

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NO.130 OF 2011

Dated:20th July, 2012

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

In the Matter of:

**M/s. Jaiprakash Power Ventures Limited
Sector-128, Noida
Distt-Gautam Budh Nagar, (UP)
Pin-201 304**

...Appellant,

Versus

- 1. Haryana Electricity Regulatory Commission
Bays No.33-36, Sector-4
Panchkula (Haryana)
PIN-134 112**
- 2. Haryana Power Generation Corporation Limited
Plot No.C-7,Sector-6,
Panchkula (Haryana)
PIN-134 109**
- 3. PTC India Limited, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi-110 066**
- 4. Northern Regional Load Dispatch Centre,
18-A, Qutab Institutional Area,
Katwaria Sarai ,
Delhi-16**

... Respondent (s)

Counsel for the Appellant (s) :Mr. Shanti Bhushan, Sr. Adv.
Mr. Vishal Gupta
Mr. Mukesh Pandit

Counsel for the Respondent(s):Mr. Anand K Ganesan for R-1
Mr. Vikas Singh, Sr. Adv. for R-2
Mr. Apoorve Karol
Mr. V Mukherjee
Mr. Chirag Kher
Mr. Vikrant Saini
Mr. Parag Tripathi, Sr Adv. for R-3
Mr. Ravi Prakash
Mr. Abhishek Mitra
Mr. Varun Pathak
Mr. Shadan Farasat
Mr. Ravi Prakash
Mr. Neeraj Kumar for R-4

J U D G M E N T

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

1. The primary question that arise for consideration in the present Appeal is as follows:

“Whether the Haryana State Commission has got the jurisdiction to adjudicate upon the dispute under Section 86 (1) (b) and Section 86 (1) (f) of the Electricity Act, 2003 between Generating Company, the Appellant and the Distribution Licensee, Haryana Power (R-2) over a Power

Purchase Agreement dated 21.3.2006 in which the said Distribution Licensee was not a party ?”

2. Jaiprakash Power Ventures Limited is the Appellant herein. It has presented this Appeal challenging the impugned order dated 25.8.2011 passed by Haryana State Commission dismissing interlocutory application filed by the Appellant before the State Commission questioning the jurisdiction of the State Commission to go into the dispute in question.

3. The short facts are as under:

(a) Jaiprakash Power Ventures Limited, the Appellant is a public Limited generating Company. Haryana Electricity Regulatory Commission (State Commission) is the 1st Respondent. Haryana Power Generation Corporation Limited (Haryana Power) is the 2nd Respondent. The PTC India Limited is the 3rd Respondent.

(b) Initially Jaypee Karcham Hydro Corporation Limited, an Associate Company of the Appellant, was implementing the 1000 MW Karcham Wangtoo Hydro Electric Project, a run of the river power station with pondage, comprising four units of 250 MW each in District of Kinnaur in the State of Himachal Pradesh.

(c) The said Company got merged with Jaiprakash Power Ventures Limited, the Appellant through a scheme of the amalgamation. Thus, the Appellant is the successor of Jaypee Karcham Hydro Corporation Limited.

(d) The Appellant, the Generating Company had approached the PTC (R-3), the Inter State Trading Licensee for entering into a Long Term Power Purchase Agreement for onward sale of electricity to the Northern State Utilities.

(e) Accordingly, on 21.3.2006, a Power Purchase Agreement was entered into between the Appellant and PTC (R-3). Under the said PPA, the Appellant was to sell to the PTC (R-3) which in turn was to purchase 704 MW gross capacity and corresponding energy from the Project of the Appellant, at the Project bus bar for a period of 35 years. By the virtue of the said PPA, the Appellant and PTC agreed upon the mechanism to determine and enforce the tariff under Article 9 read with Schedule E of the PPA. As per the said provision, the capital cost of the project was to be approved by Central Electricity Authority (CEA)/Central Commission and the tariff for sale of power to PTC was to be approved by the Central Commission.

(f) The said PPA gave the right to the PTC to sell the purchased power to one or more purchasers. As per the provisions of the PPA, it was for the sole benefit of the parties thereto and any liability towards any third party to the PPA was expressly excluded.

(g) Thereafter, the PTC (R-3) entered into four Power Sale Agreements (PSAs) with various Utilities of Four States namely (1) Punjab State Electricity Board (2) Uttar Pradesh Power Corporation Ltd (3) Haryana Power Generation Corporation Ltd (R-2) and (4) Rajasthan Discoms. These PSAs were entered into between the parties on different dates.

(h) The PPA clearly provided that in the event of termination or otherwise of the PPA, the PTC will not be in breach if it supplies electricity to the Distribution Company from some other alternate source. Haryana Power (R-2) approached the State Commission for approval of the PSA entered with PTC. Accordingly, the same was approved on 21.6.2007 by the State Commission.

(i) On 27.7.2009, the Appellant filed a Petition before the Central Commission making the PTC (R-3) as a Respondent praying for the approval of the revised capital cost incurred or to be incurred for setting-up of

the project. The Central Commission by its order dated 26.10.2009, dismissed the Petition at the admission stage itself holding that the said Petition was not maintainable. Under those circumstances, the Appellant sent a letter on 17.12.2009 to the PTC (R-3) informing the PTC about the dismissal of its petition by the Central Commission and indicating that in view of the same, the PPA entered into between the Appellant and PTC(R-3) became void as the same could not be enforced.

(j) At this point of time, the PTC (R-3) filed a Petition on 14.1.2010 before the Delhi High Court U/S 9 of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator. However, the Learned Single Judge of the High Court dismissed the Petition.

(k) Thereupon, the PTC filed an Appeal on 19.2.2010 against the said order. The said Appeal was also dismissed by the Division Bench by the order dated 13.8.2010. The PTC as against these orders filed a SLP before the Hon'ble Supreme Court. The Hon'ble Supreme Court while issuing notice in the petition passed an order to the effect that if Appellant enters into any agreement for sale of electricity with any third party, the same will be subject to the result of

the said SLP. The said SLP is still pending before the Hon'ble Supreme Court.

(l) In the meantime, the PTC invoked the Arbitration Clause contained in Clause 13.3 of the PPA against the Appellant. In terms of the invocation of the said Arbitration Clause, the Arbitral Tribunal consisting of three Members was duly constituted to go into the dispute between the PTC and the Appellant. After hearing both the parties, the Arbitral Tribunal by the Majority Award dated 28.4.2011, dismissed the claim of the PTC and declared the PPA between the Appellant and R-3 as not enforceable in law.

(m) As against this order, the PTC filed a Petition U/s 34 of the Arbitration and Conciliation Act, 1996 before the High Court of Delhi challenging the said award dated 28.4.2011. The Single Judge entertained the said Petition and heard the parties.

(n) At this stage, the Haryana Power Corporation (R-2) who entered into the PSA with PTC(R-3) filed a Petition on 25.5.2011 before the Haryana State Commission u/s 86 (1) (b) and 86 1 (f) of the Act, 2003 praying for the direction to both the Appellant as well as the PTC(R-3) to comply with their contractual obligation by supplying power to them as per PPA and PSA and

to restrain them from selling the contracted capacity to any third party. In the said Petition, the notice was issued to the parties. Then the Appellant in pursuance of the receipt of the Notice, appeared before the State Commission and filed an interlocutory application on 22.6.2011 raising the preliminary objection seeking dismissal of the Petition filed by Haryana Power on the ground that the State Commission has no jurisdiction to entertain the said Petition in view of the fact that there was no privity of contract between Appellant and the Haryana Power (R-2) as Haryana Power (R-2) was not a party to the PPA.

(o) The State Commission after hearing the parties however dismissed the said Petition vide its impugned order 25.8.2011 holding that it has got the jurisdiction and proceeded to conduct enquiry over the merits of the Petition filed by the Haryana Power (R-2).

(p) At this stage, the Appellant has filed this Appeal challenging the impugned order dated 25.8.2011 dismissing the interlocutory application filed by the Appellant, on being aggrieved over this order.

4. The Learned Senior Counsel appearing for the Appellant while assailing the impugned order dated 25.8.2011, has made the following submissions questioning the jurisdiction

of the Haryana State Commission to adjudicate the dispute in question:

(i) Admittedly, the Appellant is a Generating Company and the PTC (R-3) is an Inter State Trading licensee. Electricity Act, 2003 permits the Generating Company to supply electricity to a trader and for the said purpose; no tariff is required to be determined. The primary object was to first free the Generating Companies from the shackles of the licensee. Therefore, the State Commission has no jurisdiction to go into the dispute between the Generating Company and the Inter State Trading Licensee in respect of the PPA entered into between them.

(ii) In the present case, neither the Appellant nor the PTC (R-3) is the licensee of the Haryana State Commission. Hence, Haryana State Commission cannot have jurisdiction over the dispute between them.

(iii) There was no clear nexus between the PPA entered into between the Appellant and PTC and the PSA entered into between PTC (R-3) and Haryana Power (R-2). The jurisdiction of the Commission to entertain a dispute between a licensee and Generating Company can be invoked only when a licensee was a

licensee of that State Commission. In this case, the Haryana Power (R-2), the deemed licensee was purchasing power on behalf of the Distribution Licensees of the State of Haryana. Therefore, the dispute between the Generating Company and Haryana Power could only arise if there is PPA between them under which the Appellant generating Company was to supply power to Haryana Power (R-2) and under which the Haryana Power(R-2) had to purchase power from the Appellant. That is not the case here. In the present case, the PSA under which the power was to be supplied to Haryana Power (R-2) by PTC, was between the PTC (R-3) and Haryana Power(R-2) only. In this PSA, the Appellant was not a party. Similarly, in PPA, Haryana Power (R-2) was not the party. Therefore, the Haryana Commission has no jurisdiction to entertain the dispute involving the Appellant.

(iv) It is settled law that although the PPA and PSA are two different documents between different parties, both these documents would become part of one contract between the generating Company and the distribution Company, only when PTC (R-3) as an authorised agent of the Appellant entered into the PSA with Haryana Power. In other words, if an agent who

has been authorised by its principal to enter into a contract does so on behalf of the principal, then the principal becomes the party to the contract. In that case, the State Commission will have the jurisdiction to go into the dispute between the distribution licensee and the generating company over the PPA entered into between the Appellant and its agent. That is not the case here.

(v) In the present case, the PPA and PSA are two different transactions between two separate parties. Thus, the question of Haryana State Commission having any jurisdiction to entertain the dispute between the PTC (R-3) and the Appellant would not arise. In this case, there was no nexus between the PPA between the Appellant Generating Company and the PTC, a Inter State Trading Licensee and the PSA between PTC (R-3) and Haryana Power (R-2), as both the contracts were independent contracts.

(vi) Various clauses of the PPA and PSA, in the present case, would show that PTC was not acting as an agent of the Generating Company to deal with the Distribution Licensee but it was dealing on its own independently as the Principal in the PPA.

(vii) Haryana Power (R-2) referred to certain documents in order to show that there was nexus and privity between the PPA and PSA. Actually there was no nexus as none of these documents referred to by the Haryana Power (R-2) would show such nexus especially when the Appellant, the generating Company was not a party to the PSA between the PTC (R-3) and Haryana Power (R-2).

(viii) The State Commission can assume jurisdiction only in respect of the dispute arising between the generating company and an electricity trader operating under a trading license granted by the said State Commission. PTC was not granted a trading license by Haryana Commission but was granted a trading license by the Central Commission. Therefore, the State Commission cannot assume any jurisdiction in relation to the dispute between the Appellant and the PTC.

(ix) The State Commission can claim jurisdiction u/s 86 (1) (f) only when there is a dispute between two parties when there is some existing legal relationship between them. No dispute can arise between the two strangers. The Appellant had a legal relationship with the PTC. Similarly, the PTC had a legal relationship with Haryana Power. But these facts would not

establish any privity of contract between the Appellant and Haryana Power. Hence, the State Commission cannot claim any jurisdiction over the Appellant at the instance of Haryana Power.

(x) Even though there was one single PPA between the Appellant and PTC for the entire power of 704 MW under which the PTC had been permitted to sell any part of that power to any party of its choice. PTC in the present case, entered into four PSAs with four different Utilities in four different States. One of them was Haryana Power (R-2). If any one of the State Commissions could get the jurisdiction to decide the dispute with regard to PPA between the Appellant and the PTC then all the 04 States Commissions will have the same jurisdiction. This would create a total impossible situation because different State Commissions could take different views. It could not have been the intention of the Parliament under the Act, 2003 to give any jurisdiction to State Commissions over a PPA to which the Distribution Licensee of a State was not a party.

(xi) As a matter of fact, the PTC had invoked the arbitration proceedings seeking for a declaration that the PPA dated 21.3.2006 was not void. However, the

Arbitral Tribunal of 3 members in their majority award dated 28.4.2011 declared the PPA void. This award has become final and binding on the parties u/s 35 of the Arbitration Conciliation Act, 1996. Even though the said award has been appealed before the High Court at Delhi, there was no stay of the operation of award. Therefore, the State Commission cannot go into the dispute over the PPA entered into between the Appellant and the PTC, when the PPA has been declared as void through the award of the Arbitral Tribunal.

5. In reply to the above submissions, the Haryana Power (R-2) in defending the impugned order, has made the following submissions:

- (i) It is settled law that there must be a nexus to establish that the particular State Commission has got jurisdiction in terms of Section 86(1)(f) of the Electricity Act, 2003. The said test envisages that if the nexus or privity is shown between the generating company and a Distribution Licensee (R-2), then in such a case, the State Commission in which the Distribution Licensee is based will have a jurisdiction in terms of Section 86 (1)(f) of the Electricity Act, 2003.

(ii) The various communications exchanged between the parties in the present case would go to show that the PPA and PSA are clearly inextricably linked. In fact, Haryana Power was identified as the ultimate beneficiary even prior to the execution of the PPA. PTC (R-3) had executed MoU dated 20.1.2006 with Haryana Power even prior to the execution of the PPA identifying the Haryana Power as the ultimate beneficiary. It is only thereafter, the PTC executed the PPA with the Appellant on 21.3.2006.

(iii) From the perusal of the various communications exchanged between the parties, namely PTC, Appellant and Haryana Power, it is clearly seen that the Appellant itself insisted that PTC (R-3) shall execute the PSA with ultimate beneficiary and get the approval of the appropriate Commission. It is relevant to note that the Appellant itself in this correspondence laid emphasis on the words "Commissions" i.e. in plural. This would imply that the Appellant itself admitted that the jurisdiction for approval of the PSA lies with the respective State Commission in terms of Section 86 (1)(b) and 86(1)(f) of the Electricity Act, 2003. The various documents from the period which begins from 28.6.2002 up to

1.4.2008 would clearly indicate that there is nexus between the Appellant and Haryana Power.

(iv) In terms of the PPA read with PSA, only 200 MW are to be supplied to the Haryana Power (R-2) by the PTC (R-3). Therefore, Haryana State Commission alone can exercise its jurisdiction in respect of the said 200 MW. In that case, the question of overlapping of jurisdiction of various State Commissions, as alleged by the Appellant does not arise.

(v) The Central Commission has no jurisdiction as there is no composite scheme particularly when the Appellant had not identified the beneficiaries at the inception of its project. Admittedly, the Appellant initially approached the Haryana Power (R-2) for sale of entire contracted power to be generated from the project which is clear from the perusal of the letter dated 28.6.2002 issued by the Appellant to the Haryana Power.

(vi) The Arbitration Tribunal Award cannot be relied upon by the Appellant since the Arbitration Tribunal lacks inherent jurisdiction to pass the award in view of the provisions of Section 86 (1)(b) and 86(1)(f) of the Electricity Act, 2003. It is settled law that when an order is passed without jurisdiction by the authority, it

could be a nullity as such the award would be non-est in the eyes of law.

(vii) Further, the said Award has been appealed before the High Court and the same is pending. Therefore, such award has no enforceability and as such it cannot be relied upon. Thus, Haryana State Commission alone has got the jurisdiction.

6. The submissions made in reply by the PTC (R-3) are as follows:

(i) The Electricity Act is a complete code. Only Electricity Regulatory Commissions either State Electricity Regulatory Commissions or Central Regulatory Commissions can have the jurisdiction. The Appellant was throughout aware that the power from the Power Project would be supplied to all the four States including the State of Haryana. The basis of PPA dated 21.3.2006 between the PTC and Appellant was that the entire power contracted under the PPA would be supplied to the States of Haryana, Rajasthan, Punjab and UP. The contention of the Appellant that four different State Commissions cannot have jurisdiction over same issue is without any basis in law. The basic question to be determined as to whether the Electricity Regulatory Commission alone has got the

jurisdiction to deal with the subject matter covered under the Act. The overlapping is not a concept unknown to law. Overlapping of the jurisdiction on one Court does not take away jurisdiction of the other Courts or authorities.

- (ii) The State Commission has elaborately dealt with the issue and has made a strong case of nexus of jurisdiction by referring to various factual aspects in the present case.
- (iii) The argument of the Appellant that the tariff of transactions between a trader and generating Company cannot be determined by the Commission and thus Central Commission or State Commissions cannot go into the present dispute between the parties, is without any basis. As a matter of fact, it has been decided by this Tribunal in the earlier case that the transactions where a generating Company is supplying electricity to a distribution company through a trader is under the purview of the 2003 Act and as such the appropriate Commission has jurisdiction to determine the tariff in such a situation as the trader is merely a intermediary.
- (iv) Whenever there is nexus, then in the light of the Section 64 (5) of the Electricity Act, 2003, the State

Commission will have the jurisdiction. However, in the case of inter State supply of electricity where the power is flowing from one State to another, the Central Commission will have a jurisdiction when there is no nexus to the supply of electricity to the State where electricity is being consumed. In other words, where there is nexus to the State of supply, the concerned State Commission will have the jurisdiction. In the absence of nexus and in the case of inter-State supply of electricity, the Central Commission will have a jurisdiction. Thus, in the case of the present dispute between the licensees and Generating Companies, either State Commission or Central Commission will have a jurisdiction.

- (v) The various letters exchanged between the parties between the period during the pre-PPA stage between 19.2.2003 and 10.3.2004 as well as other correspondence from 10.7.2006 to 19.7.2006 which relates to pre-PSA stage and the letters from 21.6.2007 to 23.1.2008 which is post PSA stage would clearly show that the above correspondence reflects the nexus between the PPA and PSA. That apart, those correspondences would further show that the PTC (R-3) was acting as an agent of the Appellant which is referred to in the correspondence by the

Appellant in which it referred to the purchases as beneficiary.

- (vi) The Arbitral Award passed by the Arbitral Tribunal lacks inherent jurisdiction and as such the award would be a nullity. Therefore, the award of the Tribunal and its finding which has been challenged in the Appeal before the High Court which reserved the judgment after hearing the parties cannot be relied upon by the Appellant.

7. The Learned Senior Counsel for the Appellant has cited the following decisions:

(a) (1975) 2 SCC 47, Md. Serajuddin and Others Versus The State of Orissa

(b) (1969) 2 SCC 343, M.C. Chacko Versus The State Bank of Travancore, Trivandrum

(c) (1977) 3 SCC 147, The Bhopal Sugar Industries Ltd. Versus Sales Tax Officer, Bhopal

(d) Lanco Amarkantak Power Pvt Ltd. v. Madhya Pradesh Electricity Regulatory Commission before the Appellate Tribunal for Electricity in Appeal No.7 of 2009 dated 6th August, 2009.

(e) Lanco Amarkantak Power Pvt Ltd. v. Madhya Pradesh Electricity Regulatory Commission before the Appellate Tribunal for Electricity in Appeal No.71 of 2008 dated 21st October, 2008

(f) (2009) 176 SCC 659, Tata Power Company Limited Versus Reliance Energy Limited and Others

(g) Lanco Amarkantak Power Pvt Ltd. v. Haryana Electricity Regulatory Commission and Others before the Appellate Tribunal for Electricity in Appeal No.15 of 2011 dated 4th November, 2011

(h) M/s. Pune Power Development Private Limited Versus Karnataka Electricity Regulatory Commission and Others before the Appellate Tribunal for Electricity in Appeal No.200 of 2009 dated 23rd February, 2011

(i) (2008) 4 SCC 755, Gujarat Urja Vikas Nigam Limited Versus Essar Power Limited

8. The Learned Senior Counsel for the R-2 has cited the following decisions:

(a) Lanco Amarkantak Power Pvt Ltd. v. Madhya Pradesh Electricity Regulatory Commission & Ors bearing Appeal No.71 of 2008 passed by this Tribunal on 21.10.2008.

(b) Lanco Amarkantak Power Pvt Ltd vs Madhya Pradesh Electricity Regulatory Commission & Ors bearing Appeal No.7 of 2009, passed by this Hon'ble Tribunal on 6.8.2009.

(c) Lanco Amarkantak Power Pvt Ltd vs Haryana Electricity Regulatory Commission & Ors bearing Appeal No.15 of 2011, passed by this Hon'ble Tribunal on 4.11.2011.

(d) Tata Power Company Limited vs Reliance Energy Limited & Others cited at (200()) 16 SCC 659 passed by the Hon'ble Supreme Court of India

(e) Gujarat Urja Vikas Nigam Ltd Vs.Essar Power Limited cited at (2008) 4 SCC 755 passed by the Hon'ble Supreme Court of India

(f) M/s. Pune Power Development Pvt Ltd vs Karnataka Electricity Regulatory Commissions & Ors bearing Appeal No.200 fo 2009 passed by the Tribunal on 23.02.2011

(g) Uttaranchal Jal Vidyut Nigam Ltd Vs Uttaranchal Power Corporation Ltd Dehradun & Anr bearing Petition No.103 of 2005 by Central Electricity Regulatory Commission, New Delhi on 05.01.2006

(h) National Aluminium Co. Ltd Vs Pressteel & Fabrications (P) Ltd cited at (2004) 1 SCC 540 passed by Hon'ble Supreme Court.

9. The Learned Senior Counsel appearing for the R-3 (PTC) has cited the following authorities rendered by this Tribunal as well as by the Hon'ble Supreme Court:

(a) Judgment of Hon'ble Supreme Court in Southern Electricity Supply Co. of Orissa Ltd v. Sri Seetaram Rice Mill (2012) 2 SCC 108

(b) Judgment of Hon'ble Supreme Court in Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission (2010) 5 SCC 23

(c) Judgment of Hon'ble Supreme Court in Tata Power Co. Ltd V Reliance Energy Ltd (2209) 16 SCC 659

(d) Judgment of Hon'ble Supreme Court of India in Booz Allen and Hamilton Inc. V. SBI Home Finance Ltd & Ors 2011 (5) SCC 532

(e) Judgment of Hon'ble Supreme Court of India in Isabella Johnson v. M.A. Susai (1991) 1 SCC 494

(f) Judgment of Hon'ble Supreme Court of India in Ashok Leyland v. State of Tamil Nadu (2004) 3 SCC 1

(g) Judgment of Hon'ble Supreme Court of India in Centrode Minerals & Metals Inc. Vs. Hindustan Copper Ltd (2006) 11 SCC 245

(h) Judgment of Hon'ble Supreme Court of India in 2006 (13) SCC 322, 2004 (1) SCC 540 and 2006 (12) SCC 642

(i) Judgment of Hon'ble Supreme Court of India in Adhunik Steels Ltd Vs. Orissa Manganese and Minerals Pvt Ltd. (2007) 7 SCC 125

(j) Judgment of Hon'ble Supreme Court of India in (2005) 4 SCC 772 and (2010) 5 SCC 388

10. In the light of the facts and rival contentions referred to above, the relevant questions that may be framed are as follows:

(a) Whether the State Commission has jurisdiction under Section 86(1)(b) and/or

Section 86(1)(f) of the Electricity Act, 2003 over a PPA entered into between a Generating Company and an inter-state trading licensee to which a Distribution Licensee of the State was not a party ?

(b) Whether the State Commission has jurisdiction to entertain a Petition at the instance of a Distribution Licensee seeking directions against a Generating Company to supply power to it when there is no agreement to supply power between such generating Company and the Distribution Licensee?

(c) Whether the State Commission has jurisdiction over the PPA between a generating company and inter-state trading licensee which does not have any nexus with the State of Haryana?

11. We have heard the Learned Senior Counsel for the parties on the above questions on various dates of hearing. After hearing was over, we reserved the matter for judgment.
12. At this stage, the Learned Senior Counsel for PTC filed an interlocutory application in IA 195/2012 raising one other

fresh issue for our consideration on the basis of the fresh development that had taken place after the hearing was over and after the judgment was reserved. Therefore, before analysing the above questions; it would be better to know about the nature of issue which has been raised by the learned Senior Counsel appearing for PTC (R-3).

13. In this Appeal as mentioned earlier, one of the grounds raised by the Appellant is that since the Arbitral Award dated 28.4.2011 has been decided in favour of the Appellant holding that the PPA was void, the State Commission has no jurisdiction to go into the dispute on the basis of the said PPA. On the other hand, it was pleaded by the PTC (R-3) that already award dated 28.4.2011 has been challenged before the High Court of Delhi and the High Court, after hearing the parties reserved the judgment and therefore, the said Award cannot be acted upon.
14. As indicated above, in this Appeal, all the parties were heard and judgment was reserved on 26.4.2012. At this stage, on 23.5.2012, the PTC (R-3) filed the said interlocutory application in IA No.195 of 2012 informing this Tribunal that the Single Judge of the High Court by the judgment dated 15.5.2012 set aside the award and praying this Tribunal to take on record the said judgment dated 15.5.2012 rendered by the High Court as it has got a bearing on this Appeal.

He also prayed for the opportunity to make oral submissions regarding the said development. Accordingly, the said petition was entertained and notice was ordered to the Appellant and other parties.

15. Both the parties were heard at length on the impact of the said judgment rendered by the High Court on this Appeal.
16. According to PTC, since the Award passed by the Arbitral Tribunal was set aside by the High Court by the judgment dated 15.5.2012, it has a direct bearing on the present matter and therefore, this Tribunal may render the appropriate judgment in this Appeal taking into consideration the finding rendered by the High Court.
17. In reply to the said statement, the Learned Senior Counsel for the Appellant submitted that it is true that the said Arbitral Award passed in favour of the Appellant has been set-aside by the High Court of Delhi by the judgment dated 15.5.2012 but as against the said judgment, the Appellant has filed the Appeal as against the said judgment before the Division Bench of the High Court which is pending. However he fairly admitted that in view of the judgment of the Single Bench of High Court setting aside the award, the Appellant cannot now rely upon the said Arbitral Award till the Division Bench takes a decision on that issue and therefore, he is not pressing the point with regard to impact

of the Award. However, it is submitted that the Appellant is pressing the other points raised for assailing the impugned order regarding jurisdiction which remain unaffected by the said judgment of High Court of Delhi and therefore, this Tribunal may allow this Appeal on the basis of those other points.

18. In view of the fresh development which has taken place now, it is unnecessary for us to deal with the ground with reference to the impact of the Arbitral Award dated 28.4.2011 which has been set aside in this Appeal. However, the Learned Senior Counsel appearing for the PTC (R-3) has strenuously submitted that the findings in the judgment rendered by the High Court on 15.5.2012 has a direct bearing and impact on the present Appeal and therefore, this Tribunal may decide the questions raised in this Appeal on the basis of the said judgment of High Court.
19. As mentioned above, though we need not deal with the point with regard to the impact of the Award, we have to consider the fresh issue as to whether the High Court's judgment dated 15.5.2012 has got an impact on the present matter as prayed for by the PTC. Before analysing the merits of this issue, it would be better to consider the other points urged by the Appellant on the questions framed above.

20. Accordingly, let us now consider the other points argued by the Appellant over the jurisdiction of the State Commission to go into the dispute in question one by one.

21. So far as the jurisdiction of Haryana Regulatory Commission under Section 86 (1)(f) is concerned, the Appellant points out two reasons to show that the Haryana Commission cannot have any jurisdiction against the Appellant. The two reasons are as follow:

(a) While the Appellant is a Generating Company, PTC is not a licensee of the State Commission within the meaning of Section 86 (1)(f) of the Electricity Act, 2003. It has been held by this Tribunal in Appeal No.7 of 2009 that the State Commission can assume jurisdiction only in respect of disputes arising between a generating company and an electricity trader operating under a trading licence granted by it. As PTC was not granted a trading licence by Haryana Electricity Regulatory Commission, but was granted a trading licence by the Central Electricity Regulatory Commission, the State Commission could not assume any jurisdiction in relation to a dispute between the Appellant and PTC regarding the PPA.

(b) The State Regulatory Commission can claim jurisdiction under Section 86(1) (f) of the Electricity Act

only when there is a dispute between two parties. Unless a dispute arises between the Appellant generating Company and Haryana Power, no jurisdiction can be claimed by the Haryana Commission over the Appellant at the instance of the Haryana Power. A dispute between the two parties can arise only when there is some existing legal relationship between them. No dispute can arise between two strangers. The Appellant generating company and Haryana Power were in fact, strangers to each other. The Appellant had a legal relationship with PTC and PTC had a legal relationship with Haryana Power. But, these two facts in the absence of nexus or privity of contract between the Appellant and Haryana Power(R-2) do not establish legal relationship between them. Hence, Haryana State Regulatory Commission cannot claim any jurisdiction over the Appellant at the instance of Haryana Power.

22. On the strength of the above two reasons, the Appellant strenuously contended that the jurisdiction of the Haryana State Commission can be invoked only in respect of the PSA entered into between PTC (R-3) and Haryana Power (R-2) and it cannot extend its jurisdiction to the PPA entered into between the Appellant and PTC (R-3). In short, the case of the Appellant is that the State Commission has no

jurisdiction to adjudicate upon the dispute between the Appellant Generating Company having its plant in Himachal Pradesh and the PTC (R-3) which is a inter State Trading licensee which has not been granted license by the State Commission especially when there is no nexus or privity between the PPA dated 21.3.2006 entered into between the Appellant and PTC (R-3) and the PSA dated 21.9.2006 entered into between the Haryana Power (R-2) and PTC (R-3).

23. It is not in dispute in the fact that when there is no nexus or privity, between the PPA and PSA, the jurisdiction of the State Commission cannot be invoked. Hence, in order to decide the issue of jurisdiction, we have to find out firstly as to whether there is any nexus or privity between the PPA entered into between the Appellant and PTC (R-3) on the one side and the PSA entered into between the PTC (R-3) and Haryana Power (R-2) on the other side.

24. When a similar question had been analysed by this Tribunal in Appeal No.15 & 52 of 2011 in the judgment dated 4.11.2011 (Lanco Amarkantak Power Pvt Ltd Vs Haryana Commission), this Tribunal has discussed the issue through the following observations. The same are as follows:

“13. At the outset, it shall be stated that, it can not be debated that when there is no nexus and privity

between the PPA and PSA, jurisdiction of the State Commission cannot be invoked. Therefore, in order to decide about the issue of jurisdiction, we have to first find out as to whether there is any nexus or privity in respect of the PPA entered into between the Appellant Lanco Power Limited and PTC (R-3) and PSA entered into between the PTC (R-3) and Haryana Power (R-2).

“14. While dealing with this question, it would be proper to analyse the legal position with reference to the functions of the State Commission. Section 86 (1) (f) of the Electricity Act, 2003 (the Act) provides as under

(86) “Functions of State Commission

(1) The State Commission shall discharge the following functions, namely:-

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

15. This provision deals with the adjudication of the dispute between (a) Generating Company and Licensee or (b) between Licensees. Thus section 86 (1)(f) dealing with adjudication of dispute is not upon any agreement between a generating Company and the Licensee. In other words, the existence of a contractual relationship between a generating company and the licensee is not a pre-condition for exercise of the jurisdiction of adjudication provided under Section 86(1)(f). The dispute between the generating Company and the licensee where such power is generated and sold by the generating company to the licensee is intended for maintaining supply to the consumers at large is covered under section 86(1)(f) of the Act. The Statutory adjudicating

power by the Appropriate Commission which regulates the tariff of the consumers, has been specifically provided for under Section 86(1)(f) of Act.

The State Commission regulating the tariff of the consumers of the State will be in a better position to adjudicate on such dispute taking into consideration the interest of the consumers of the State.

16. If a generating Company enters into an agreement for sale of power generated by it, knowing the place where the power generated is going to be consumed, the generating company acts with the nexus to such consumers. This nexus leads to the fact that the State Regulatory Commission of the place where the electricity is to be consumed is the Appropriate Commission to exercise jurisdiction. If the sale and purchase of power has a nexus to the State, the concerned State Commission will have jurisdiction notwithstanding the fact that there is no direct contractual arrangement between the generating company and the Distribution Licensee. In this context, it would be worthwhile to refer to Section 64 (5) of the Electricity Act, 2003 which is as under:

“(5) Notwithstanding anything contained in Part X, the tariff for any inter-state supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor”.

17. *This provision thus clarifies that the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity shall be the Appropriate Commission”.*

.....

26. *Now let us see as to whether there has been nexus between the PPA and PSA.*

.....

40. *As indicated above, the purchaser in the present case namely the Haryana Power (R-2) has been specifically identified before the execution of the final PSA and the said information was conveyed to the Appellant by PTC (R-3) through its letter dated 28.7.2006. It was only thereafter, that an amended PPA was executed between the PTC (R-3) and the Appellant on 18.9.2006 whereby a new article bearing No.16.6.5 was added. Under this amendment, the PTC may assign its right and transfer its obligations under the PPA to the Purchaser namely Haryana Power (R-2).*

.....

44. *As indicated above, the order dated 6.2.2008 was passed by the State Commission only after involving the Appellant as a party. The contents of the order dated 6.2.2008 would reveal that the Appellant had confirmed that PFC had commenced the project appraisal in October, 2005 (before notification of Tariff Policy on 6.1.2006) and as such PPA/PSA signed between the Appellant–PTC- Haryana Power qualifies for exemption under clause 5.1 of the Tariff Policy. As a matter of fact, this order dated 6.2.2008 is a review of the earlier order passed by the State Commission dated 31.10.2007 in which the State Commission originally refused to grant approval for the reason that in terms of the tariff policy of Government of India, the*

negotiated route for conclusion of the PSA was not permissible.

.....

48. When the Appellant actively participated in the proceedings, and induced all the parties concerned to act upon its representation that it would abide by the sale of power needed by Haryana Power for distribution to its consumers and particularly when the Appellant acted upon those agreements namely PSA and PPA entered into between the parties and in the absence of the challenge to the above proceedings and the orders passed by the State Commission on 6.2.2008 by the Appellant, can the Appellant be permitted to take a different stand? The answer is emphatic "No".

25. In the light of the above observations, let us discuss the jurisdiction of the State Commission in this Appeal taking into consideration of the present facts of the case.

26. In this case, the Haryana Power (R-2) was purchasing power on behalf of the Distribution Licensees in the State of Haryana from PTC (R-3) a inter State Trading Licensee. There was no agreement between the Appellant and Haryana Power under which the Appellant Generating Company was to directly supply power to Haryana Power (R-2) and under which the Haryana Power(R-2) was to directly purchase power from the Appellant, the Generating Company. In the present case, the PSA under which the power was to be supplied to the Haryana power (R-2) by the

PTC (R-3) was between the PTC (R-3) and Haryana Power (R-2) only.

27. Admittedly, the Appellant was not a party to the PSA. However, it is settled law that if the PSA had been entered into by the PTC with the Haryana Power as an authorised agent of the Appellant with whom it entered into PPA, the Appellant would automatically become a party to the said PSA. It is in that context, the question of nexus between the PPA and PSA assumes significance. In other words, even though the PPA and PSA were two different documents between two different parties, both the documents would become part of one contract which was between the generating Company and the PTC, only when the PTC was acting as an agent of the Appellant.
28. As per the law of the agency, when an agent who has been authorised by its principal to enter into a contract does so on behalf of the principal with the 3rd party, then the principal becomes a party to the contract.
29. According to the Haryana Power (R-2), the PPA and PSA are two back to back agreements. On the other hand, the Appellant has contended that in the present case, there was no nexus or privity between the PPA and PSA.

30. In the light of these rival contentions, we shall see whether there is nexus and privity between the PPA and PSA.
31. In that process, we have to first find out from various clauses of the PPA and PSA as to whether it would show that PTC(R-3) was acting merely as a conduit between the Appellant Generating Company and the Distribution Licensee (R-2) or as a merchant. The various clauses of the PPA are as follows:

“Clause 4.3.1 of the PPA

“.....The risk and title to power and energy shall be transferred from the company to PTC at the delivery point.....”.

“Clause 4.3.2 of the PPA

“PTC shall have the right to sell the Contracted Power and Contracted Energy to any Purchaser and shall inform the Company of such Purchaser. This shall not relieve PTC of its obligation to off take Contracted power and Contracted Energy from the Project and to make Tariff Payments to the Company”.

“Clause 9.1.1 of the PPA

From the Commercial Operation Date (COD) of the first Unit of the Project, PTC shall pay the Company, Tariff Payment calculated in accordance with this Article 9 and Schedule E. The payment shall be made against the monthly bills raised by the Company for each month. All Tariff payments by PTC shall be in Indian Rupee.

“Clause 15.11 of the PPA

None of the provisions of this Agreement shall constitute a partnership or agency or any such similar relationship between the Company and PTC”

32. Above clauses would indicate that the risk and title to power and energy shall be transferred by the Appellant Company to PTC at the delivery point. This agreement shall not constitute a partnership or agency between the Appellant and the PTC. It is also to be noted that as per Article 9 of the PPA the obligation to make payment of tariff to the Appellant was only upon PTC and not on any purchaser.

33. Let us see the clauses of the PSA which are as under:

“Clause 4.3.2 of the PSA

“Notwithstanding anything to the contrary in this Agreement, PTC shall not be in breach of this Agreement, if, due to termination of the PPA or otherwise. PTC supplies power at mutually agreed rates to the Purchaser from one or more alternative sources”.

“Clause 15.11 of the PSA

“None of the provisions of this Agreement shall constitute a partnership or agency or any such similar relationship between the Purchaser and PTC”.

34. These provisions would indicate that the PTC was not acting merely as an agent of the Generating Company and nor as a conduit between the Generating Company and the

Distribution Licensee. On the contrary, these clauses would indicate that PTC was dealing on its own behalf independently as a principal in the PPA as well as in the PSA.

35. In other words, the PTC was taking upon itself the financial and commercial risk. As such, the PTC was not acting as an agent of the generating company.
36. The learned Senior Counsel for the Appellant has pointed out the various other provisions of the PPA to show that Haryana Power was not a party to the Appellant's PPA and as such there was no privity of contract between them. Those clauses of the PPA are as under:

Recital E

“PTC will enter into suitable arrangements with one or more Purchasers for sale of Contracted Power from the Project”.

(a) **Definition of Purchaser**

“Purchaser” means one or more entities to which PTC may sell the power and energy purchased from the Company”.

The above quoted clause of PPA gives the right to Respondent No.3 i.e. PTC to sell the purchased power to one or more purchasers. The PPA does not identify Respondent No.2 or any other specific entity as purchaser to whom Respondent No.3 was obliged to supply power.

(b) **“2.1 Effective Date and Term of Agreement**

“This Agreement shall become effective upon the date of its execution by the Parties.....”

The provisions of PPA became effective immediately upon the signing/execution by the Appellant and the Respondent No.3 and its effectiveness was not dependent upon any condition precedent.

(c) **“4.2 PTC’s Obligations**

PTC agrees and undertake to:

(ii) *Offtake Contracted Power and Contracted Energy and pay Monthly Bills and Supplementary Bills in accordance with this Agreement.*

(vii) *sell Contracted Power and Contracted Energy in accordance with this Agreement.*

4.3 Right to Electrical Output

4.3.1 *“The Company undertakes to sell to PTC and PTC undertakes to purchase and pay the Tariff in accordance with this Agreement for the Contracted Power and Contracted Energy from the Project. The risk and title to power and energy shall be transferred from the Company to PTC at the Delivery Point.....”*

Definition of Delivery Point

“Delivery Point” means the point of interconnection with the CTU or a Transmission Licensee from where open access in accordance with CERC Inter-State Transmission Regulations is available and at which

the risk and title of the Billable Power and Billable Energy shall pass from the Company to PTC”.

The above Clauses would show that the risk and title of the contracted power and energy shall be transferred from the Appellant to PTC (R-3) at the delivery point. It is well settled that once the title in the property of the goods sold passes to the buyer to dispose of the said goods is in the capacity of the owner of the said goods, the sale of contracted power and energy under the PPA by the Appellant to the PTC (R-3) gets completed at the delivery point by the passing of the risk and title of the contracted power and energy to the PTC (R-3). The Agreement that the power was agreed to be sold to PTC at the project point in the **State of Himachal Pradesh** and the PPA did not involve any inter State supply of electricity or supply of electricity in more than one State.

- (d) *4.3.2 PTC shall have the right to sell the Contracted Power and Contracted Energy to any Purchaser and shall inform the Company of such Purchaser. This shall not relieve PTC of its obligation to offtake Contracted Power and Contracted Energy from the Project and to make Tariff Payments to the Company”*

The above clause clearly shows that PTC was free to sell the power to any person without any intervention of

the Appellant. It also shows that the obligation of the PTC (R-3) to off take power under the PPA and make payments thereof was independent of its right or ability or inability to sell the power to any purchaser.

- (e) *“4.3.5 Notwithstanding Article 4.3.3, the Company may expand the capacity of the Project and enter into arrangements for the sale of power generated as a result of expanded capacity to any third party, provided that:*

i.....

- ii. *PTC shall have the first right of refusal over the additional power generated by such expansion on terms and conditions as may be mutually agreed between PTC and the Company.”*

As per the above clause the Appellant had an independent right to expand the capacity of the Project and to sell the additional power to any third party and however, PTC (R-3) was given the right of first refusal over the additional power on terms and conditions to be mutually agreed between them. No such right has been given to Haryana Power in the PSA between it and PTC (R-3).

- (f) **“15.2 Third Party Beneficiaries**

“This agreement is solely for the benefit of the Parties and their respective successors and permitted assigns and shall not be construed as creating any duty,

standard of care or any liability towards any third person".

The above clause clearly rules out the scope of any interference that the PPA is for the benefit of anyone who is not a party to the PPA. Any duty standard of care or liability towards any third party (which will include Haryana Power (R-2)) has been expressly ruled out by the parties to the PPA.

(g) **"15.7 Assignment**

15.7.1 *This Assignment shall not be assigned by either Party other than by mutual agreement between the Parties in writing*".

15.7.2 *Notwithstanding Article 15.7.1, the Company may assign its rights and transfer its obligations under this Agreement to its Lenders or Affiliates and PTC may assign its rights and transfer its obligations under this Agreement to its Lenders or Affiliates.*

Provided that, in case of an assignment to Affiliates:

(i) *an entity shall qualify as an "Affiliate", if it, directly or indirectly controls, is controlled by or is under common control with the relevant Party; the term "control" meaning ownership of more than fifty percent (50%) of the equity share capital or voting rights of the company or the power to appoint a majority of the board of directors of a company;*

(ii).....

(iii).....

The above clause bars the parties to the PPA to assign their rights and transfer their obligations to anyone without the mutual agreement between the parties in writing. The assignment was permissible on mutual agreement in writing only to the lenders or affiliates of the parties. It is clear that a Purchaser (which includes Haryana Power (R-2) could not be assigned the PPA without the mutual agreement in writing between the parties of PPA.

(h) **“15.11 No Partnership**

“None of the provisions of this Agreement shall constitute a partnership or agency or any such similar relationship between the Company and PTC”

The above clause shows that the PPA between the Appellant and the PTC (R-3) was on principal to principal basis. Neither party was acting as an agent of the other nor had the parties created any partnership amongst themselves to sell the contracted power to the Purchaser. Thus, PTC (R-3) acted independently under the PPA as a Principal to sell the power to the Purchaser and not as an agent or partner of the Appellant.

37. The Learned Senior Counsel for the Appellant further pointed out the relevant clauses of the PSA between the

Haryana Power (R-2) and PTC (R-3) to show that there was no privity of contract between the Appellant and Haryana Power. **They are as follows:**

(a) **“4.3 Right to Electrical Output**

4.3.1 Subject to the terms and conditions of this Agreement, PTC undertakes to sell the Purchaser Contracted Power and Energy to the Purchaser and the Purchaser undertakes to purchase the Purchaser’s contracted Power and Purchaser Contracted Energy and pay to PTC the amount due under the terms of this Agreement. The risk and title to power and energy shall be transferred from PTC to the Purchaser at the Delivery Point....”

Definition of Delivery Point

“Delivery Point” means the point of interconnection with the CTU or a Transmission Licensee, from where open access in accordance with CERC Interstate Transmission Regulations is available and at which the risk and title of the Purchaser Billable Power and Purchaser Billable Energy shall pass from the Company to PTC and shall further pass from PTC to the Purchaser.”

The above clauses show that the risk and title to the power and energy will be transferred from Respondent No.3 to the purchaser at delivery point. The definition of delivery point in the PSA is identical to the definition of the “delivery point” in the PPA with the addition that

the risk and title of the billable power and energy shall further pass from PTC India Limited (R-3) to Haryana Power (R-2). These terms will show that the risk and title of the billable power and energy to Respondent No.2 is being transferred from PTC (R-3) to sell the power and energy to Haryana Power (R-2) as an owner of the same and not as an agent of the Appellant.

- (b) **“4.3.2** *“Notwithstanding anything to the contrary in this Agreement, PTC shall not be in breach of this Agreement. If, due to termination of the PPA or otherwise, PTC supplies power at mutually agreed rates to the Purchaser from one or more alternative sources”*.

The above clause in the PSA shows that it was clearly agreed between Haryana Power (R-2) to PTC (R-3) that the obligation of PTC (R-3) to supply power to Haryana Power (R-2) was not dependent on the PPA between the Appellant and the PTC (R-3). The above clause relieves PTC (R-3) from breach of PSA if PTC (R-3) supplies power to Haryana Power (R-2) after getting the power from any other alternate source in the event the PPA between the Appellant and the PTC (R-3) is terminated or otherwise. This clearly shows that the obligation of PTC (R-3) to supply power to Haryana Power (R-2) was an independent obligation expressly

agreed by PTC (R-3) in order to save itself from the consequences of the breach of PSA.

(c) “**13.7 Disputes under the PPA**

13.7.1 *PTC shall provide the Purchaser with a copy of all notices relating to any disputes raised by the Company or PTC under the PPA.*

13.7.2 *In the event any dispute arises between PTC and the Purchaser relating to, or arising out of the rights and obligations of PTC or the Company under the PPA, then such matters shall be resolved through Arbitration between the Company and PTC, as provided for in the PPA. In all such instances, PTC shall represent the Purchaser’s interest in such proceedings. The Purchaser agrees that it shall accept and be bound by the award (s) of the Arbitration, as the case may be, between the Company and PTC”.*

The above clause in the PSA between Haryana Power (R-2) and PTC (R-3) clearly shows the understanding of the Haryana Power (R-2) as regards to its Position in the PPA between the Appellant and the PTC (R-3) as under:

(i) That the disputes under the PPA between Jaiprakash Power (Appellant) and PTC (R-3) will be resolved by way of arbitration between them as provided in the PPA.

(ii) That Haryana Power (R-2) cannot be a party to such arbitral proceedings but will be bound by the outcome of such proceedings.

This clearly shows the intent and understanding of Haryana Power (R-2) that since it is not a party to the PPA between the Appellant and PTC India Limited (R-3) it cannot be a party to the arbitration proceedings between them. Therefore, now to contend that the sale of contracted power by Jaiprakash Power (Appellant) to PTC India Limited (R-3) was in effect a sale by the Appellant to Haryana Power (R-2) is contrary to the above understanding and intent. Haryana Power (R-2) cannot be permitted to take a contrary stand to the one which it had expressly agreed to in the PSA that it is bound by the arbitration award in any dispute between Jaiprakash Power (Appellant) and PTC India Limited (R-3).

(d) **“15.2 Third Party Beneficiaries**

“This Agreement is solely for the benefit of the Parties and their respective successors and permitted assigns and shall not be construed as creating any duty, standard of care or any liability towards any third person”.

The Haryana Power (R-2) and PTC India Limited (R-3) had clearly agreed between themselves that the PSA

between them is only for their benefit and does not create any duty or standard of care or any liability towards any third party. The said clause therefore, clearly excludes any claim against Haryana Power (R-2) and PTC India Ltd (R-3) under the PSA by any third party which will include the Appellant, Jaiprakash Power. This clearly means that in the event PTC India Limited (R-3) would have been in default under the PPA the Appellant had no right to make a claim as against the Haryana Power (R-2) under the PSA which leads to the conclusion that there is no privity of contract between the Appellant and Haryana Power (R-2).

(e) **“15.7 Assignment**

15.7.1 *This Agreement shall not be assigned by either Party other than by mutual agreement between the Parties in writing”.*

15.7.2 *Notwithstanding Section 15.7.1, PTC may assign its right and transfer its obligations under this Agreement to its Affiliates by notifying, in writing, the Purchaser.*

Provided that, in case of an assignment to Affiliates:

(i) *An entity shall qualify as an “Affiliate” of PTC if it, directly or indirectly, controls, is controlled by or is under common control with PTC; the term “control” meaning ownership of more than fifty percent (50%) of the equity share capital or*

voting rights of the company or the power to appoint a majority of the board of directors of a company;”.

(ii)

(iii)

The said clause in the PSA clearly shows that the parties to the PSA were not entitled to unilaterally assign the PSA to any other person except PTC (R-3) having a limited right to assign its rights and transfer its obligations under the PSA only to its affiliates and none other. This clearly shows that PTC (R-3) was not free to assign its rights under the PSA to the Appellant, Jaiprakash Power Ventures Limited. The PSA in the present case neither provides for assignment of PPA to the Haryana Power (R-2) nor does the definition of ‘affiliate’ include any purchaser.

(f) **15.11: No Partnership**

“None of the provisions of this Agreement shall constitute a partnership or agency or any such similar relationship between the Purchaser and PTC”.

The said clause expressly rules out any inference with regard to the creation of agency by the provisions of the PSA between its parties. This means that PTC (R-3) was not acting as an agent of any party under the PSA. The PSA was an agreement on a principal to

principal basis between the parties. Further the said clause also expressly rules out that the parties were acting in partnership.

38. Thus, from the perusal of above quoted clauses of the PPA as well as the PSA, the following factors as regards the relationship between the Appellant, Haryana Power (R-2) and PTC (R-3) would emerge:

- (a) **The PPA between the Appellant and PTC (R-3) became effective on its execution.**
- (b) **PPA gave a clear right to PTC (R-3) to sell the power purchased by it under the PPA to any Purchaser whomsoever without any control of the Appellant on such decision making of PTC (R-3).**
- (c) **It was agreed that the risk and title of the power and energy sold will pass on to PTC (R-3) from Jai Prakash Power (Appellant) at Delivery Point in Himachal Pradesh and will further pass on to Haryana Power (R-2) from PTC (R-3). This clearly shows that PTC (R-3) agreed to sell the power to Haryana Power (R-2) as an owner of the power and not as an agent of Jai Prakash Power (Appellant).**
- (d) **PPA obliged PTC (R-3) to off take contracted power and make payments of the same to the Appellant**

even if it is not in a position to sell the contracted power. This clearly shows that obligation of PTC(R-3) to off take contracted power under the PPA from Delivery Point of the Appellant and to make payments thereof to the Appellant were independent of its rights or ability or inability to sell the said power to any other party.

- (e) Despite PTC (R-3) being given the first right to refusal for any additional power generated on expansion of the capacity of the project of the Appellant, no such right was given to any purchaser of PTC (R-3) either under the PPA or the PSA.
- (f) The PPA and the PSA both clearly recognised that there cannot be a unilateral assignment of the rights and transfer of obligations of the parties to anyone except to the affiliates of the parties or the lenders as the case may be.
- (g) The PPA and the PSA both clearly recognize that they are the agreements for the benefit thereto and do not create any duty or liability towards any third party.

- (h) **The PPA and the PSA both recognize that there is no relationship of partnership between the parties thereto and the provisions of the respective agreements do not make any party as the agent of the other.**
- (i) **The PSA clearly provides that the obligation of PTC (R-3) to sell power to Haryana Power (R-2) is independent of its ability or inability to purchase power from the Appellant under the PPA.**
- (j) **The PSA clearly shows the understanding of the Haryana Power (R-2) that there is no privity of contract between it and the Appellant as in Clause 13.7.2 of the PSA. Further, Haryana Power expressly agreed to be bound by the award in the arbitration proceedings between the Appellant and the PTC (R-3) as regards to the disputes under the PPA.**
- (k) **The Clauses of PPA show that the Appellants had rights against and obligations towards PTC (R-3) and not against Haryana Power (R-2).**
- (l) **The Clauses of PSA show that Haryana Power (R-2) had rights against and obligations towards PTC (R-3) only and not against the Appellant.**

Thus, the position which has emerged after the analysis of the above Clauses shows that the PPA and the PSA are two distinct and separate agreements on a principal to principal basis and the common party namely the PTC (R-3) does not act as an agent of the Appellant or Haryana Power (R-2). As such, there is no privity of contract between the Appellant and the Haryana Power (R-2). On the strength of these, it is pointed out by the learned Senior Counsel for the Appellant that the State Commission cannot have any jurisdiction over the Appellant as well as over any dispute between the Appellant and PTC (R-3) with regard to the PPA between them.

39. On the other hand, the Learned Senior Counsel appearing for the Haryana Power (R-2) furnished a copy of the various communications exchanged between the parties to show that the PPA and PSA are clearly and inextricably linked. It is also pointed out that the correspondence made before the execution of the PPA between the Appellant and Haryana Power identify the Haryana Power as ultimate beneficiary. He also pointed out that similarly, the perusal of various letters exchanged between the Appellant and the PTC would indicate that Appellant itself insisted that PTC to execute the PSA with ultimate beneficiary and get the approval of the appropriate Commission.

40. The Learned Senior Counsel appearing for the Haryana Power has furnished the series of correspondence exchanged between the Appellant Haryana power and PTC in order to establish the nexus between the Appellant and Haryana Power (R-2). They are as follows:

**VARIOUS COMMUNICATIONS EXCHANGED
BETWEEN THE PARTIES**

Date	Particulars
28.06.2002	<p>Appellant vide its letter dated 28.06.2002 issued to Haryana Vidyut Prasaran Nigam Ltd. Proposed to sell the power generated from its 1000 MW Karcham Wangtoo Hydro-Electric Project to HPGCL. The relevant extract of the said letter is being reproduced herein below for ready reference:</p> <p><i>“As discussed with your good self, we would like to now enter into a long term Power Purchase Agreement (PPA) with you for sale of power generated by our above project from 2009-10 onwards. We would be grateful if you kindly consider the matter, advice us further action and provide us a draft MOU, as may be considered necessary for execution between the Company and you”.</i></p>
21.08.2002 29.08.2002 03.09.2002 14.10.2002 08.11.2002 19.11.2002	<p>Various communications exchanged between Appellant and Haryana Vidyut Prasaran Nigam Ltd pertaining to various issues qua supply of power from the Appellant’s project situated at Karcham Wangtoo directly to the State of Haryana.</p>
19.02.2003	<p>PTC vide its letter dated 19.2.2003 informed the CEA that PTC had been working towards locating possible off-takers for the Appellant project and further stated that the tie up of power from the project will be made with the Northern Region State Utilities.</p>

20.05.2003	Appellant vide its letter dated 20.05.2003 issued to PTC (R-3) requested PTC to firm up the sales arrangement with the beneficiary state/ consumers and to forward the draft PPA (s) between the PTC and beneficiary States/ Consumers.
18.6.2003	<p>Appellant executed a Memorandum of Understanding (MOU) dated 18.6.2003 with PTC India Limited (R-3) for onward sale of power sought to be generated by the Appellant from its 1000 MW Karcham Wangtoo Hydro Electric Project:</p> <p><i>“That sale of power from the Project by PTC to the Customers, including SEBs/State Power Utilities, will be on the terms and conditions, including the term of power tariff and Payment Security Structure, as may be found acceptable to both PTC and JKHCL as well as the Lenders, within a time frame to be co-terminus with finalization of PPA between PTC and JKHCL”</i></p>
17.10.2003	<p>The Appellant vide its letter dated 17.10.2003 issued to Central Electricity Authority (CEA) informed CEA that the Appellant was in constant dialogue with PTC for sale of the entire saleable power to the neighbouring State Utilities/Consumers.</p> <p><i>“2. In this connection, we have to inform you that we are in constant dialogue with Power Trading Corporation (PTC) for sale of entire saleable power to the neighbouring State Utilities/ Consumers. We have also entered into Memorandum of Understanding (MoU) on 18th June, 2003 with PTC for the purpose. A copy of the said MoU is enclosed for your kind perusal. PTC has since given presentation to various State Electricity Boards/Utilities in Northern Region and are perusing the matter with them to obtain Comfort Letters indicating therein the quantum of power to be taken by them”</i></p>
14.11.2003	Appellant wrote to PTC stating that they had agreed to cap Rs.6700 crores in respect of the project cost and calculations of tariff as the same would enable PTC to market the power to various State Utilities and obtain

	their comfort/commitment letters at the earliest.
10.3.2004	<p>Appellant wrote to PTC requesting if for the draft PPA with PTC and the draft power sale agreements with the prospective buyers in order to satisfy the lead financial institution, Power Finance Corporation of India.</p> <p><i>“As you are kindly aware, we have approached Power Finance Corporation of India (PFC) for seeking financial assistance for the captioned project and to act as lead institution to syndicate the balance debt from other FIs/Banks. During a meeting held on 9th March, 2004, PFC has, interalia, desired to furnish them at least Firm Commitment letters urgently for entire saleable power as also to have in position related PPAs as early as possible. We shall be grateful to have the draft PPA envisaged to be entered into by us with PTC and also the draft of another PPA, which may be signed by PTC with prospective buyers and/ us as a party”.</i></p>
20.01.2006	<p>In pursuance of the MOU entered between Appellant and PTC, PTC further entered into MOU’s with other State Utilities including HPGCL (R-2) for onward sale of power of 200 MW power generated from the Appellant project on 20.01.2006. Thus, HPGCL had been identified as the ultimate beneficiary prior to the execution of the PPA between the Appellant and Haryana Power (R-2).</p>
21.03.2006	<p>Power Purchase Agreement entered into between the Appellant and PTC India. With a condition precedent as follows:</p> <p>“3.1.3 (iv) PTC shall have executed the Power Sales Agreement (s) with the Purchaser, approved by Appropriate Commission, for the entire Contracted Power and made a copy of the same available to the Company”.</p>
10.7.2006	<p>Jaypee vide its letter dated 10.07.2006 wrote to PTC and acknowledged that it was aware that PTC has executed ‘MOU’ with some States for onward sale of</p>

	<p>power to be purchased from the Appellant.</p> <p><i>“We understand that PTC has executed ‘MOU’ with the same States for onward sale of power to be purchased from Karcham Wangtoo Hydroelectric Project as under:</i></p> <p><i>Punjab - 200 MW</i> <i>Haryana -200 MW</i> <i>Uttar Pradesh - 200 MW</i> <i>Rajasthan - 104 MW</i></p> <p><i>In view of the above, we request PTC to freeze the PSAs and apply for ‘Open access Licence’ at the earliest, so that a total view may be taken by PGCIL for organising Transmission System for evacuation of power generated by Karcham Wangtoo Project. In case the PSAs are yet to be executed by PTC, copies of MOU/Comfort Letters along with application for “Open access” may be provided to PGCIL in the interim. Your early action in the above matter will be highly solicited”.</i></p>
15.07.2006	<p>PTC wrote to the Appellant vide letter dated 15.07.2006 requesting the Appellant that a presentation be carried out so that onward agreements for sale of power could be concluded.</p> <p><i>“You would not doubt agree that in view of the need to close our negotiations on the power sale agreements at the earliest, it is essential that the presentation be carried through quickly. It is, therefore, requested that the matter may kindly be given high priority so that onward agreements could be concluded early in our mutual interest and in the best interest of the project. An early confirmation is solicited please.”</i></p>
21.9.2006	<p>Power Sale Agreement between Haryana Power (R-2) and PTC India for onward sale of power from the Appellant’s Project.</p>
21.06.2007	<p>HERC vide its letter dated 21.6.2007 issued to HPGCL approved the PSA as was required under law and as envisaged under Article 3.1.3 (iv) of the PPA.</p> <p>HERC had approved the PSA for supply of 200 MW</p>

	Power contracted by the HPGCL for the benefit of the people of Haryana and therefore, in terms of Section 86 (1) (b) read with Section 86 (1) (f) of the Electricity Act, 2003, the HERC has exclusive jurisdiction for regulating the PPA/PSA.
21.06.2007	<p>Appellant wrote to PTC enquiring about the status of downstream power sale agreements and reiterated that in terms of Article 3.1.3 of the PPA, PTC shall have executed the PSA with the purchasers and have got the approval of the Appropriate Commission for the entire contracted power.</p> <p><i>“In terms of Article 3.1.3 (Condition Precedent) of the PPA, PTC shall have executed the PSAs with the Purchaser (s) and got approval of the Appropriate Commission (s) for the entire contracted power”.</i></p>
23.01.2008	<p>Jaypee wrote to PTC requesting for the latest status in respect of the execution of the PSA’s with the Purchaser (s) and approval of the Appropriate Commission (s) for the entire contracted power</p> <p><i>“2. In terms of Article 3.1.3 (Condition Precedent) of the PPA, PTC shall have executed the PSAs with the Purchaser (s) and got approval of Appropriate Commission (s) for the entire Contracted Power.</i></p> <p><i>3. We would request you to please let us know the latest status in the above matter”.</i></p>
01.04.2008	PTC vide letter dated 01.04.2008 informed Jaypee that HERC has approved the PSA dated 21.09.2006 executed between PTC and HPGCL for sale of 200 MW electricity from the Appellant project’

41. On the strength of these documents, the Learned Senior Counsel appearing for the Haryana Power (R-2) argued that there is a nexus between the Appellant and Haryana Power

which gives jurisdiction to the Haryana State Commission to go into the dispute between the parties.

42. On the other hand, the Learned Senior Counsel for the Appellant while referring to each of these documents submitted that none of these documents would show that the Appellant had a nexus with Haryana Power (R-2) and it was a party to the PSA entered into between PTC and Haryana Power. The following is the reply made by the Appellant with reference to these documents:

(i) **Letters dated 28.6.2002, 29.8.2002, 3.9.2002, 14.10.2002, 8.11.2002 and 19.11.2002**

All these letters were prior to the Appellant entering into an MOU with PTC which was entered into on 18.6.2003. In fact, HPGCL in its letter to HERC dated 25.5.2007 had itself state in Para 7 that “....*It is pertinent to mention that initially developer approached Haryana and other beneficiaries directly but later on preferred to sign PPA with PTC*”.

All these letters relied upon by HPGCL are totally irrelevant to the issue involved. Though initially, some attempt was being made to have direct relationship with some of the utilities of Haryana but did not fructify and thereafter an MOU was entered into by the Appellant with PTC on 18.6.2003 with regard to entire saleable (704 MW in the PPA) power. PTC later agreed to supply 704 MW to power utilities of 4 different States.

(ii) Letter dated 19.2.2003 by PTC to CEA

This was in connection with the techno economic clearance of the project being granted by CEA. In the letter itself it was mentioned that PTC had made presentations to Delhi Transco Limited, the Delhi Distribution Companies as well as to HVPN and hopes to receive favourable response from them. However, signing of MOU with Delhi / Haryana for purchase of Karcham Wangtoo power may take some more time. They confirmed their willingness to facilitate the development of the Karcham Wangtoo HEP and expressed their confidence that the tie up for sale of power would be made with the Northern Region State Power Utilities. Ultimately, PTC had succeeded in entering into agreements to sell parts of the power with the power utilities of 4 different States. Thus, this letter also does not show that the generating company was a party to the PSA or there was any nexus. Incidentally, it may also be mentioned that even this letter was also prior to the signing of the MOU between the Appellant generating Company and PTC.

(iii) Letter dated 20.5.2003 by Appellant to PTC

Even this letter preceded the MOU between the Appellant and PTC. The purpose of the letter was to communicate to PTC that the CEA had approved the completion cost of Rs.5910 Crores for the project, CoD of which was December 2009 and the tariff calculation as per CERC guidelines on that completion cost was enclosed. PTC was requested:

“to firm up the sales arrangement with the beneficiary States/consumers in a manner that the tariff paid to us is in accordance with CERC guidelines prevailing on the date of signing of PPA, on final completion cost to be approved by the Competent Authority. In the meantime, you are also requested to forward us draft of PPA (s) prepared to be executed between us & PTC and PTC & beneficiary States/consumers.”

It is clear that the purpose of this letter was to ensure that the power would be sold in a manner that the Appellant generating company got a proper tariff based on the cost of project as approved by CEA. It may be mentioned that neither any State nor any power utility was mentioned in this letter.

(iv) MOU dated 18.6.2003 between the Appellant and the PTC

The MOU does not refer to any State or any Power Utility. This MOU shows that the Appellant was willing to sell the entire saleable power to PTC and the sale of power from the project to the Customers including SEBs/ State Power Utilities will be on the terms and conditions including the terms of power tariff and Payment Security Structure as may be found acceptable to both PTC and Appellant generating company as well as the Lenders. There was no reference either to the State of Haryana or to any power utility of Haryana in this MOU or any other State.

(v) **Letter dated 17.10.2003 from Appellant generating Company to Central Electricity Authority**

In the letter, it was intimated to CEA that the Appellant generating company was in constant dialogue with PTC for sale of entire saleable power to the neighbouring State Utilities/Consumers and that PTC had given presentations to various State Electricity Boards / Utilities of Northern Region and was pursuing the matter with them to obtain Comfort Letters indicating there in the quantum of power proposed to be taken. It may be mentioned in this connection that when techno economic clearance was granted to the project by the CEA on 31.3.2003, it was granted with certain stipulations one of which was that "*Letters of comfort to avail power from the Project shall be obtained & furnished to CEA*". It was to fulfil this stipulation in the techno economic clearance that this letter was written to CEA.

(vi) **Letters dated 14.11.2003 and 10.3.2004 by Appellant to PTC**

Both these letters were written before the PPA was entered into between the Appellant and PTC and they related to seeking financial assistance for the project from the Power Finance Corporation who required firm commitment letters for the entire saleable power and to have PPAs as early as possible. At that stage, it was being contemplated whether there will be PPA with PTC or there will be PPA with prospective buyers also. However, since no buyer was found with whom the Appellant generating Company could directly have a PPA, it was finally decided to have a PPA only with

PTC for the entire power (704 MW) and leaving it to PTC to sell on its own any parts of that power to different power utilities of any State. In fact, the first power utility which was willing to purchase 200 MW was power utility of Punjab. Originally, it appears from the letter that they were interested in purchasing 400 MW power from PTC but finally they entered into a PSA only for 200 MW. This shows that nothing was firmed up with any State till this stage.

In this connection a reference may also be made to Clause 15.6 of the PPA which was as follows:-

“15.6 Entirety

This agreement constitutes the entire agreement between the Parties as to its subject matter and supersedes any prior understanding or agreement reached between the Parties, including any memorandum of understanding between the Company and PTC, executed in connection with the Project”.

This clause clearly shows an unequivocal understanding between the Appellant and Respondent No.3 that all prior correspondence including the MoU stood superseded by the PPA and no reference could be made to them to interpret the PPA.

(vii) MOU dated 20.1.2006 between PTC and HPGCL

Since an MOU between the Appellant and PTC had already been executed on 18.6.2003 under which the Appellant was to supply power to PTC and PTC could sell any part of that power to any power utility etc, it

was well in order that on 20.1.2006, PTC itself entered into an MoU with HPGCL. Thereafter, when the PPA namely a firm agreement with all relevant conditions was entered into between the Appellant and PTC on 21.3.2006, a regular PSA on 21.9.2006 with all relevant clauses was also entered into between PTC and HPGCL although only for part of the power i.e. 200 MW.

(viii) Letter dated 10.7.2006 by the Appellant to PTC

Since it was natural for PTC, an inter-state trading licensee that it would be selling power to other power utilities there was nothing strange in PTC after it entered into PSAs with power utilities informing the Appellant about such agreements. It would however, be absurd to suggest that receipt of any such information would make the Appellant a party to the PSA. In fact, as the letter itself shows this was not only in respect of Haryana but also in respect of other States namely Punjab, Uttar Pradesh and Rajasthan. The purpose of letter was to ask PTC to apply for open access at the earliest for evacuation of power generated by the Appellant's project which was normal and in order. A generating company is required to know that where the power generated by it will be ultimately supplied to facilitate the transmission of electricity.

(ix) Letter dated 15.7.2006 from PTC to the Appellant

As the letter itself shows that after signing of the PPA with Appellant on 21.3.2006, PTC was still negotiating for the sale of power from the project to the States of

Northern Region and nothing was finalized till then. Since some States particularly Punjab had some queries and apprehensions regarding technical and operational risks associated with the project, keeping in views its location, a technical presentation to Punjab and possibly to one or more of the other off taking States was contemplated in order to address their concerns effectively.

If any prospective buyer from PTC had any technical apprehensions about the project on account of its location, it would have been natural for PTC to ask the Appellant to remove these apprehensions from the minds of any potential buyer of PTC.

(x) The approval letter dated 21.6.2007 by HERC of the PSA between PTC and HPGCL

It is important to note in this connection that on 18th January, 2007 HERC while considering the grant of approval of the PSA, the State Commission had contemplated a modification to Clause 14.5 of the PSA to suggest that:

“If PPA termination procedure has to be invoked due to PTC event of default, the Company should be under obligation to offer the contracted power and energy directly to the purchase viz, HPGCL to mitigate supply risk”.

The Company in the above quote refers to the Appellant, ‘PPA’ refers to the Power Purchase Agreement executed between the Appellant and PTC on 21.3.2006.

However, HPGCL objected to this suggestion for the change by its reply dated 25.5.2007 and mentioned the following as reasons for its objections:

“No privity of contract should be created between the Company and the Purchaser, HPGCL in this case. Hence direct supply during the consultation period has not been provided for. After termination of agreements, the purchaser and generating company shall be free to enter into an agreement”.

Further it is stated that an attempt was made to add such provisions but because of 4 purchasing States, the provisions could not be got added. It is pertinent to mention that initially developer approached Haryana and other beneficiaries directly but later on preferred to sign PPA with PTC”.

The above clearly shows the following:

(i) The State Commission after perusing the PSA between the Haryana Power (R-2) and PTC (R-3) was of the view that there should be a direct obligation of the Appellant towards Haryana Power (R-2) in case the PPA between the Appellant and the PTC (R-3) is terminated. This clearly shows that the State Commission was of the view that the PPA and the PSA does not create any obligation of the Appellant towards Haryana Power (R-2).

(ii) The response to the said query of the State Commission by the Haryana Power (R-2) makes the understanding and the intention of the R-2 clear wherein it states that *“no privity of contract should be created between the company and the*

purchaser, HPGCL in this case". This makes it clear that R-2 itself had agreed that neither there is nor there should be any privity of contract between it and the Appellant.

(iii) The said objection/comment by the Haryana Power was accepted by the State Commission and it approved the PSA on 18/21.6.2007 without raising any further clarification in this regard. This makes it further clear that the State Commission also agreed that there should not be any privity of contract between the Appellant and the Haryana Power (R-2).

Thus, it is crystal clear that at the time of approval of PSA everyone including HPGCL as well as HERC clearly understood that there was no privity of contract contemplated between the Appellant generating Company and HPGCL.

(xi) Letters dated 21.6.2007 and 23.1.2008 by the Appellant to PTC

These two letters were written by the Appellant to PTC drawing its attention to the condition precedent of the PPA in terms of article 3.1.3 which required the PTC to have executed the PSA with the purchasers and get the approval of the appropriate Commission for the entire power. The letters refer to the signed PSAs with PSEB, HPGCL, UPPCL and Rajasthan Discoms.

If there was a condition precedent to be fulfilled by PTC that they had entered into proper contracts for sale of the entire power it was quite natural for the Appellant to require them to show that the PSAs had

been approved by the appropriate Commission. It is not possible to comprehend as to how this would make the generating company i.e. Appellant as a contracting party to the PSAs. It was the fulfilment of a stipulation in a contract between the Appellant generating company and PTC which left PTC free to enter into contracts with purchasers of their own choice but they had to show to the Appellant that the tariff in those PSAs had got the approval of the appropriate Commissions.

The coming into operation of the PPA in the present case was not dependent on the fulfilment of this condition precedent by PTC since Clause 2.1 of the PPA in the Appellant's case provide that the PPA became effective upon the date of its execution by the parties. Clause 2.1 of the PPA dated 21.03.2006 is being extracted below:

“2.1 Effective Date and Term of Agreement

This Agreement shall become effective upon the date of its execution by the Parties. The Agreement shall have a term from such date of execution by the Parties until the Expiry Date (“Term of Agreement”), when it shall automatically terminate, unless:

- (i) Terminated earlier, pursuant to article 2.2, or*
- (ii) Extended, pursuant to Article 2.3”*

43. We have carefully considered the submissions made by the parties with regard to these documents. Among these documents referred to above, the letter dated 25.5.2007 sent

by Haryana Power to the State Commission mentioning that there cannot be any privity of contract between Haryana Power (R-2) and the Appellant Generating Company, in our view, is quite important. This document would show that when the State Commission while considering the grant of approval for the PSA, suggested to the Haryana Power for modification of the PSA to the effect that if the Appellant invoked the termination procedure as against the PTC in the event of its default, the Appellant should be under obligation to directly supply power and energy to Haryana Power but, Haryana Power (R-2) emphatically objected to this suggestion by sending a reply to the State Commission on 25.5.2007 that there cannot be any privity of contract between the Appellant and Haryana Power (R-2).

44. In fact, the State Commission agreed to accept the said objection of the Haryana Power (R-2) and accordingly it did not modify the said PSA as suggested earlier. This fact which is not disputed is quite relevant to decide the issue. Thus, it is evident that at the time of approval of the PSA, Haryana Power as well as the State Commission clearly understood that there was no privity of contract between the Appellant and the Haryana Power.
45. In view of the above circumstances pointed out by the Learned Senior Counsel for the Appellant, we are unable to

accept the contention of the Respondent that the nexus between the PPA and PSA had been established.

46. Let us now go into the correctness of the findings given in the impugned order with reference to Privity of Contract on the basis of which the State Commission arrived at the conclusion that it has the jurisdiction.

Privity of Contract

(i) Impugned Order

“PPA entered into between JKHCL & PTC and the PSA entered into between PTC & HPGCL are back to back agreements and neither of the two survives/ is viable without the other.”

47. Through the above observation in the impugned order, the State Commission gave a finding that it has got the jurisdiction against the Appellant by considering the PPA and PSA together as if both the agreements are back to back agreements and both were between the same parties. This finding is not correct in view of the following reasons:

- (a) The PPA between the Appellant and PTC (R-3) was entered on 21.3.2006. Thereupon, the PSA was entered between Haryana Power (R-2) and PTC (R-3) on 21.9.2006. These two agreements are separate.

- (b) The PPA and PSA have been entered into between the two different parties.
 - (c) The PPA entered into between the Appellant and PTC (R-3) provided that the obligation of the Appellant to supply electricity was solely to PTC (R-3) which was independently entitled to sell the said power to one or more purchasers of its choice.
 - (d) The PTC (R-3) entered into PSA with Haryana Power (R-2) independently. Therefore, the PTC (R-3) is independently responsible and liable for supply of power to any of its purchaser including the Haryana Power.
48. In view of the above, the prayer made by Haryana Power (R-2) before the State Commission seeking for direction as against the Appellant is not sustainable as the State Commission lacks jurisdiction to issue directions against the Appellant towards its obligation against PTC (R-3) who is a trader of electricity under the PPA.
49. To make this point stronger, the Learned Senior Counsel for the Appellant would further point out the following aspects to demonstrate that the State Commission does not have any jurisdiction over the Appellant. Those aspects are as follows:

- (a) The parties to the PPA i.e. the Appellant and PTC have their registered offices at Himachal Pradesh and New Delhi respectively, outside the jurisdiction of the Commission;
- b) The PPA had been executed between Appellant and R-3 in Delhi, outside the jurisdiction of the Commission;
- c) Appellant's power project from which power was to be supplied to PTC (R-3) under the PPA was located in the State of Himachal Pradesh;
- d) The delivery point, in terms of Clause 1.1 of the PPA is located within the State of Himachal Pradesh, outside the jurisdiction of the State Commission;
- e) The Appellant had no contract directly with Haryana Power (R-2).
- f) The Appellant had a PPA only with Respondent No. 3 which is an inter-state trading licensee operating under the, license granted to it by the Central Electricity Regulatory Commission and not by any State Electricity Regulatory Commission;

50. On the strength of these points it is pointed out by the Appellant that the provisions of PPA as also the alleged rights and obligations arising there under neither had any nexus with the State of Haryana nor conferred any jurisdiction upon the State Commission to adjudicate upon the disputes arising

out of the PPA. Therefore, the finding rendered by the State Commission that PPA and PSA are back to back agreements to the effect that neither of the two would survive without the other is not valid in law.

51. We would now refer to the other findings in the impugned order made by the State Commission:

Impugned Order:

“In this context, it would be pertinent to note that PTC, before entering into PPA with JKHCL, signed MOUs with various state utilities for onward sale of contracted 704 MW of power and only after the ultimate buyers were established could the PPA between PTC & JKHCL be signed. Thus it is incorrect to say that HPGCL is not a party to the PPA and so cannot raise any dispute connected with the PPA. In fact ultimate buyers are the most important / affected parties in the PPA.”

52. The above observations would make it clear that the State Commission was under the impression that the Appellant had signed the MOUs with various state utilities for onward sale of 704 MW power even before the Appellant entered into PPA with PTC (R-3) and that therefore, the Haryana Power must be construed to be a party to the PPA.

53. According to the Appellant, this observation is factually not correct. Before signing the PPA i.e. on 21.3.2006, the PTC (R-3) did not have any MOU with any State Utilities except the Haryana Power (R-2). It is pointed out that the said inaccurate observations made by the State Commission has resulted on an erroneous presumption that the PPA between the Appellant and PTC (R-3) was signed only after the buyers of the power were established. The PPA between the Appellant and PTC was for 704 MW. The only MOU entered into between the PTC and Haryana Power before the PPA dated 21.3.2006 was for only 200 MW power. Thus, it is clear the signing of the PPA between the Appellant and the PTC in respect of 704 MW of power was not dependent upon any MOU or tie-up for sale of power with PTC India (R-3) with any purchaser. Therefore, the finding which have been given in the impugned order on the strength of the MOU prior to PPA is not valid because the said MOU did not have any impact on the PPA which was entered into between the Appellant and the PTC later i.e. on 21.3.2006.

54. The next finding is as follows:

Impugned Order:

“PSA signed between Respondent R-2, PTC, and the Petitioner, HPGCL, which is entirely based on the PPA and of which PPA is a part, has been approved by the Commission as per the provisions of section 86 (1) (b) of the Electricity Act, 2003 and under the provision of section 86 (1) (f) of the Act, the Commission has powers to adjudicate in the matter as already stated in para (ii) above.”

55. The above finding would make it clear that it was found that merely because the copy of the PPA was annexed with the PPA, the State Commission must be construed to have approved both the PPA as well as the PSA and as such the PPA has become part of PSA. The above finding is totally erroneous. The order of the approval of the PSA does not indicate that it has approved PPA as well especially when the Appellant had not been made a party to the proceedings for the approval of the PSA. Therefore, merely because the PPA had been annexed with the PSA, it cannot be said that any document of whatever nature annexed to the PSA would get

automatically approved by the Commission when the PSA had been approved.

56. The next finding is as follows:

Jurisdiction of the State Commission

(i) **Impugned Order:**

“Under section 86 (1) (b) read with section 86 (1) (f), the commission has the powers / jurisdiction to adjudicate upon the disputes between the licensees and the generating companies. This has also been upheld by the Hon’ble Supreme Court in the matter of Tata Power (Civil Appeal Nos. 3510-3511 and 3593 of 2008).

Relevant part of the judgment is reproduced below :

“Section 86 (1) (b) provides for regulation of electricity purchase and procurement process of Distribution Licensees. In respect of generation its function is to determine the tariff for generation as also in relation to supply; transmission and wheeling of electricity, Clause (b) of sub section (1) of section 86 provides to regulate electricity purchase and procurement process of Distribution Licensee including the price at which the electricity shall be procured from the generating companies or licensees or from other sources through agreements. As part of the regulations, it can also adjudicate upon disputes between the licensees and generating companies in regard to the implementation, application or interpretation of the provisions of the said agreement.”

57. The reliance of the judgment of Hon'ble Supreme Court by the State Commission to invoke the jurisdiction is misconceived. The Hon'ble Supreme Court in the Tata Power case has made said observation with regard to agreement between a Distribution Licensee and a generating company and this cannot be relied upon in the present case. As a matter of fact, the paragraph 83 of the said Judgment of Hon'ble Supreme Court which is relevant in this regard is as under:

“..... The generation company, thus, exercises freedom in respect of choice of site and investment of the generation unit; choice of counter-party buyer; freedom from tariff regulation when the generating company supplies to a trader or directly to the consumer.”

58. So, this observation would make it clear that the Generating Company supplying the power to a trader or directly to the consumer will not be subject to the tariff regulations. That apart, in the very same judgment the Hon'ble Supreme Court in Para 107 has held that the State Commission does not have powers to give directions to generating Companies who

have not entered into any PPA with the Distribution Licensees of that State. Para 107 reads as under:

“107. While exercising its power of “regulation” in relation to purchase of electricity and procurement process of distribution, it is not permissible for the Commission to direct allocation of electricity to different licensees keeping in view their own need. Section 86(1)(b) read with Section 23 if interpreted differently would empower the Commission to issue direction to the generating company to supply electricity to a licensee who had not entered into any PPA with it. We do not think that such a contingency was contemplated by Parliament.”

59. In view of the above, observation of the Hon'ble Supreme Court, the findings given by the State Commission on the strength of one portion of the Hon'ble Supreme Court ignoring the relevant paragraphs namely 83 and 107 is not sustainable.

60. The next finding is as follows:

Impugned Order:

“.....The procedure to be followed for adjudication of disputes has also been laid down by Hon'ble Supreme Court in the matter of Gujarat Urja Vikas Nigam Ltd. V/s Essar Power Ltd. (2008) 4 SCC. The

relevant portion of the judgment is reproduced as under :

“Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996.”

61. The reliance by the State Commission on the above judgment of Hon'ble Supreme Court is misplaced. The said judgement had been rendered by the Hon'ble Supreme Court in the context of an agreement between a generating company and a Distribution Licensee. As regards the jurisdiction of the State Commission to adjudicate upon the dispute between the generating company and the Distribution Licensee, the said judgment has to be read in the context of an agreement and a dispute on the said agreement between a generating company and a Distribution Licensee. In the

present case, as indicated above, there was no agreement between the Generating Company and the Distribution Licensee.

62. The Learned Senior Counsel for the Appellant has relied upon the judgment of this Tribunal in Appeal No.7 of 2009 dated 6th August, 2009 in which this Tribunal has held that Madhya Pradesh State Commission does not have the jurisdiction to go into the dispute between the Generating Company and interstate trading licensee who have been granted a trading license by the Central Commission.

63. On the other hand, the Learned Counsel for the Respondent has cited two judgments namely Appeal No.200 of 2009 dated 23.2.2011 in the case of M/s. Pune Power Development Pvt Ltd v Karnataka Electricity Regulatory Commission & Ors and Appeal No.15 of 2011 dated 4.11.2011 in the case of M/s. Lanco Amarkantak Power Pvt Ltd Vs. Haryana Electricity Regulatory Commission to show that when both the PPA and PSA are back to back

agreements and there is a clear nexus between the PSA and PPA and they are inextricably interlinked to each other, the State Commission will have jurisdiction.

64. It is true that the issue about jurisdiction had been decided by this Tribunal in those cases. In Appeal No.7 of 2009, it had been decided that Madhya Pradesh State Commission has no jurisdiction. In Appeal No.200/2009 dated 23.2.2011 the case of M/s. Pune Power Development Pvt Ltd v Karnataka Electricity Regulatory Commission & Ors and Appeal No.15 of 2011 dated 4.11.2011 in the case of M/s. Lanco Amarkantak Power Pvt Ltd Vs. Haryana Electricity Regulatory Commission, it has been decided that the Karnataka Commission and Haryana Commission respectively have the jurisdiction to go into the dispute between the Distribution Licensee and inter State trading licensee as well as the generating Company and the distribution Company.

65. We shall now find out as to which of the judgment cited by both the parties would apply to the present facts of this case.

66. Let us see the relevant findings given by this Tribunal in Appeal No.7 of 2009 cited by the Appellant, which is as under:

“13. The main question that arises for consideration is as follows: Whether the Madhya Pradesh State Commission has got a jurisdiction to adjudicate upon the disputes between the Appellant, a generating company situated outside Madhya Pradesh and the R-2 (PTC) which has not been granted licence by the Madhya Pradesh State Commission?”

i) Section 86(1)(f) of the Act recognizes the power of the State Commission to adjudicate upon disputes between the licensees and the generating companies and to refer any dispute for arbitration. Let us quote Section 86 of the Act now –

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

(a)

(b)

(c)

(d)

(e)

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

ii) The above provision with the opening words the State Commission , must be construed in the context of the territorial jurisdiction of the Regulatory Commission of each State. The word “the licensee” as referred to in Section 86(1)(f) has to be construed to mean such licensees which

have been granted a trading licence or such licensee who has been granted a trading licence by the particular State Commission seeking to assume jurisdiction over the dispute. This means, the State Commission can assume jurisdiction in respect of the disputes arising between a generating company and an electricity trader operating under a trading licence granted by it. In this case, Madhya Pradesh State Commission has assumed jurisdiction in respect of the disputes under the PPA between the Appellant, a generating company which is situated in Chhattisgarh and R-2 who is a trading licensee granted by the Central Commission and not the Madhya Pradesh State Commission.

15. The Madhya Pradesh State Commission itself has framed Regulations in 2004 which would give the details of the jurisdiction to adjudicate disputes between generating companies and trading licensees under Section 86(1)(f) read with Section 158 of the Act. It clarifies that the Madhya Pradesh State Commission can only deal with the dispute relating to the licensees that operate under a trading licence granted by the Madhya Pradesh State Commission.

16. In this context, it would be worthwhile to refer to relevant Regulation. Para 10.2 of the MPERC Regulations reads as follows:

“10.2 The Commission may act as arbitrator or nominate person(s) as arbitrator(s) to adjudicate and settle disputes between the Trading Licensee, any other licensee or generating companies in pursuance of clause (f) of sub-section (1) of section 86 read with Section 158 of the Central Act and Regulations of the Commission.”

17. Then, who is a trading licensee? This is defined under Clause 1.4(t) of the MPERC Regulations which is as follows:

“a person who has been granted a Trading Licence for intra-state trading in Madhya Pradesh and does not include a person granted license by CERRC (Central Commission) for inter-state trading or a person granted license for trading by other State Commission.”

18. So both Clauses 10.2 and 1.4(t) of the Regulations have clarified the situation.

i) Admittedly in this case the PPA has been executed in New Delhi, outside the State of Madhya Pradesh.

ii) The Appellant’s generating station admittedly situated outside the State of Chhattisgarh.

iii) The delivery point for power output from the Appellant’s power plant to the R-2 as defined in Article 1.1 of the PPA is located within the State of Chhattisgarh.

iv) Admittedly, the R-2 is not the trading licensee under the Madhya Pradesh State Commission and he is holder of the trading licence by the Central Commission for inter-state trading.

19. The above admitted facts clearly show that the PPA as also the rights and obligations arising thereunder bear no nexus with the State of Madhya Pradesh so as to confer any jurisdiction upon the Madhya Pradesh State Commission to adjudicate upon the disputes arising out of the said agreement.

21. It was argued vehemently by both Learned Counsel for the R-2 and R-3 that the Madhya Pradesh State Commission has got jurisdiction over the present dispute by virtue of the fact that the PPA and PSA constitute back to

back arrangements. This contention cannot be countenanced as these two agreements are separate and distinct. Further between the two different parties these two agreements had been entered into. The close reading of the PPA clearly establishes that the obligation of the Appellant to supply the power energy output under the PPA is solely to R-2 which is independently entitled to sell the said power to one or more purchasers and accordingly the R-2 is independently responsible and liable for the supply of power to such purchasers.

23. The resale of power procured under PPA takes place under the Power Sale Agreement (PSA) between the R-2 and R-3. the Appellant is not a party to this transaction. As such the purchase of power under the PPA cannot be construed to be within the jurisdiction of the Madhya Pradesh State Commission since there is no certainty whatsoever that the power would be resold by R-2 to Madhya Pradesh. Therefore, the argument based on treatment of both agreements as one is not sustainable.

29. As mentioned earlier, the words "The State" as incorporated in Section 86 would mean that every State Commission has to have jurisdiction to adjudicate upon every dispute between its licensee and a generator. Otherwise every State Commission would have jurisdiction to adjudicate upon every dispute between any generator and any licensee which could not have been the intention behind adjudicatory mechanism under the Act.

32. To put it briefly, the conjoint reading of Clause 10(2) and Clause 1.4(t) and Section 86(1)(f) would clearly indicate that the Madhya Pradesh State Commission could deal with the disputes only between the trading licensee who has been granted a trading licence for intra-state trading in Madhya Pradesh and the generator and that person cannot be called to be trading licensee to invoke

the jurisdiction of the Commission merely because he has been granted licence either by the Central Commission for inter-state trading or by any other Commission for trading.

67. In this case, it has been decided on the basis of the various clauses of the PPA and PSA and the Regulations framed by the State Commission to the effect that the Madhya Pradesh State Commission has no jurisdiction to decide the dispute between the Appellant Lanco and PTC which was entered between them in the form of PPA holding that they are not back to back Agreements. So this decision is on the basis of the said facts of the case.
68. It has been argued by the Respondent that in the judgment in Appeal No.7 of 2009, the Madhya Pradesh State Commission has relied upon certain regulations on the basis of which the State Commission held that it did not have jurisdiction to decide the dispute relating to the trading license which has been granted by the Central Commission but in the present case no such Regulations have been framed by the state Commission and as such the said finding would not apply to the present case. This contention in our view is not tenable.
69. It has been pointed out by the Appellant that the State Commission in the present case also has framed Haryana Electricity Regulatory Commission (Licensing of Trading, Eligibility Criteria for grant of Trading License, the Duties and the Terms and Conditions of Trading License) Regulations

2005 (hereinafter referred to as “HERC Trading License Regulations, 2005”). The said regulations contained similar provisions regarding the definition of the trading licensee and adjudication of disputes involving trading licensees and generating company as are contained in Madhya Pradesh Electricity Regulatory Commissions Regulations 2004. The said Regulations are as follows:

- (e) *Licence” means a licence granted under Section 14 of the Act to undertake trading in electricity within the territory of the state of Haryana.*
- (f) *“Licensee” means a person who has been granted a licence under Section 14 of the Act to undertake intra-state trading in electricity within the state of Haryana and includes a person deemed to be a licensee under Section 14 of the Act.”*

“Form -8

(h)“Licence” means a licence granted under section 14 of the Act;

(i) “Licensee” means.....(Name of the Licensee) who has been granted a Licence in its capacity as operator of the licensed Business in the specified area of trading;

13. Dispute Resolution

The Commission shall adjudicate upon the disputes between the Licensees and Generating companies and may refer any dispute for arbitration as per the HERC (Conduct of Business) regulation 2004 (Regulation No. HERC/06/2004).”

70. Thus, the above quoted clauses of Regulations 2005 read with Section 86 (1)(f) makes it evident that similar Regulations have been framed by the Haryana State Commission also and as such the State Commission can have the jurisdiction over the dispute relating to the trading licensees only when the trading license has been granted by the said State Commission.
71. On the strength of this contention, it is contended by the Appellant that it does not have the jurisdiction on the trading licensees who have been granted license by the Central Commission regarding the dispute with generating Company about the PPA between them. In view of the above submission, it has to be held that when the trading licensee of the State Commission have an agreement with the Distribution Licensee of the State of Haryana, then only the State Commission of Haryana will have a jurisdiction over the said agreement regarding the dispute arising between the trading licensee and Distribution Licensee. Therefore, the contention of the Respondent that the finding on Appeal No.7 of 2009 would not apply to the present case cannot be countenanced.
72. The Learned Counsel for the Haryana Power (R-2) as mentioned earlier placed reliance on the judgment of this

Tribunal in Appeal No.200 of 2009 dated 23.2.2011. Let us refer to the issue as well as the finding in the said judgment.

73. The dispute in this case was with regard to non supply of power by M/s. Pune Power Development Pvt Ltd, a trading licensee, the Appellant to M/s. Mangalore Electric Supply Company Limited (R-2), a distribution licensee of the agreement entered into between the parties. The first point raised by the Appellant and the findings in the above Appeal is as follows:

“(i) The Appellant not being a licensee of the Karnataka State Commission cannot be proceeded with by the said State Commission which does not have the jurisdiction to entertain the dispute between the Appellant and the licensee of its own State.

19. In the present case, the Appellant and the Respondent Nos.2 and 3 are licensees. It is an admitted fact that the Appellant is a trading licensee having obtained the trading license from the Central Commission. The Respondent No.2 is a Distribution Licensee having obtained the license from the State Commission. As such, both are licensees. The dispute in the present case arises under the Letter of Intent issued by the 2nd Respondent in favour of the Appellant.

25. The Appellant has relied upon the decision in the case of Lanco Amarkantak Power Private Limited vs Madhya Pradesh Electricity Regulatory Commission in Appeal No. 7 of 2009 dated 6.08.2009 to contend that only the Central Commission has jurisdiction to

adjudicate upon the disputes under Section 86(1)(f) of the Act.

27. If we look at the facts of the said case, it is clear that the factual background of the said case is entirely different from the present case. This Tribunal in the said case was dealing with the jurisdiction of the Madhya Pradesh State Commission involving a dispute between the Generating Companies situated in Chhattisgarh and the PTC India Limited, an inter-State Trading Licensee. It was not dealing with any dispute relating to the sale of power to a Distribution Licensee in the State of Madhya Pradesh. Power Purchase Agreement was executed outside Madhya Pradesh. Admittedly, in that case, the Generating Station was situated in Chhattisgarh. The delivery point of power was also located in Chhattisgarh.

28. Based on these facts, this Tribunal came to the conclusion that none of the rights and obligations arising under the PPA had any nexus to the State of Madhya Pradesh so as to confer jurisdiction upon the Madhya Pradesh State Commission. Based on the said finding, it was held in that case that Madhya Pradesh State Commission did not have the jurisdiction to deal with the said issue.

29. The above principles which have been laid down by this Tribunal in that case would not be applicable to the present case for the following reasons:

(i) The present case involves a dispute between the Distribution Licensee of Karnataka and the Appellant which is an inter-State licensee;

- (ii) *The inter-State Trading Licensee is selling power to the Distribution Licensee in the State of Karnataka, thereby having a nexus to the State of Karnataka.*
- (iii) *Procurement of power by Distribution Licensee, Respondent No.2 from Trading Licensee, the Appellant falls within the regulatory jurisdiction of the State Commission of Karnataka under Section 86(1)(b) of the Act;*
- (iv) *The transaction is for the procurement of power from the Appellant required by the Distribution Licensee, Respondent No.2 for its distribution and retail supply activities in the State of Karnataka. Thus, the procurement of power has a direct nexus with the State of Karnataka as the supply is to the Karnataka Distribution Licensee .*

SUMMARY OF OUR FINDINGS:

37. (I) *The present case involves a dispute between the Distribution Licensee of Karnataka, the Respondent and the Appellant which is an inter-State licensee. The Appellant is selling power to the Distribution Licensee Respondent in the State of Karnataka, thereby having a nexus to the State. Since the procurement of power by the Distribution Licensee from the Trading Licensee is being done in the State of Karnataka, the Appellant falls within the jurisdiction of the State Commission under Section 86(1)(b) of the Act. The procurement of power has a direct nexus with the State of Karnataka as the supply is to the Karnataka Distribution Licensee. There is no restriction on the location of the Trading Licensees to determine the jurisdiction of the State Commission. The supply of electricity, namely, the Appellant being at a different place does not oust the jurisdiction of the State*

Commission under Section 86(1)(f) to adjudicate upon the dispute between the licensees. Therefore, we hold that so long as the Distribution Licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86(1)(f) to adjudicate upon the dispute. The 1st point is answered accordingly.

74. In this case, there is a specific finding given by the Tribunal on the basis of the facts of that case that the procurement of power has a direct nexus with the State of Karnataka as the supply was being made to Karnataka Distribution Licensee and that so long as the Distribution Licensees are involved in the procurement of power in the State, the State Commission alone will have the jurisdiction to adjudicate upon the dispute. So, in that case, the above finding had been rendered by this Tribunal on the basis of the facts to the effect that the Karnataka Commission has got the jurisdiction because the nexus between the parties had been established. Thus, it is clear that in the above Appeal, it has been held that the agreement under which the dispute arose, was between an interstate trading licensee and a Distribution Licensee of Karnataka. Since Distribution Licensee had been granted a license by the Karnataka Electricity Regulatory Commission, it has been held that the dispute which was with the Distribution Licensee of the Karnataka Commission, was clearly covered u/s 86 (1) (f) of the Electricity Act, 2003.

75. In the present case, neither the Appellant nor the PTC (R-3) is a licensee of Haryana Commission and the matter is not relating to the agreement between the trading licensee and distribution licensee and thus the findings in the Pune Power Case are not applicable.
76. The Learned Counsel for the Haryana Power(R-2) cited the judgment of this Tribunal in Appeal No.15 of 2011 dated 4.11.2011 in Lanco Power Limited Vs. Haryana Commission wherein it was held that there is a clear nexus between the PPA and PSA. According to the Respondent, the facts are similar to the present case.
77. Let us now deal with the issue as well as the relevant facts for giving such a finding by the Commission.
78. This case relates to the dispute between the Haryana Power and PTC, the Lanco Power with reference to the PSA entered into between the PTC and Haryana Power. In this case, the facts were somewhat similar in regard to the issue as to whether PPA and PSA are back to back agreements. Let us refer to the issue and discussion in that case:

“Whether the State Commission has got the jurisdiction to go into the dispute in question between the parties in the facts and circumstances of the present case as required in the Electricity Act, 2003? (Appeal No. 15/2011)

12. According to the Appellant Lanco Power Limited, the jurisdiction of the State Commission can be invoked only in respect of the PSA between the PTC (R-3) and Haryana Power (R-2) and it cannot extend its jurisdiction to the PPA between the Appellant and PTC (R-3). In short, the case of the Appellant is that the State Commission has no jurisdiction to adjudicate on the dispute between the Appellant generating Company having its plant in Chhattisgarh and the 3rd Respondent PTC which is a inter-state Trading licensee especially when there is no nexus or privity in respect of the PPA dated 19.10.2005 entered between the Appellant Lanco Power Limited, and the PTC (R-3) and the PSA dated 21.9.3006 entered into between Haryana Power (R-2) and PTC (R-3).

13. At the outset, it shall be stated that, it can not be debated that when there is no nexus and privity between the PPA and PSA, jurisdiction of the State Commission cannot be invoked. Therefore, in order to decide about the issue of jurisdiction, we have to first find out as to whether there is any nexus or privity in respect of the PPA entered into between the Appellant Lanco Power Limited and PTC (R-3) and PSA entered into between the PTC (R-3) and Haryana Power (R-2).

14. While dealing with this question, it would be proper to analyse the legal position with reference to the functions of the State Commission. Section 86 (1) (f) of the Electricity Act, 2003 (the Act) provides as under:

(86) “Functions of State Commission

(1) The State Commission shall discharge the following functions, namely:-

.....
....

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

15. This provision deals with the adjudication of the dispute between (a) Generating Company and Licensee or (b) between Licensees. Thus section 86 (1)(f) dealing with adjudication of dispute is not upon any agreement between a generating Company and the Licensee. In other words, the existence of a contractual relationship between a generating company and the licensee is not a pre-condition for exercise of the jurisdiction of adjudication provided under Section 86(1)(f). The dispute between the generating Company and the licensee where such power is generated and sold by the generating company to the licensee is intended for maintaining supply to the consumers at large is covered under section 86(1)(f) of the Act. The Statutory adjudicating power by the Appropriate Commission which regulates the tariff of the consumers, has been specifically provided for under Section 86(1)(f) of Act. The State Commission regulating the tariff of the consumers of the State will be in a better position to adjudicate on such dispute taking into consideration the interest of the consumers of the State.

16. If a generating Company enters into an agreement for sale of power generated by it, knowing the place where the power generated is going to be consumed, the generating company acts with the nexus to such consumers. This nexus leads to the fact that the State Regulatory Commission of the place where the electricity is to be consumed is the Appropriate Commission to exercise jurisdiction. If the sale and purchase of power has a nexus to the State, the concerned State Commission will have jurisdiction notwithstanding the fact that there is no direct contractual arrangement between the generating company and the Distribution

Licensee. In this context, it would be worthwhile to refer to Section 64 (5) of the Electricity Act, 2003 which is as under:

“(5) Notwithstanding anything contained in Part X, the tariff for any inter-state supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor”.

21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and Distribution Licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.

22. The above aspects is clear from Section 86 (1) (b) of the Electricity Act which reads as under:

“ 86. Functions of State Commission

(1) The State Commission shall discharge the following functions, namely:-

.....

(b) regulate electricity purchase and procurement process of Distribution Licensees including the price at which electricity shall be procured from the generating

companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;”

23. *As per the above Section, the purchase of electricity is being dealt as a procurement process of the Distribution Licensee which would include through agreements for purchase of power for distribution. It is not confined to a single aspect of an Agreement. Thus the purchase of electricity by the Haryana Power (R-2), for distribution within the state of Haryana through another intermediary trader (R-3) and the supply of the same by the generating Company (Appellant) through such intermediary trader (R-3) is a process within the meaning of the Section 86(1)(b) of the Act.*

24. *In other words, even though the Haryana Power (R-2) was not the party to the PPA dated 19.10.2005 and the Amended Agreement dated 18.9.2006, the parties to the PPA have intended that the power sold under the PPA to be further sold to Haryana Power (R-2), the ultimate beneficiary for the purpose of distribution to the consumers of the State of Haryana. As such the Haryana Power (R-2) is entitled to enforce the terms of PPA. To put it in a nut shell, the sale of entire contracted capacity of 300 MW by the Appellant, is intended for re-sale by PTC (R-3) to Haryana Power (R-2) and as such, the ultimate sale of entire 300 MW to Haryana Power (R2) was under the PSA.*

25. *According to the Respondents in this Appeal, the PPA and PSA are back to back arrangements. On the other hand, the Appellant has contended that there is no nexus or privity in respect of the PPA dated 19.10.2005 entered into between Lanco Power, the Appellant, PTC (R-3) and the PSA dated 21.9.2006 entered into between the PTC (R-3) and Haryana Power (R-2).*

29. *The Appropriate Commission is, therefore, the State Commission which approves the tariff for purchase and sale of power by PTC i.e. the same State Commission and as per definition the State Commission competent to determine the tariff for the project. From the perusal of the above clauses, it is apparent that the State Commission which is deciding on the tariff for the licensee situated in the State of Haryana i.e. the procurement of power being for the consumers in the State is the Appropriate Commission for the purposes of matters raised in the present case.*

33. *The second document is the Amendment Agreement dated 18.9.2006 . This shows that after grant of in principle approval by the State Commission and approval of Government of Haryana for the purchase of power from PTC purchased from the Appellant's project, the Appellant executed an amendment to the PPA. The amendment agreement recognized the assignment of the agreement to the purchaser with the following terms:*

“6. A new Article 16.6.5 of the PPA in Amendment Agreement shall be as follows:

16.6.5 Notwithstanding the provisions of this Article 16.6, in the event that a default under the PPA does not have the likelihood of being cured and the PPA is likely to be otherwise terminated, PTC may assign its rights and transfer its obligations under this Agreement to the Purchaser provided that the Purchaser expressly assumes all obligations of PTC under this Agreement and is in a position to perform them”.

37. *After execution of the PPA as well as the PSA, Haryana Power(R-2) approached the State Commission for approval of the PSA between the R-2 and R-3. In this proceeding, the State Commission,*

not only heard the Respondent Haryana Power (R-2) and PTC (R-3) but also the Appellant and only on the basis of statement made by the Appellant, it approved the PSA by the order dated 6.2.2008. The relevant extract of the order dated 6.2.2008 relating to the role played by the Appellant is as follows:

“Consequently, HPGCL, Power Trading Corporation (PTC) and Lanco Amarkantak Power Private Ltd., were directed to appear before the Commission on 04.01.2008 for making their presentation. Lanco Amarkantak Power Private Limited was also considered a concerned party since they are the generator with whom long term PPA has been signed by PTC India Ltd for supply of power and the same PPA was Annexure-I to PSA which has been put up for approval of this Commission. The hearing took place as scheduled”.

46. From bare reading of the above letter it is clear that the Appellant had specifically pleaded before the State Commission that the PPA forms integral part of PSA and the Appellant is an important party to the PSA for supply of power to the Haryana State. The Appellant in the said letter also affirmed that the sale of power by the Appellant to Haryana Power through PTC was a negotiated route which is permissible under the Tariff Policy as effective steps were already taken prior to the cut off date mentioned therein. On the basis of this affirmation, the State Commission passed the order dated 6.2.2008 giving approval to the PSA. The relevant extracts of which is as follows:

“The Commission after initial examination of the review petition, considered it appropriate to hear the concerned parties before taking a final decision in this case. Consequently HPGCL

Power Trading Corporation (PTC) and Lanco Amarkantak Power Private Ltd, were directed to appear before the Commission on 4.1.2008 for making their presentation Lanco Amarkantak Power Private Limited was also considered a concerned party since they are the generator with whom long term PPA has been signed by PTC India Ltd, for supply of power and the same PPA was Annexure-I to PSA which has been put up for approval of this Commission. The hearing took place as scheduled.

.....After a detailed hearing of the parties the Commission directed all of them to submit their views and their response to the query (ies) raised by the Commission during the course of hearing in writing by 14.1.2008. The parties complied with the direction within the stipulated date

.....However, M/s. Lanco Amarkantak Power Private Ltd. in its letter LAPPL/PTC/403/7817 dated 12.01.2008 filed in response to the direction given by the Commission at the time of hearing on 04.01.2008 has submitted that the operation of the pool account cannot be a notional one as per the PSA .

.....Consequently, in accordance with Para 1.1.3 of Schedule E of the PPA as amended vide amendment No.1 dated 19.10.2005 which is part of Annexure-1 to Power Sale Agreement (PSA). The Commission approves levelised capitalization tariff of Rs.2.32kWh at Generator's bus bar for the entire term of the agreement..."

47. So, the above order would clearly show that the purchase of power on the strength of PSA was approved by the State Commission mainly on the

basis of the admissions made by the Appellant before the State Commission.

48. When the Appellant actively participated in the proceedings, and induced all the parties concerned to act upon its representation that it would abide by the sale of power needed by Haryana Power for distribution to its consumers and particularly when the Appellant acted upon those agreements namely PSA and PPA entered into between the parties and in the absence of the challenge to the above proceedings and the orders passed by the State Commission on 6.2.2008 by the Appellant, can the Appellant be permitted to take a different stand? The answer is emphatic “No”.

59. As mentioned above, the PSA was submitted by Haryana Power (R-2) before the State Commission for its approval. Though it was rejected by the State Commission on 31.10.2007 it was approved only in the Review petition filed by the Haryana Power, on the basis of the plea by the Appellant recognizing the nexus between the PPA and PSA. In fact, Appellant sent the letter to the Commission on 12.01.2008 with regard to the above aspect. In that letter it was admitted by the Appellant that it was an important party in the PSA for the supply of power to the Haryana State as per the agreement. The relevant portion from the letter dated 12.1.2008 is as follows:

“1. Background:

*Lanco Amarkantak Power Pvt Ltd (LAPPL) and PTC signed PPA on 19.10.2005. PTC in turn entered into onward Power Sale Agreement with HPGCL on 21.9.2006, wherein the PSA’s Annexure I has PPA (signed between LAPPL and PTC) and, hence, **PPA forms an integral part of PSA. Thus LAPPL is an important party in***

***the PSA for the supply of power to the Haryana State as per the agreement.”
(emphasis supplied)***

98. Summary of our findings:-

a) Even though the Haryana Power (R-2) was not the party to the PPA dated 19.10.2005 and the Amended Agreement dated 18.9.2006, the parties to the PPA have intended that the power sold under the PPA to be further sold to Haryana Power (R-2), the ultimate beneficiary for the purpose of distribution for State Commission. Recitals to the PPA would categorically indicate that both the PSA and PPA are back to back agreements as the PPA between the Appellant and R-3, PTC got firmed up only with the execution of PSA entered into between Haryana Power (R-2) and R-3 PTC. As such the R-2 is entitled to enforce the terms of PPA by approaching the Haryana State Commission.

b) The fundamental basis on which the PSA was approved by the State Commission was that the PSA is based upon the PPA and PPA was annexed to PSA. Thus in approving PSA, State Commission has also approved the PPA as an Annexure to PSA. The PSA deals with the sale of electricity by PTC (R-3) to Haryana Power (R-2) based upon the purchase of electricity by PTC (R-3) from Lanco Power, the Appellant.

c) From bare reading of the admissions and submission made by the Appellant before the State Commission, it would be clear that the Appellant had pleaded before the State Commission that the PPA forms integral part of PSA and the Appellant is an important party in the PSA for supply of power to the Haryana State. The Appellant affirmed that the sale of power by the Appellant to Haryana Power through

PTC was a negotiated route which is permissible under the Tariff Policy as effective steps were already taken prior to the cut off date mentioned therein. On the basis of this categorical admission and affirmation, the State Commission passed the order dated 6.2.2008 approving the PSA. Therefore, from the Amendment Agreement to the PPA and the conduct of the Appellant in approaching the State Government on its own for supply of power for utility in the State of Haryana, it can be safely held that the nexus with Haryana Power (R-2) is established beyond doubt.

d) The Appellant specifically admitted before the State Commission that the Appellant's project and the sale of power by the Appellant to the Haryana Power (R-2) through the PTC (R-3) through negotiated route is permissible under the tariff policy as effective steps were taken even prior to the cut off date. Even in the written submissions filed by the Appellant before the State Commission in these proceedings, the Appellant brought out the status of the project and requested the State Commission to approve the sale of power from the Appellant's project to Haryana. This plea of admission made by the Appellant before the State Commission would confirm that the PPA forms an integral part of the PSA. Though the Appellant was not a party to the PSA, it became an important party in the proceedings before the State Commission for the approval of the PSA. Only on the basis of the said stand, the State Commission approved the PSA. If such a stand had not been taken by the Appellant before the State Commission it is quite possible that the State Commission would not have approved the PSA. In other words, in case the Appellant had taken a stand before the State Commission that the PSA and PPA are two distinct documents, and as such

the Commission has no jurisdiction to adjudicate between the two, the Commission would not have approved the PSA.

e) In view of the above, it has to be concluded that the PPA and PSA in the present case are two documents are interconnected and inextricably linked to each other and only State Commission has the power to fix the tariff for purchase of power by the PTC from the Appellant for the re-sale to the 2nd Respondent (Haryana Power) under PSA for the distribution to the consumers in the State of Haryana. Accordingly, the Haryana Electricity Regulatory Commission has jurisdiction to adjudicate upon the disputes between the Appellant generating company and the 2nd Respondent Haryana Power being deemed licensee. Thus, the finding on the question of jurisdiction given by the State Commission is upheld. As such there is no merit in Appeal No.15 of 2011.

79. While distinguishing above case, the Appellant submits that the question framed in the above case with regard to the jurisdiction of the State Commission was analysed by this Tribunal in the light of the peculiar facts and circumstances of the said case and those facts cannot be applied to the present case because those facts are materially different. In Appeal No.15 of 2011 it was found that on the basis of the materials available on record that the Generating Company, the Appellant in the above appeal was clearly a party to the PPA as well as the PSA and the PSA had been entered into

by the PTC admittedly on behalf of the Generating Company as an agent on behalf of the Appellant.

80. There is no dispute as mentioned earlier that, if an agent who is being authorised by its principal to enter into a contract does so on behalf of the principal, then the principal becomes the party to the contract. Appeal No.15 of 2011 is a case of that kind. Therefore, on the facts of the case, it was held that there was a nexus between the PPA and PSA. But, in the present case, the above features are not present. That apart, the PPA and PSA in the present Appeal are two independent transactions between two separate parties.

81. The important feature in the Appeal No.15 of 2011 is that the Appellant himself had pleaded before the State Commission praying for approval of the PSA contending that the PPA forms integral part of the PSA. Only on the basis of the statement of the Appellant, the State Commission passed the order of approval of the PSA. Admittedly, after execution of PSA, the Amendment Agreement was entered into between the appellant and the PTC referring to the PSA which had already been entered into and approved. In that context, the Tribunal held taking into consideration of the recitals of the PPA as well as amendment agreement entered into between the Appellant and the PTC held that both the PSA and PPA are back to back agreements, especially when the PPA

between the Appellant and PTC got affirmed only with the execution of PSA entered into between Haryana Power and PTC.

82. Thus, finding in the above case, would not apply to the present facts of the case. As we have already found in the earlier paragraphs that various clauses of the PSA and PPA in the present Appeal would show that PTC was not acting merely as a conduit between the generating company and Distribution Licensee but dealing on its own behalf independently as principal in the PPA and in the PSA and was taking upon itself the financial and commercial risk which have been referred to in various clause of the PPA and PSA and as such they are not back to back agreements.
83. Therefore, it is to be held in the light of the above discussion that the judgement in Appeal No.200 of 2009 and Appeal No.15 of 2011 cited by the Haryana Power (R-2) would not apply to the present facts of the case.
84. In this context, it would be interesting to note one other feature wherein Haryana Power (R-2) as well as PTC (R-3) have taken different stand contradicting each other before this Tribunal.
85. According to Haryana Power (R-2) Central Commission has no jurisdiction to adjudicate upon the present dispute and the

State Commission alone has got the jurisdiction. But, the PTC (R-3) has taken an altogether different stand to the effect that the Central Commission will have the jurisdiction in the present case.

86. Haryana Power (R-2) has given the following reasons to show that the Central Commission has no jurisdiction to adjudicate upon the present dispute:

(a) A 'Composite Scheme' as provided in Section 79 (1) (b) of the Electricity Act, 2003 as per the Commission is one in which a generating station is originally conceived for the purpose of meeting the power requirements of more than one State.

(b) The Generating Station could be set up in one State but the beneficiaries would be pre-identified and be in more than one State. Such generating Stations had, at their very inception, inter-state beneficiaries identified and consequently the sale from such stations involved more than one State.

(c) The expression 'composite scheme' for generation and sale of electricity in more than one State in clause (b) of sub section (1) of Section 79 (1) of the Act should be interpreted to mean a composite scheme on lines of central generating companies where the generating stations were envisaged from the very beginning to have generation and sale in more than one State.

87. On the basis of the above aspects, it is contended by the Haryana Power (R-2) that the Central Commission has no jurisdiction as the Appellant had neither identified the

beneficiaries at the inception of its project nor it was pre-determined that the power generated from the Appellant's project will always be sold in more than one State and further that the PPA read with the PSA in the present case cannot be a composite scheme that the generating station was envisaged from the very beginning to have generation and sale in more than one State.

88. But the PTC (R-3) has contended that in the present case, the Central Commission will have a jurisdiction to go into the dispute. The relevant submissions made by the PTC in its reply dated 27.12.2011 are given as under:

“ 7. It is submitted that in the facts and circumstances of this case it cannot be debated that the Appellant was aware all along that the electricity generated from the Project was to be supplied to different states. It is submitted that the PPA between PTC and the Appellant and PTC and the downstream purchasers, which the Appellant was aware all along, formed a scheme for generation of electricity in more than one State. It is submitted that as distribution of electricity was to be done in many States and the procurement process of many Distribution Licensees was involved, the CERC should regulate the tariff”.

.....

8. It is submitted Section 79 of the Electricity Act, 2003 gives a discretion to the CERC to decide as to in what manner it would like to regulate the tariff under clauses (a) and (b), that is, in respect of supply of electricity owned or controlled by the Central

Government or in case of supply of electricity by generating company not owned or controlled by the Central Government if such generating company enters into or otherwise has a composite scheme for generation and sale of electricity in more than one State. The CERC according to its wisdom can determine the tariff if it so feels is necessary both in respect of generating Companies owned or controlled by the Central Government as well as other generating companies not owned or controlled by the Central Government who enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State”.

89. So, on the basis of this averment, the PTC (R-3) made following prayer in its reply:

“Direct the Appellant to approach CERC for Regulation of its tariff for supply of Electricity in the State of Haryana, Punjab, Rajasthan and U.P; and”

90. So, the reply would clearly indicate that the PTC has taken a different stand in the reply filed before this Tribunal that the Central Commission alone has got the jurisdiction to go into the dispute in question and consequently, PTC prays this Tribunal that the Appellant shall be directed to approach the Central Commission for Regulation of its tariff for supply of electricity to the State of Haryana and other States.

91. By taking this stand, the PTC has in fact admitted in this Appeal that the Haryana State Commission will not have the jurisdiction and on the other hand, the Central Commission alone will have the jurisdiction and accordingly the Appellant

may be directed to approach the Central Commission. This stand taken by the PTC (R-3) is not only contrary to the stand taken by the Haryana Power (R-2) but also against the findings given by the State Commission holding that the State Commission alone has got the jurisdiction.

92. The present stand taken by the PTC (R-3) is being stoutly opposed by the Appellant contending that the PTC (R-3) has tried to make out a completely different case from that of its earlier stand taken before the State Commission. This objection is to be sustained in view of the fact that this stand had never been taken by PTC (R-3) before the Commission. Thus, PTC (R-3) has taken a new plea before this Tribunal and made a fresh prayer in the reply even without the cross Appeal being filed as against the findings of the State Commission.
93. As indicated above, both the Respondents have taken a different stand with reference to the jurisdiction of the Central Commission.
94. It shall be stated at this stage that we are only concerned with the limited question as to whether the State Commission has got the jurisdiction over the PPA dated 21.3.2006 between the Appellant and Haryana Power (R-2) there being no privity of contract between them.

95. In other words, we are not called upon to decide the question as to whether the present dispute has to be adjudicated by the Central Commission or not. We are only called upon to go into the legality, propriety and correctness of the impugned order passed by the State Commission holding that it has got the jurisdiction. As a matter of fact, on the basis of the pleas made by the parties before the State Commission, a question had been framed by the Commission as to whether it has got the jurisdiction to go into the dispute and whether the Petition seeking for the directions to the Appellant as well as the PTC on the strength of the PPA and PSA was maintainable or not.
96. In the present case, having considered the facts as well as various clauses of the PPA and PSA, the State Commission has given a finding that the State Commission has got the jurisdiction to go into the dispute in question and as such the Petition filed by the Haryana Power (R-2) was maintainable.
97. Hence, we can go into the only question as to whether the finding rendered by the State Commission with reference to its jurisdiction and maintainability of the Petition before the State Commission is correct or not. Our answer should be either 'Yes' or 'No'.
98. We cannot go beyond this. We feel that it is not appropriate to go into the question as to whether the Central Commission has got the jurisdiction in the event of our holding that the

decision of State Commission is not sustainable. The said exercise in our view, is beyond the scope of this Appeal. Furthermore, the Haryana Power (R-2) has given its own reasonings to indicate that the Central Commission has no jurisdiction and the State Commission alone has got the jurisdiction. This aspect was not dealt with by the State Commission, as the said question was not framed by the State Commission.

99. As indicated above, the PTC (R-3) has taken a stand which is a new plea before this Tribunal that Central Commission has got the jurisdiction meaning thereby that State Commission has no jurisdiction.
100. In this context, we are to be remembered that whenever it is held that the particular issue cannot be decided by the State Commission, it does not mean that the said issue could be decided only by the Central Commission. Similarly, when the Central Commission cannot decide the particular dispute, it does not automatically mean that the State Commission will have the jurisdiction to decide the said dispute.
101. There are principles and guidelines which have been given by this Tribunal and Hon'ble Supreme Court regarding the aspect as to what all are the issues that the Central Commission could deal with for consideration U/s 79 (1) (a) to (d) and (f) of the Act and what all are the issues that State

Commission could deal with for consideration U/S 86 (i) (b) and (f) of the Act. We cannot mechanically hold that since this issue cannot be decided by the State Commission, it must go to the Central Commission.

102. It is to be reiterated that we cannot be called upon to decide the issue as to whether the Central Government has got the jurisdiction to go into the dispute or not as this was not the question before the State Commission. This Appeal has been filed by the Appellant only to assail the findings and reasonings given by the State Commission for arriving at a conclusion that State Commission has got the jurisdiction.
103. Admittedly there is no cross Appeal filed by PTC (R-3) raising this plea as against the finding of the Commission that it has the jurisdiction. Therefore, it may not be proper for us to go into the question as to whether the Central Commission has got the jurisdiction and to direct the Appellant to approach the Central Commission. We are to answer for the limited question as to whether the State Commission has got the jurisdiction or not and nothing beyond that.
104. We have earlier discussed in various paragraphs giving the facts and materials furnished by the parties before the State Commission as well as before the Tribunal and held that the State Commission has got no jurisdiction in the light of the

said facts and various clauses of the PPA and PSA in the present case.

105. Therefore, we reject the arguments advanced by both the Learned Senior Counsel for the Respondents for the reasons stated above.

106. Let us now refer to and discuss the ratio decided by Hon'ble Supreme Court in various authorities cited by the parties on the issue of Privity of Contract which may decide the jurisdiction of the State Commission.

107. Though both the parties cited cartload of authorities, we need not go into all those authorities as they would relate to various relevant and irrelevant issues. We feel that it would suffice for us to deal with the judgments of the Hon'ble Supreme Court in relation to the Privity of Contract which is to be established for conferring the jurisdiction of the State Commission.

108. The Learned Senior Counsel for the Appellant cited the Constitution Bench Judgment of Hon'ble Supreme Court in the case of Md. Serajuddin Vs State of Orissa; (1975) 2 SCC 47 wherein the Constitution Bench has held that there was no privity of contract in relation to the alleged back to back agreements though the sale by the Appellant to State Trading Corporation, was through a separate contract and

subsequent sale by the State Trading Corporation made to the foreign buyers was through a different contract and therefore, it cannot be treated as the sale by the Appellant to the foreign buyers since there was no privity of contract between the foreign buyers and the Appellant. On the strength of this decision, it is contended that the facts of that case would squarely apply to the facts of this case and as such, the Tribunal may render the same finding in this Appeal following the ratio decided by Hon'ble Supreme Court in the Serajuddin case.

109. He also cited the (2009) 16 SCC 659 Tata Power Company case wherein the Hon'ble Supreme Court has held that the Commission is not empowered to issue directions to the Generating Company to supply electricity to a licensee who had not entered into any PPA with it.
110. Per contra, the Learned Senior Counsel for the Haryana Power (R-2) cited the order of the Central Commission dated 5.1.2006 in the matter of Uttaranchal Jal Vidyut Nigam Limited Vs Uttranchal Power Corporation Limited in Petition No.103/2005 in which it is held that the Central Commission has no jurisdiction to adjudicate upon the dispute which does not involve composite scheme. He also cited the judgment in Appeal No.183/2009 and the order in Review Petition

No.15/2010 passed by this Tribunal which confirmed the said order of the Central Commission.

111. On the strength of these decisions, it is contended by the Haryana Power (R-2) that the PPA read with PSA in the present case, cannot be construed as a composite scheme, where the generating station was envisaged from the very beginning to have generation and sale in more than one State.
112. The Learned Senior Counsel appearing for the PTC (R-3) as mentioned above, has taken a different stand to the effect that the Central Commission has got the jurisdiction to go into the present dispute especially when the PTC was an inter State Trading Licensee to whom the license was granted by the Central Commission.
113. The Learned Counsel for PTC (R-3) cited the Constitution Bench of Hon'ble Supreme Court in the case of PTC v. Central Electricity Regulatory Commission (2010) 4 SCC 603 wherein it has been held that 2003 Act is an exhaustive and complete code on all aspects relating to the electricity. He also cited the judgment of Hon'ble Supreme Court in the case of Southern Electricity Supply Co. of Orissa Ltd v. Sri Seetaram Rice Mill, (2012) 2 SCC 108 and (2010) 5 SCC 23 in the case of Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission wherein it is held that

since the State Electricity Board was unable to take decisions on tariff in an independent manner and in view of the dismal performance of the State Electricity Board, the power to resolve all the disputes and termination of tariff was conferred to the State Commission or Central Commission. He also cited (2008) 4 SCC 755 Gujarat Urja case in which it is held that in respect of all the disputes between the licensee and generating Company, either the Central Commission or a State Commission will have the jurisdiction to go into the disputes between them.

114. On the strength of these decisions, it is contended by the Learned counsel for the PTC that in case of inter State supply of Electricity where the power is flowing from one State to another and in the cases where there is no nexus to supply of electricity to the State where electricity is being consumed, the Central Commission will have the jurisdiction.
115. As already mentioned, this specific plea had not been raised before the State Commission. However, as stated above, we are only concerned with the question as to whether the Haryana State Commission has got the jurisdiction to go into the dispute between the Distribution Licensee of Haryana State and the generating Company, the Appellant over the PPA in which the Distribution Licensee of the Haryana State Commission was not the party.

116. In the light of the said question we will have to consider these judgments.
117. As far as the ratio decided by the Hon'ble Supreme Court in the Constitution Bench in PTC case, Tata Power Case and Gujarat Urja case is concerned, the same is not disputed. But, the question is "whether the ratio in these judgments cited by the Learned Senior Counsel for the Respondent would apply to the present facts of this case?"
118. On going through all the judgments cited by the parties, it is evident that the Constitution Bench judgment in the case of Md. Serajuddin Vs State of Orissa; (1975) 2 SCC 47 would be quite relevant. The facts of the said case before the Hon'ble Supreme Court are almost similar to the facts of the present case. The Hon'ble Supreme Court in the said case has clearly held that the sale by the Appellant to State Trading Corporation which was through a separate contract is different to the sale by State Trading Corporation to foreign buyers which was through a different contract and as such the sale by the Appellant to the State Trading Corporation cannot be treated as a sale to the foreign buyers and therefore, there was no privity of contract between the Appellant and foreign buyers. The relevant observation is as follows:

“25. The contention on behalf of the appellant that the contract between the appellant and the Corporation and the contract between the Corporation and the foreign buyer formed integrated activities in the course of export is unsound..... The features which point with unerring accuracy to the contract between the appellant and the Corporation on the one hand and the contract between the Corporation and the foreign buyer on the other as two separate and independent contracts of sale.....

.....The Corporation entered on the scene and entered into a direct contract with the foreign buyer to export the goods. The Corporation alone agreed to sell the goods to the foreign buyer. The Corporation was the exporter of the goods. There was no privity of contract between the appellant and the foreign buyer. The privity of contract is between the Corporation and the foreign buyer.

***26.Such contracts for procurement of goods for export are described in commercial parlance as back to back contracts.** In export trade it is not unnatural to find a string of contracts for export of goods. It is only the contract which occasions the export of goods which will be entitled to exemption. The appellant was under no contractual obligation to the foreign buyer either directly or indirectly.*

It was further observed in that very paragraph:-

The rights of the appellants were against the Corporation. Similarly the obligations of the appellant were to the Corporation. The foreign buyer could not claim any right against the Appellant nor did the appellant have any obligation to the foreign buyer. All acts done by

the Appellant were in performance of the appellant's obligation under the contract with the Corporation and not in performance of the obligations of the Corporation to the foreign buyer.

119. It was also observed in paragraph 27 of the judgment that:

27. The expression “sale” in Section 5 of the Act has the same meaning as in Sale of Goods Act. String contracts or chain contracts are separate transactions even when there is similarity relating to quantity, quality of goods, shipment, sampling and analysis, weighment and force majeure etc. or other similar terms. A contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for the money consideration called the price. There were two separate contracts. The price was different in the two contracts. This difference also dissociates the two contracts from each other.....”

120. As discussed above in this case also, there was no privity of contract between the Appellant and Haryana Power and the Appellant was under no contractual obligation of Haryana Power.

121. It may be noted that in the PSA between PTC and HPGCL it was provided in Clause 9.1.1 under which HPGCL was required to pay to PTC not only the cost incurred by PTC in accordance with the PPA but also the PTC’s trading margin in addition to the tariff.

122. Thus, the reasoning and the ratio of the judgment of the Hon'ble Supreme Court in the case of Md.. Serajuddin, supra, squarely applies to the present case and therefore it cannot be held that there is any privity of contract between the Appellant and the Haryana Power (R-2) and similarly, it cannot be said that the sale of electricity by the Appellant to the PTC (R-3) was a sale to Haryana Power (R-2).
123. Let us now come to the fresh issue raised by PTC (R-3) through the Application in IA NO.195 of 2012 in this Tribunal with a prayer to take on record the judgement of High Court dated 15.5.2012 and to decide the Appeal on the basis of the judgement of Delhi High Court.
124. On this fresh issue, both the parties were heard.
125. According to PTC (R-3), the High Court by its judgment dated 15.5.2012 set aside the Arbitral Award and gave a finding over the PPA between the Appellant and the PTC(R-3) to the effect that in the case of intra State supply of electricity, the State Commission will have jurisdiction and in case of Inter State supply of electricity, the Central Commission will have the jurisdiction. On the basis of the said finding, it is pointed out by the PTC that the High Court directed the Appellant to approach the Central Commission for fixation of tariff for supply of electricity to the PTC and therefore, the said finding given by the High Court is binding on this Tribunal and

therefore, the Appeal filed by the Appellant may be disposed of by giving the suitable consequential directions to the Appellant. He also cited the various authorities to show that the decision of the High Court will have binding effect on this Tribunal within its jurisdiction. The citations are as follows:

- (a) PTC V CERC (5 Judges) (2010) 4 SCC 603
- (b) Rupa Ashok Hurra v. Ashok Hurra (2002) 4 SCC 388
- (c) L Chandra Kumar v. Union of India (1997) 3 SCC 261
- (d) East India Commercial Co. Ltd., Calcutta v. The Collector of Customs, Calcutta, AIR 1962 SC 1893
- (e) Ambica Industries v. Commissioner of Central Excise (2007) 6 SCC 769
- (f) Baradakanta Misra v. Bhimsen Dixit (1973) 1 SCC 446
- (g) Suresh Desai & Associates v. Commissioner of Income Tax (Delhi HC) (1998) 230 ITR 912 (Delhi)

126. In reply to this submission made by the Senior Learned Counsel for PTC (R-3), the Learned Senior Counsel appearing for the Appellant while conceding that the Appellant cannot rely upon the Arbitral Award as it is set aside by the High Court, submitted that the other points raised by him would remain unaffected by the High Court's judgment setting aside the Arbitral Award. Further, it is contended that it may not be correct to say that the Tribunal is

bound by the decision of the High Court, since this Tribunal has been constituted and conferred with an appellate jurisdiction by replacement of the appellate jurisdiction of the High Court over the decision of the Electricity Commissions. It is also pointed out that as against the judgment of the single Judge, the Appeal has been entertained by the Division Bench and the matter has been posted for final disposal on 4.7.2010 and therefore there was no question of the judgment of the Single Judge being binding on this Tribunal.

127. We have carefully considered the submissions made by both the parties. The main question in the present Appeal raised for our consideration is whether Haryana State Commission has any jurisdiction over the dispute arising between the Appellant which is a Generating Company on one side and the Distribution Licensee and PTC (R-3) an Inter State Trading Licensee on the other side. The jurisdiction was questioned by the Appellant before the State Commission in the application filed by the Distribution Licensee seeking for the direction to the Appellant to perform its obligations as per the PPA.

128. The Appellant's main contention is that the Haryana Commission has no jurisdiction over the dispute arising between the Appellant, Generating Company and PTC (R-3) which is an Inter State Trading Licensee that too in the

application filed by the Distribution Licensee (Haryana Power) who was not a party to the PPA. In this case, we have dealt with the issue elaborately in the earlier paragraphs and on the basis of the various factual materials available on record including the various clauses of PPA and PSA entered between the parties, we have come to the conclusion that the State Commission has no jurisdiction as there was no nexus between the PPA and PSA.

129. Now, Learned Senior Counsel for the PTC on the strength of the High Court judgment dated 15.5.2012 virtually prays for a direction to be given to the Appellant to go to the Central Commission seeking for the relief. By this prayer, the PTC seeks for a declaration from this Tribunal that though the State Commission has no jurisdiction, the Central Commission will have the jurisdiction to go into the dispute.
130. As we have already indicated, we are not called upon to decide the question as to who is the appropriate authority to decide the dispute in question.
131. On the other hand, we are only called upon to decide the question as to whether the Haryana State Commission has got the jurisdiction in the facts and circumstances of the case and as to whether the conclusion arrived at by the State Commission regarding the jurisdiction is correct or not.

132. Even though, the Learned Senior Counsel for the Appellant contended that this Tribunal may not be bound by the judgment of the High Court which is challenged in the Appeal before the Division Bench, he submitted that even if the judgment of the High Court is to be treated as binding, then also, the present appeal deserves to be allowed in the light of the observations made by the single judge of the High Court in the judgment dated 15.5.2012. He quoted the following observations made by the High Court:

“Under Section 86 (1) (f) all disputes relating to the Regulatory jurisdiction of the SERC which involve a distributing licensee or a trading licensee or a transmission licensee has to be adjudicated exclusively by SERC. Under Section 2 (39) of the EA a ‘licensee means a person who has been granted a licence under section 14. It only depends on whether, sic (where) the transaction of sale of electricity has taken place and if it is within the jurisdiction of a SERC, then that SERC would have jurisdiction to entertain the dispute”.

133. On the basis of the specific observations made by the High Court that the issue of jurisdiction of the Commission would depend upon the question as to where the transactions of sale of electricity has taken place and if it is within the jurisdiction of the particular State, then that State Commission alone will have the jurisdiction to go into the dispute between the parties. According to the Learned Senior Counsel for the Appellant, if this observation of the High Court has to be

followed, then Himachal Pradesh State Commission alone will have jurisdiction as in that State only transaction of sale has taken place. In view of this submission, we will analyse the facts of the present case as to where the transaction of the sale of electricity has taken place.

134. According to the Appellant, both under the PPA dated 21.3.2006 entered into between the Appellant and PTC as well as the PSA dated 21.9.2006 entered into between the Haryana Power and PTC, the power was to be delivered in the State of Himachal Pradesh and not in Haryana and as such Haryana State Commission has no jurisdiction.
135. In the light of the criteria referred to by the High Court for deciding the question of jurisdiction, now we will consider the actual facts by reiterating the relevant clauses of the PPA and PSA which we have quoted earlier. In PPA, the definition of the Delivery Point has been referred to as under:

Definition of Delivery Point in the PPA

“Delivery Point” means the point of interconnection with the CTU or a Transmission Licensee from where open access in accordance with CERC Inter-State Transmission Regulations is available and at which the risk and title of the Billable Power and Billable Energy shall pass from the Company to PTC.

136. Similarly, in the PSA, the definition of Delivery Point has been referred to as under;

Definition of Delivery Point in the PSA

“Delivery Point” means the point of interconnection with the CTU or a Transmission Licensee, from where open access in accordance with CERC Inter-State Transmission Regulations is available and at which the risk and title of the Purchaser Billable Power and Purchaser Billable Energy shall pass from the Company to PTC and shall further pass from PTC to the Purchaser.

137. The reading of the above clauses in both the PPA and PSA would make it evident that point of interconnection is the Project bus bar which is situated in Himachal Pradesh and not in Haryana. However, on this basis, we are not inclined to give the finding that Himachal Pradesh State Commission will have the jurisdiction.

138. On perusal of the judgment of the High Court, it is noticed that the High Court of Delhi had no occasion to deal with various provisions of the clauses of the PPA and PSA entered into between different parties in order to decide about the jurisdiction to resolve the dispute in question. As mentioned above, on the basis of the materials available on record and also the clauses of the PPA and PSA we have held that PTC, the inter State Licensee has entered into PSA with Haryana

Power not as an agent of the Appellant but as principal to principal basis.

139. The main question that was considered by the High Court is with reference to the legality of the Arbitral Award. While going through that question, the High Court had gone into the other aspects with reference to the finding given in the Arbitral Award to the effect that the Central Commission has no jurisdiction for determination of tariff. In that context, the High Court came to the conclusion that finding in the Arbitral Award regarding the jurisdiction of the Central Commission is wrong. Consequently, the High Court directed the Appellant to approach the Central Commission that too, for determination of tariff. Therefore, the finding with reference to the direction of the High Court to the Appellant to approach the Central Commission for determination of tariff and not with reference to the issue in question. Therefore, we have to hold that the said Judgment has no bearing or impact on this Appeal before this Tribunal.

140. As stated above, this Tribunal has discussed the facts in detail and referred to various provisions of the PPA and PSA and also considered the relevant regulations framed by the State Commission and on that basis, as stated in the earlier paragraphs, we have concluded that the State Commission has no jurisdiction. At this juncture, we must make it clear

that we are not entering into the question as to which Commission i.e. whether Himachal Pradesh State Commission or Central Commission has got the jurisdiction to adjudicate on the dispute in question. If we enter into the said process we feel that it would amount to crossing our borders. Therefore, we would not do it.

141. In the light of the above reasoning, we are unable to accept the submission of the Applicant, PTC (R-3) and accordingly the Application in IA 195 of 2012 is rejected.

142. **Summary of Our Finding**

(i) State Commission will have jurisdiction to adjudicate upon the PPA between the generating Company and inter State Trader only if nexus or privity is established between the PPA and the PSA between the Inter State Trader and the Distribution Licensee. In the present case, we find no nexus between the PPA entered into between the Appellant and PTC (R-3) and PSA entered into between PTC (R-3) and Haryana Power (R-1). Hence, State Commission has no jurisdiction to go into the dispute in question.

(ii) The facts of the present case are different from the matter between Pune Power Development Pvt Ltd Vs

KERC & Ors in Appeal No.200 of 2009 decided by this Tribunal on 23.2.2011 and the matter between Lanco Power Ltd Vs HERC & Ors in Appeal No.15 of 2011 decided by this Tribunal on 4.11.2011. In Pune Power case, the dispute was between the Inter-State Trader and the distribution licensee of Karnataka relating to procurement of power by the distribution licensee against the agreement entered into with the trader. In Lanco Power case, it was found that there was nexus between the PPA entered into between PTC and the generating Company and PSA entered into between PTC and Haryana Power. In that case, Lanco Power appeared before the State Commission in the proceedings for approval of the PSA and requested the State Commission to approve the PSA. After execution of the PSA, the amended agreement was also entered into between Lanco Power and PTC referring to the PSA which had already been entered into. Thus, the findings of the Tribunal in Appeal No.200 of 2009 and Appeal No.15 of 2011 regarding jurisdiction of the State Commission will not apply in the present case.

(iii) PTC in the present case has taken a different stand to the effect that the Central Commission has got the jurisdiction to go into the present dispute

especially when the PTC was an Inter-State trading licensee to whom the license has to be granted by the Central Commission. PTC also through an Application prayed for taking on record the judgment of Delhi High Court dated 15.5.2012 and decide the Appeal on the basis of the judgment of the High Court. We must make it clear that we are not called upon to decide the question as to who is the appropriate authority to decide the dispute in question. On the other hand, we are called upon to decide the question as to whether Haryana State Commission has the jurisdiction in the facts and circumstances of the case. We find that on the basis of specific finding of the High Court also, Haryana State Commission will not have jurisdiction in the present case. However we are not inclined to give our findings on the issue whether the Central Commission has got the jurisdiction to adjudicate upon the dispute in question.

143. In view of our above findings, the order impugned is set-aside. The Appeal is allowed.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 20th July, 2012

✓ ~~REPORTABLE/NON-REPORTABLE~~