1997 (68) ECR 209 (SC) in the case of Mafatlal Industries Ltd., Vs Union of India has specifically held that Section 72 of the Contract Act contains rules of equity and hence equitable considerations are relevant in applying the said Rule.
- 69.** In view of the above position, even in a case where it is established that the amounts were paid by mistake there should not be any automatic refund but it will be subject to the estoppel, waiver etc., which are rules of equity.

- 70.** At any rate, as mentioned above, the Appellant has failed to produce materials to establish that the amount has been paid under mistake and belief.
- 71.** On the other hand, it has been established by the Respondent Company before the State Commission that the original stand taken by the Appellant defending their payments explained to the Government as well as to the Auditor that the payment was bonafide and beneficial.
- 72.** In the absence of any material to substantiate the present plea with regard to the mistake, the contention of the Appellant that the payment was made as mistake and hence is liable to be refunded u/s 72 of the Contract Act, is misconceived.
- 73.** On going through the impugned order in entirety, it is evident that the State Commission has correctly concluded that the payment already made cannot be liable to be refunded by rightly reconciling the various provisions of the PPA as well as the Notification of the Government of India and made a proper interpretation based on the correct understanding and the conduct of the parties.
- 74.** Therefore, the point urged on this issue by the Appellant also would fail.

75. Summary of our findings.

- i) There is force in the contention of the Respondent Company in view of the admission made by the Board in the letter dated 14.5.2005 as well as other two letters dated 2.9.2006 and 16.9.2006 to the effect that the said arrangement was outside the purview of the PPA. So, these documents would clearly show that there was a clear offer and acceptance without reference to the terms of the PPA with regard to the power supplied from 14.5.2005 to 14.5.2007.**
- ii) The principle of estoppel laid down by the Hon'ble Supreme Court is very much applicable to the present case. Therefore, the Appellant's contention in this regard would fail.**
- iii) According to the Appellant, the State Commission ought not to have relied upon the Notification dated 30.3.1992 of the Government of India in coming to the conclusion that there are two Commercial Operation Dates. This is quite contrary to the stand taken by the Appellant before the State Commission. It was the Appellant which had placed reliance on the said Notification before the State Commission.**

76. In view of our above findings, the Appeal has no merits.
So, the same is dismissed. No order as to costs.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 10th July, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~