

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.46 of 2012

Dated: 11th Oct, 2012

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

**M/s. Karamchand Thaper & Bros (C.S.)Ltd.,
"Thaper House",
25, Brabourne Road,
Kolkata-700 001**

Appellant

Versus

- 1. M/s. M. P. Power Trading Co. Ltd.,
Block No.2, Shakti Bhawan,
Rampur, Jabalpur-482 008**
- 2. M.P Electricity Regulatory Commission,
"Metro Plaza", 5th Floor,
Bittan Market,
E-5, Area Colony,
Bhopal-462 016**

Respondents

**Counsel for the Appellant (s): Mr. Harish Malhotra,Sr.Adv
Mr. M K Shah
Mr. Ravi Sikri**

Counsel for the Respondents (s):Mr. Hemant Sahai,Sr.Adv.
Mr.Manoj Dubey
Mr. Ambica Garg
Mr. S. Venkatesh for R-1
Ms. Surbhi Sharma
Mr. Anurag Sharma
Mr. Hemant Singh
Ms.Shikha Ohri for R-2

J U D G M E N T

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

1. M/s. Karamchand Thaper & Bros. (C.S.) Ltd is the Appellant herein. M/S. M P Power Trading Co. Ltd is the First Respondent. Madhya Pradesh Electricity Regulatory Commission (State Commission) is the Second Respondent.
2. The Appellant has filed this Appeal challenging the impugned order dated 21.2.2012 passed by the State Commission as against the Appellant upholding the contention of M.P State Trading Company Ltd (R-1) that the contract between them was a concluded contract.
3. The brief facts leading to the filing of this Appeal are as follows:-
 - (a) M/s.MP Power Trading Company Limited (R-1) invited tenders through the Expression of Interest

on 16.4.2009 for the sale of power on firm basis for the period from 16.7.2009 to 30.9.2009. In response to the same, M/s. Karamchand Thaper and Brothers (C.S) Limited , the Appellant through its letter dated 21.4.2009 made the offer for purchase of the said power. Accepting the said offer, the M P Power Trading Company (R-1) issued a Letter of Intent in favour of the Appellant on 27.4.2009 requesting its acceptance of the Letter of Intent within three days failing which, the M.P. Power Trading Company (R-1) will be free to take appropriate action as deemed fit in the matter.

- (b) In reply to the same, on 30.4.2009, the Appellant sent a letter to the M P Power Trading Company (R-1) thanking for the Letter of Intent issued in their favour and assuring that it would make all sincere efforts for the sale of surplus power on the basis of the said Letter of Intent.
- (c) In response to the said letter, on 7.5.2009, the M.P Trading Company (R-1) sent a reply to the Appellant thanking for its acceptance of Letter of Intent and requesting to explore all possibilities for scheduling of contracted power in terms of

clause 9 of the Letter of Intent and to initiate early action for obtaining advance bookings on transmission corridor.

- (d) In response to letter dated 7.5.2009, the Appellant, Karamchand Thaper & Brothers (CS) Ltd wrote letter dated 15.5.2009 to M/s. M P Power Trading Company that it was exploring all possibilities for scheduling of surplus power from M P Power Trading Company for the period from 16th July, 2009 and 30th September, 2009 in terms of the Letter of Intent issued in its favour. In addition to this letter, the Appellant again wrote another letter dated 19.5.2009 on the similar lines.
- (e) Again on 22.5.2009, the M P Power Trading Company sent a reminder letter to arrange for the advance reservation of transmission corridor or else they would take action by resorting invoke the compensation clause.
- (f) After receipt of the said letter, on 23.5.2009, the Appellant sent a reply letter intimating to the Respondent that there was no probable buyer available to purchase the power and so, it might make alternative arrangements for the sale of power.

- (g) However, on 25.5.2009, the Appellant again wrote a letter informing the M P Power Trading Company (R-1) that it was participating in a tender enquiry issued by the Maharashtra State Electricity Distribution Company Limited (MSEDCL) Mumbai on the strength of the Letter of Intent issued in their favour and assured that it was making sincere efforts for sale of power in pursuance of the said Letter of Intent.
- (h) Thereupon, on 20.7.2009, the M.P Trading Company (R-1) wrote a letter to the Appellant requesting to open weekly revolving Letter of Credit. However, the Appellant did not open the same. Under those circumstances, the M P Power Trading Company (R-1) raised the bill dated 06.10.2009 and directed the Appellant to pay the compensation of Rs.46.2 Crores for breach of contract by non off-take of power.
- (i) In reply to the said letter, the Appellant wrote letters dated 31.7.2009 and on 7.10.2009 raising an objection to the compensation bill stating that the contract was not concluded.
- (j) On receipt of the said letters, the M.P. Trading Company (R-1) issued a legal notice to the

Appellant demanding for the payment of compensation.

- (k) In reply to the said legal notice, the Appellant wrote a letter on 6.2.2010 reiterating that the Appellant was not liable to pay the compensation as there was no concluded contract between the parties.
- (l) In view of the above stand taken by the Appellant, M.P. Power Trading Company Limited (R-1) approached the State Commission and filed the Petition under Section 86(1) (f) for adjudication of dispute with the following prayers:

“ (i) To hold that Respondent (Karamchand Company) is liable to pay an amount of Rs.46.2 crores as compensation for non off-take of power during the period from 16.07.2009 to 30.09.2009 in terms of the LOI dated 27.4.2009 issued by MP Tradeco.

(ii) To direct Respondent to pay an amount of Rs.46.2 crores along with surcharge at the rate of 1.25% per month till the date of actual payment.”

- (m) This Petition was entertained by the State Commission and notice was issued to the Appellant. On receipt of the notice, the Appellant appeared before the State Commission and raised preliminary objection to the maintainability of the Petition as well as the claim of the M P Power Trading Company (R-1) stating that there was no concluded contract in existence between the parties and that therefore, there was no breach of contract warranting compensation.
- (n) The State Commission, after hearing both the parties on the preliminary issue, passed the impugned order dated 21.2.2012 giving a finding against the Appellant that since a Letter of Intent dated 27.4.2009 issued by the M P Power Trading Company Limited (R-1) was accepted the Appellant through its letter dated 30.4.2009, the legally enforceable contract had come into existence. On the basis of the said finding, the State Commission proceeded to go into other issues as to whether the Appellant is liable for breach of contract and if so, what is the quantum of damages that are payable by the Appellant to the M P Power Trading Company.

(o) At this stage, the Appellant, aggrieved by the impugned order dated 21.2.2012 deciding the preliminary issue as against the Appellant, has filed this Appeal before this Tribunal.

4. The Learned Senior Counsel for the Appellant while assailing the impugned order has made the following submissions:

(a) The M.P Power Trading Company (R-1) invited tenders on 16.4.2009 intending to sell power for the period from 16.7.2009 to 30.9.2009. The Appellant, through its letter dated 21.4.2009 gave their offer and quoted their rates for the purchase of surplus power for the said period subject to the terms and conditions as contained in the letter dated 16.4.2009 inviting tenders.

(b) On 27.4.2009, the M.P. Power Trading Company (R-1), having accepted the said offer, issued a Letter of Intent in favour of the Appellant by putting a counter offer regarding the right of the Respondent for termination and claim for compensation in case of default. In the said letter, the M.P Power Trading Company (R-1) asked the Appellant to send its acceptance of

Letter of Intent within three days failing which the M.P. Power Trading Company (R-1) will be free to take appropriate action.

- (c) In response to the same, on 30.4.2009, the Appellant sent a letter stating that sincere efforts would be made by selling the surplus power but due to impending general parliamentary elections in the country, most of the heads of the State Power Utilities were busy and have hardly any time left for taking decision in this regard. As such, this letter did not indicate that the counter offer referred to in the Letter of Intent was accepted by the Appellant.
- (d) Then on 23.5.2009, the Appellant sent a letter mentioning that despite offers sent to various power utilities, they could not succeed in finding a buyer of power and requested the M.P. Power Trading Company (R-1) to look for alternative arrangements for sale of above surplus power. This letter also would not indicate that absolute acceptance by the Appellant was made and communicated under Section 7 of the Contract Act. On the other hand, it has been

intimated to the Respondent to look for an alternative arrangement for sale of power.

- (e) Thereafter, there were several letters correspondence between the parties. In those letters, the Appellant merely intimated about its efforts to sell the surplus power to various utilities by participating in tender inquiries but it did not intimate or communicate that the Appellant accepted the counter offer contained in the Letter of Intent made by the M P Power Trading Company, imposing some fresh conditions other than the conditions contained in the Expression of Interest dated 16.4.2009.
- (f) Admittedly, no PPA was entered into. Therefore, there was no concluded contract. Under those circumstances, the claim for the compensation on the ground of alleged breach of a contract which was not concluded, is not legal. As such, the order impugned holding that there was a concluded contract is not valid in law.

5. The learned Senior Counsel appearing for the M.P. Power Trading Company (R-1) would make the following reply submissions:

- (a) In response to the Respondent's letter of Expression Interest dated 16.4.2009, the Appellant submitted its offer through letter dated 21.4.2009 which was duly accepted by the M.P. Power Trading Company through issue of letter of Intent on 27.4.2009. Under such circumstances, the offer of Appellant dated 21.4.2009 and acceptance by the M.P. Power Trading Company (R-1) through the Letter of Intent on 27.4.2009, would make the Contract complete. Subsequent execution of PPA was a mere formality. Just because the PPA was not executed, it does not imply that the Appellant would not be made liable since the Letter of Intent was accepted by the Appellant.
- (b) On receipt of letter dated 27.4.2009, the Appellant had issued a letter dated 30.4.2009 in which it has categorically stated that ***“We are thankful for the issue of above referred Letter of Intent in our favour for the sale of firm power available with the M.P. Power Trading Company during the period from 16th July, 2009 to 30th September, 2009 with a compensation from both sides”.***

- (c) From a bare perusal of the above letter, it is clear that the Appellant accepted the Letter of Intent by thanking the M P Power Trading Company (R-1) for issuing the Letter of Intent in their favour. In the said letter, the Appellant assured the Respondent that the Appellant would make all sincere efforts for the sale of surplus power in pursuance of the Letter of Intent. This should show that there was an acceptance of the Letter of Intent and as such the contract between the parties was concluded.
- (d) In response to the said letter, the Respondent on 7.5.2009 sent a reply recording that ***“We are thankful to you for accepting the terms and conditions of LOI No.811”***. The Appellant did not dispute or respond with any protests to the said letter.
- (e) The Appellant sent several letters intimating the M P Power Trading Company (R-1) that it was making rigorous efforts to sell the surplus power as per the Letter of Intent thereby reaffirming its acceptance and assurance. The letter dated 15.5.2009, 19.5.2009, 25.5.2009, 1.6.2009 and 25.6.2009 would clarify this position.

(f) The perusal of these letters would make it clear that the Appellant was acting in furtherance to the terms and conditions of the Letter of Intent. The contention of the Appellant that the agreement was never entered into and that therefore, the Appellant is not liable for compensation is only an afterthought with the objective to absolve from its obligations.

(g) It is a well settled principle of law that a valid contract also exists between the parties by way of their conduct under Section 8 of the Contract Act. The various correspondences showing the conduct of the Appellant have been taken into consideration by the State Commission and on that basis, the State Commission gave a finding that there is a concluded contract which is perfectly justified. Hence the Appeal is liable to be dismissed.

6. In the light of the above rival contentions, the following questions would arise for consideration:

(a) Whether the Letter of Intent dated 27.4.2009 can be construed to be accepting the offer made by the Appellant through its offer letter dated 21.4.2009?

- (b) Whether the reply by the Appellant dated 30.4.2009 could be construed to be acceptance of the Letter of Intent issued on 27.4.2009, when it was in the nature of a counter offer which requires absolute acceptance on the part of the Appellant?
 - (c) Whether in the absence of an unambiguous and absolute acceptance of the Appellant, contract could be said to have concluded or come into existence between the parties?
- 7. On these questions, the Learned Senior Counsel for both the parties argued at length. They also cited several authorities.
- 8. The core question involved in this Appeal is this: Whether the concluded contract between the Appellant and the M P Power Trading Company (R-1) on the basis of the correspondence between the parties through various documents available on record, had come into existence or not?
- 9. Before dealing with this question, it shall be pointed out that the State Commission which comprises of both Chairman and Member, has issued the impugned order dated 21.2.2012. In this order, the Chairman has given a separate finding that concluded contract had come into

existence and on the other hand, the Member of the Commission through the separate order giving his dissenting view has held that there was no concluded contract emerged. Ultimately, Under Section 92 (3) of the Electricity Act by exercise of veto power, the Chairman's finding that there was concluded contract has been declared to be the order of the State Commission.

10. While discussing the issue above, it is better to refer to the impugned order passed by the State Commission through its Chairman. The relevant portion of the said order is as follows:

“19. The Commission has to review the correspondence exchanged between the parties to conclude whether there exists a valid/binding contract or not. In the instant case the Petitioner invited tenders on 16.4.2009 for sale of power on firm basis for the period from 16.7.2009 to 30.9.2009. In response to the aforesaid enquiry, an offer was made by the Respondent vide letter dated 21.4.2009. Accordingly, Letter of Intent (LOI) was issued in favour of the Respondent on 27.4.2009 seeking acceptance of the same within three days failing which the Petitioner would be free to take appropriate action as deemed fit in the matter. The relevant Para of the said LOI is reproduced below:

“Your acceptance may please be sent through fax within three days failing which M.P. Tradeco will be free to take appropriate action as deemed fit in the matter. Subsequently, an agreement for sale of power shall be executed”.

20. In pursuance to the said LOI, the Respondent wrote a letter to the Petitioner on 30.4.2009 wherein it thanked the Petitioner for issuing LOI in their favour with compensation on both sides. The relevant extract of the Respondent's letter dated 30.4.2009 reads as under:

"We are thankful for the issue of above referred LOI in our favour for the sale of Firm power available with M P Tradeco during the period 16th July, 2009 to 30th September, 2009 with compensation on both sides". In this connection it is submitted as under:

1. That sincere efforts have been made by offering this surplus power available to the following deficit State Power Utilities and Private Distribution Companies:

a) Punjab State Electricity Board, Patiala

b) Haryana Power Procurement Centre, Panchkula, Haryana

c) Maharashtra State Electricity Distribution Company Ltd, Mumbai

d) Tata Power Company Limited Mumbai

e) Rajasthan Power Procurement Centre, Jaipur

f) North Delhi Power Limited (NDPL), New Delhi

g) BSES Rajdhani Power Limited, New Delhi

h) BSES Yamuna Power Limited, New Delhi

2. *That due to General Parliament Elections in the Country, most of the Head of Departments of State Power Utilities are over busy with the Election Process and have hardly any time left for taking decisions in this regard. Further you will also appreciate that there was hardly 2 to 3 days available after the issue of above referred LOI late in the evening on 27.4.2009 for getting the required LOI/Order issued from the buyer for initiating the application for the advance reservation of transmission corridor by 30th April, 2009 for the month of July, 2009 with the nodal RLDC.*

3. *That State Power Utilities/Private Distribution Companies, who were taken into confidence before submitting the offer have tied up power procurement for the above said period from the other power producers due to the late issuance of LOI by MP Tradeco:*

“We are making our all sincere and rigorous efforts for the sale of the above said surplus power.

Thanking you and assuring you our best services at all times to come”.

21. *The Commission has observed that the Respondent had sent the above letter on 30.4.2009 to the Petitioner within three days as per the terms of LOI which was issued on 27.4.2009. From the perusal of the letter dated 30.4.2009, it is clear that the Respondent accepted the LOI by thanking the Petitioner for issuing LOI in its favour and also assured the Petitioner that it was making all sincere and rigorous efforts for the sale of surplus power. Counsel for the Respondent has vehemently argued that the Petitioner had modified the conditions offered*

by the Respondent, hence the LOI dated 27.4.2009 can only be termed as a counter-offer and not acceptance. Further the Respondent has contended that the said LOI of the Petitioner was never accepted by the Respondent as it was a counter offer. The Commission is of the view that if there were any modification or any substantial or material variations according to the Respondent in the LOI, the Respondent ought to have pointed this out in its correspondence. However, the Respondent never pointed out the modifications in its above letter. Only objection raised by the Respondent in the above letter was on the late issuance of the LOI by the Petitioner. The Commission has observed that even when the Petitioner wrote a letter to the Respondent on 7.5.2009 vide which it thanked the Respondent for accepting the LOI, the Respondent never denied its acceptance in its subsequent letters. The letter dated 07.05.2009 clearly indicates that the Petitioner was under an impression that its LOI has been accepted by the Respondent. The relevant extract of the Petitioner's letter dated 07.05.2009 reads as follows:

“Kindly refer this office LOI No.811 dated 27.04.2009 placed on M/s. KCT for sale of surplus power by M.P Tradeco from 16th July, 2009 to 30th September, 2009 in different time blocks. We are also thankful to you for accepting terms and conditions of LOI No.811:

Regarding issue of LOI, it is to clear that M.P Tradeco had placed LOI well in time within three days after opening of the i.e. on 27.04.2009, therefore, the point raise by you regarding late issuance of LOI is not acceptable”.

22. Perusal of the above correspondence makes it abundantly clear that the Respondent had not raised

any objection in respect to the modifications made by the Petitioner in the order dated 21.4.2009. Instead of disputing the correctness of the Petitioner's averment made in the aforesaid letter regarding the acceptance of LOI by the Respondent, the Respondent kept on writing letters (dated 15.5.2009 and 19.5.2009) to the Petitioner informing about the progress made in furtherance to the LOI. The Respondent's letter dated 15.5.2009 written in reference to the Petitioner's letter dated 7.5.2009 is reproduced below:

"Vide our letter No.PT/KCT/-MP Transeco/3004 /2009-10 dated 30.4.2009, we have already submitted that as per Clause 9 of the subject cited LOI, "We are exploring all the possibilities for scheduling of surplus power from MP Tradeco for the period 16th July, 2009 to 30th September, 2009 and have sent officers immediately to various deficit State Power Utilities and Private Distribution Companies as per details given below:

- a) Punjab State Electricity Board, Patiala*
- b) Haryana Power Procurement Centre, Panchkula, Haryana*
- c) Maharashtra State Electricity Distribution Company Limited, Mumbai*
- d) Tata Power Company Limited, Mumbai*
- e) Rajasthan Power Procurement Centre, Jaipur*
- f) North Delhi Power Limited (NDPL), New Delhi*
- g) BSES Rajdhani Power Limited, New Delhi*
- h) BSES Yamuna Power Limited, New Delhi*

It is very kindly submitted that NDPL (a Private Power Distribution Company in Delhi) and HPPC (State Power Procurement Utility of Haryana) were taken into confidence before submitting our offer to MP Tradeco. During follow up with NDPL, against our above mentioned offer sent to them, we have been intimated by NDPL, that they tied up power procurement for the above said period with Jindal Power and there is no additional requirement for this period. We are constantly in touch with HPPC, who are in the process of deciding very shortly for the purchase of surplus power for the period May, 2009 to September, 2009. As per past experience, you will very kindly also agree that the purchasers for the surplus power of above said period are mainly from Northern India only.

In view of our very long cordial relation with MP Transco, we shall most sincerely make all out efforts to maintain our cordial relations with MP Transco.

Thanking you and assuring you our best services at all times to come”.

23. The Commission has observed that in the letter dated 15.5.2009, the Respondent informed the Petitioner that it was exploring all possibilities for scheduling of surplus power from the Petitioner for the period 16th July, 2009 to 30th September, 2009 in terms of Clause 9 of the LOI. The letters dated 15.5.2009 and 19.5.2009 of the Respondent clearly show that, the Respondent was acting in furtherance of the said LOI. On 22.5.2009, the Petitioner sent a reminder letter to the Respondent asking them to initiate early action for obtaining advance booking of the transmission corridor in accordance with the

CERC Regulation dated 21.1.2009 and on failure to initiate early action for reservation of corridor, compensation clause would be invoked. On receipt of this letter, the Respondent wrote another letter dated 23.5.2009, asking the Petitioner to make alternate arrangement for sale of aforesaid surplus power as no buyer was available with the Respondent.

However, on 25.5.2009, the Respondent again wrote a letter to the Petitioner informing that it is participating in MSEDCL tender enquiry for the sale of surplus power as per the LOI. The Respondent vide its letters dated 1.6.2009, 25.6.2009, 9.7.2009 kept on informing the Petitioner that it is participating in various tender enquiries for sale of surplus power in pursuance of the LOI dated 27.4.2009. The letter dated 25.6.2009 is reproduced below:

“In continuation to our above referred letter, it is very kindly submitted that Maharashtra State Electricity Distribution Company Limited (MSEDCL) have very recently issued tender enquiry for the purchase of 325 MW RTC Firm Power for the period 1st June, 2009 to 31st May, 2010 and the due date of opening of this tender enquiry is on 25.5.2009. We are participating in this tender enquiry for the sale of MP Surplus Power as per subject cited LOIs and shall immediately update MP Tradeco about the outcome of this tender enquiry.

It is once again assured that we shall most sincerely make all out efforts to maintain our cordial relations with MP Tradeco”.

24. The matter has been examined by the Commission in light of the principles laid down by the Hon'ble Supreme Court in its various judgments and

submissions made by the parties. From a perusal of the correspondence, it is observed that the Respondent conveyed its acceptance to the Petitioner by sending a letter dated 30.4.2009 within the stipulated time mentioned in the LOI dated 27.4.2009. In furtherance to this acceptance, the Respondent kept on updating the Petitioner about the development made at its end. Referring to Section 7 of the Indian Contract Act, 1872 the Respondent has submitted that a valid, binding and concluded contract would come into existence only if the offer is accepted in absolute and unqualified terms. The Respondent has alleged that LOI dated 27.4.2009 was a counter proposal which required the acceptance of the Respondent and as the Respondent never sent its acceptance there cannot be a binding contract. On the other hand, Counsel for the Petitioner has submitted that at various instances, the Respondent by its conduct showed that it was acting in furtherance the said LOI.

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26. *Admittedly, acceptance under Section 7 of the Indian Contract Act, 1872 must be absolute and unconditional. However, acceptance need not always be expressed, it may also be implied or inferred from the conduct of parties as per Section 8 of the Indian Contract Act, 1872. In Bhagwati Prasad Pawan Kumar v Union of India 2006 (V) SCC 311: (Supra) the Hon'ble Supreme Court has also observed as under:*

“19. It is well settled that an offer may be accepted by conduct. But conduct would not amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. Each case must rest on its own facts”.

27. *Coming to the facts of this case, the Respondent by its very conduct had accepted the terms and conditions of the LOI dated 27.4.2009 without protesting against modification made in the LOI issued on 27.4.2009 and such acceptance by conduct is recognised in the Contract Act as valid acceptance. Hence, the argument of the Respondent that there is no concluded contract between the parties in absence of acceptance in terms of LOI stands dismissed.*

28. *Counsel for the Respondent has further contended that correspondence to the Petitioner by the Respondent was solely made for the purpose of maintaining cordial relations with the Petitioner. According to Counsel for the Respondent, the matter was inchoate and only at the stage of negotiations. However, the Commission is of the view that from the language of the correspondence, it is clear that the Respondent did not write letters to the Petitioner just for maintain cordial relations with the Petitioner but was making sincere efforts for selling surplus power in terms of the LOI. In view of these facts and circumstances, the Commission is of the view that the Respondent had accepted the LOI and was constantly making efforts in pursuance to the said LOI. From the correspondence of the Respondent, it is observed that on the basis of LOI issued by the Petitioner, the Respondent participated in the tender enquiry of the MSEDCL and TNEB and was taking advantage of the same. It is also observed that the Respondent never raised any objection regarding the modification made by the Petitioner in the LOI or existence of a valid contract till the first invoice was raised by the Petitioner. At no point did the Respondent ever refute the existence of a contract. Hence the contention of the Respondent that there was no agreement is not tenable.*

29. *On the basis of the documents and the correspondence available on record, the Commission is of the view that in the instant case the execution of the PPA was not a condition precedent but a mere formality. Hence, the Commission concludes that a legally enforceable contract in terms of the relevant provisions of the Contract has already come into existence when the LOI dated 30.4.2009 was issued, received and accepted by the Respondent.*

30. *Next issue before the Commission is to determine whether the Respondent is liable for the breach of contract or not and if there is breach of contract, the quantum of damages, if any, that are payable to the Petitioner. The Commission has decided to take-up these issues in the next hearing”.*

11. The crux of the findings in the impugned order passed by the State Commission through its Chairman are as follows:

- (a) **The M.P Trading Company Limited invited tenders on 16.4.2009 for sale of power on firm basis for the period from 16.7.2009 to 30.09.2009. M/s. Karamchand Thaper & Bros. (C.S.) Ltd made an offer to purchase the said power through letter dated 21.4.2009. M/S M P Trading Company Limited on considering the offer made by M/s. Karamchand Thaper & Bros. (C.S) Ltd. issued Letter of Intent in favour of M/S. Karamchand Thaper & Bros (C.S) Ltd on 27.4.2009. In the letter, the M.P Trading Company sought for the acceptance of**

the Letter of Intent within three days. On receipt of the letter within three days, i.e. on 30.4.2009, M/S. Karamchand Thaper & Bros (C.S) Ltd., sent a reply letter to M/s. M.P Power Trading Company Ltd thanking them for issuing the Letter of Intent in their favour and assuring that it was making all sincere and rigorous efforts for sale of surplus power supplied by M/s. M.P Power Trading Company Ltd. This letter shows that there was acceptance of the Letter of Intent issued by the M.P. Power Trading Company Limited by M/S. Karamchand Thaper & Bros. (C.S) Limited.

- (b) M/s. Karamchand Thaper & Bros (C.S) Ltd., contended that since the M/S. M P Power Trading Company modified certain conditions offered by it, the Letter of Intent cannot be said to be the an acceptance of offer made by M/s. Karamchand Thaper & Brothers as it can be termed as a counter offer and as such, there was no acceptance by M/s. Karamchand Thaper & Brothers (C.S) Ltd of the counter offer. The perusal of the letter dated 30.4.2009 shows that M/s. Karamchand Thaper Company did not mention in the letter that there was a**

modification of the conditions offered by it and they could not accept the counter offer. In the absence of any objection to the said letter dated 27.4.2009, it is to be construed that the letter dated 30.4.2009 sent by M/s. Karamchand Thaper Brothers (C.S) Ltd, is the acceptance of Letter of Intent.

- (c) In the reply letter sent 7.5.2009 sent by M/s. M.P Power Trading Company on receipt of the letter dated 30.4.2009 sent by M/s. Karamchand Thaper & Bros (C.S) Ltd, on 7.5.2009, M/S. M P Power Trading Company Limited thanked M/s. Karamchand Thaper & Bros for accepting the Letter of Intent. The perusal of this letter shows that when the letter dated 7.5.2009 was sent by M/s. M.P Power Trading Company, the M/s. M P Power Trading Company had an impression created by the M/s. Karamchand Thaper & Bros (C.S) Ltd through its letter dated 30.4.2009 that the Letter of Intent had been accepted by M/s. Karamchand Thaper & Bros (C.S.) Ltd. by which the contract is concluded.**

- (d) **As a matter of fact, M/s. Karamchand Thaper & Bros (C.S.) Ltd had never raised any objection in respect of the alleged counter offer made by M/s. M.P Power Trading Company in its offer dated 21.4.2009. M/s. Karamchand Thaper & Bros (C.S) Ltd never disputed the correctness of the claim of M/s. M P Power Trading Company through the letter dated 7.5.2009 that the Letter of Intent was accepted by M/s. Karamchand Thaper & Bros (C.S) Ltd, at any point of time. Instead, M/s. Karamchand Thaper & Bros (C.S) Ltd kept on writing letters to M/s. M P Power Trading Company informing them about their steps taken to sell the power in furtherance to the Letter of Intent.**
- (e) **The letters sent by M/s. Karamchand Thaper & Bros (C.S) Ltd dated 15.5.2009 and 19.5.2009 would clearly show that M/S. Karamchand Thaper & Bros (C.S) Ltd informed M/s. M P Power Trading Company that it was exploring all possibilities for scheduling all surplus power supplied by M/s. M P Power Trading Company in terms of Clause 9 of the Letter of Intent.**

- (f) **M/s. M P Power Trading Company sent a letter to M/s. Karamchand Company on 22.5.2009 asking it to initiate early action for obtaining advance bookings of the transmission corridor and on failure by M/s. Karamchand Thaper & Bros (C.S.) Ltd, the M.P Power Trading Company would invoke the compensation clause. Only then in the reply to this letter, M/s. Karamchand Thaper & Bros wrote the letter dated 23.5.2009 asking M/s. M.P Power Trading Company that it might make alternative arrangements for the sale of surplus power.**
- (g) **M/s. Karamchand Thaper & Bros (C.S) Ltd did not stop with that. It went on writing letters to M/s. M P Power Trading Company that it was participating in various tender inquiries for the sale of surplus power in pursuance of the Letter of Intent dated 27.4.2009. Those letters are dated 15.5.2009, 19.5.2009, 25.5.2009, 1.6.2009, 25.6.2009 and 9.7.2009. From perusal of these correspondence, it is clear that M/s. Karamchand Thaper & Bros (C.S)Ltd conveyed its acceptance to M/s. M P Power Trading Company by sending letter dated 30.4.2009**

within three days as mentioned in the Letter of Intent dated 27.4.2009 and in furtherance to its acceptance, M/s. Karamchand Thaper & Brothers (C.S) Limited kept on informing M/s. M P Power Trading Company Limited about its efforts by participating in various tender inquiries held in various States for the sale of surplus power as per the Letter of Intent in question.

- (h) It is true that Section 7 of the Indian Contract Act, 1872 provides that the acceptance must be absolute and unconditional. However, acceptance need not always be expressed. It may be implied or inferred from the conduct of the parties as per Section 8 of the Indian Contract Act, 1872.**
- (i) The present facts of the case would clearly reveal that M/s. Karamchand Thaper & Bros (C.S) Limited by its very conduct had accepted the terms and conditions of the Letter of Intent dated 27.4.2009 by means of letter dated 30.4.2009 without any protest against the alleged modifications contained in the Letter of Intent. On the other hand, it went on informing**

M/s. M P Power Trading Company that it is participating in various tender inquiries for making a sincere effort for selling the surplus power in terms of the said Letter of Intent issued by M/s. M P Power Trading Company in favour of M/s. Karamchand Thaper & Bros (C.S) Limited.

- (j) **This conduct would show that the offer was accepted and the legally enforceable contract had come into existence when the Letter of Intent issued on 27.4.2009 was received and accepted by M/s. Karamchand Thaper & Bros (C.S) Ltd which was intimated through its letter dated 30.4.2009.**

12. These are the findings given by the Chairman of the State Commission, which was declared to be the impugned order of the State Commission.

13. As we stated above, the Member of the State Commission differed from the view of the Chairman and gave a dissenting view. Let us now refer to the findings given by the Member of the State Commission giving his dissenting views which is as under:

“

(v) After considering the rival contentions of the parties and examining the contents of the correspondence between the parties on record, the Commission would frame following two issues for consideration:

(a) Whether the letter of intent dated 27.4.2009 can be considered as acceptance of offer submitted by the Respondent?

(b) If (a) is answered in negative, then, whether the communication dated 30th April, 2009 of the Respondent can be taken as acceptance of the offer made vide LOI 27.4.2009 of the Petitioner and/or whether subsequent correspondence of the Respondent can be construed as acceptance of offer by conduct.

(vi) On the first issue, the Petitioner has stated that there were material variations viz-a-viz his offer, in respect of terms of letter of credit which was to be accepted as payment security and also addition of right of termination of contract in event of payment default which was not in his offer.

(vii) On the other hand, the Petitioner has relied on Hon'ble Supreme Court judgment in Dresser Rand S.A Vs Bindal Agree Chem Ltd., AIR 2006 SC 871 and Shankarlal Narayandas Mundade Vs New Mofussil Co. Ltd (1947) 73 IA 98 and similar other judgments. The Commission has given careful consideration to the rival contentions however, as the text of the LOI itself requires the Respondent to accept it and the material deviations mentioned by the Respondents are a matter of record, it is held that the LOI was not an acceptance of the offer of the Respondent but a counter offer.

(viii) Now we will take up the second issue as the first issue has been answered in negative. On this issue, the main contention of the Petitioner was that the letter dated 30th April, 2009 was an acceptance letter. The Petitioners have also contended that even if this not so, the subsequent conduct of Respondents makes it amply clear that they had accepted the offer made by LOI dated 27.5.2009 and have acted in furtherance of that LOI. On the other hand, the Respondents have contended that acceptance cannot be read into their communications and that is a well settled law that the acceptance must be absolute and unqualified as envisaged under section 7 of the Indian Contract Act, 1872. Both the parties have cited various rulings of the higher courts to buttress their contentions. Let us first examine the communication dated 30th April, 2009 mentioned earlier in para 20. The Respondents while thanking the Petitioner for issue of LOI mentioned 8 utilities to whom surplus power was offered and stated that these Utilities have since tied up the power procurement due to late issue of LOI and that they are making sincere efforts for sale of above said surplus power. It is difficult to read an absolute and unqualified acceptance in the above text as required under Section 7 of the Indian Contract Act, 1872. At best, it can be seen as a ploy for keeping the offer open in hope of roping in buyer(s) subsequently. We, therefore, hold that this communication cannot be construed as an absolute and unqualified acceptance resulting into a binding contract.

(ix) Now let us examine the contention of acceptance by conduct taken by the Petitioner. The Petitioner has contended that the

Respondent continued to convey to them that they have made offer of this surplus power to various utilities against the tender floated by them. To this, the Respondent mentioned that they were only assisting the Petitioner in view of their long standing business relationship in disposal of the surplus power. The sale of power was scheduled to commence from 15th July, 2009. It has been mentioned that after the letter dated 30th April, 2009 various other letters dated 15.5.2009 and 19.5.2009 were written by the Respondent mentioning that they are exploring all possibilities of selling the surplus power of the Petitioner. On 22nd May, 2009, the Petitioner sent a communication to the Respondent saying that failure to initiate early action for reservation of corridor will result in invocation of compensation clause. On 23rd May, 2009, the Respondent conveyed to the Petitioner that they make alternative arrangement for sale of surplus power as they have no buyers. However, further on 25.5.2009, 01.6.2009, 25.6.2009 and 9.7.2009, Respondents informed the Respondent that it is participating in various tender for sale of surplus power. It has been contended by the Petitioner that the Respondents were all along acting in furtherance of the LOI placed on them and that thus, they have accepted the LOI by their conduct.

It is seen that in the first communication itself, the Respondent has mentioned 8 power utilities to whom the power was offered. It was further mentioned that because of the late issue of LOI, the said utilities have tied up their power requirement elsewhere.

.....

Based on the above analysis, the Commission concludes that the LOI placed by the Petitioner was neither accepted vide letter dated 30th April, 2004 in a manner which is absolute and unqualified as required under Section 7 of the Indian Contract Act nor the correspondence on record establish acceptance by conduct as contended by the petitioner. As such, no concluded contract had emerged. The Petition for adjudication of dispute under Section 86 (1) (f) of the Electricity Act, 2003 is not sustainable, hence dismissed”.

14. The crux of the findings and the reasons given in the dissenting order passed by the Member of the Commission are as follows: **“There are two issues framed for consideration:**

- (a) **Whether the Letter of Intent dated 27.4.2009 issued by the M.P Trading Company can be considered as acceptance of offer submitted by M/s. Karamchand Thaper & Bros. (C.S) Limited ?**
- (b) **Whether the reply letter dated 30.4.2009 to the Letter of Intent dated 27.4.2009 sent by M/s. Karamchand Thaper & Bros. (C.S) Ltd and subsequent correspondence between the parties could be construed as acceptance of offer by conduct.**

The answers to above questions are as follows:

- (a) There were material variations in the offer through its Letter of Intent sent by M/s. M P Trading Company in respect of the terms of Letter of Credit which was to be accepted as payment security as well as right of termination of the contract in the event of payment of default. Therefore, this material variation between the offer and the Letter of Intent would amount a counter offer. In view of the above, it is held that the Letter of Intent was not an acceptance of the offer by M/s. Karamchand Thaper & Brothers (C.S) Ltd but it is only a counter offer.
- (b) It is a well settled law that the acceptance must be absolute and unqualified as envisaged under Section 7 of the Indian Contract Act, 1872. On receipt of the Letter of Intent dated 27.4.2009, M/s. Karamchand Thaper & Brothers (C.S) Limited sent a communication dated 30.4.2009 that since there was a delay in the issue of Letter of Intent, 8 Utilities to whom surplus power was offered, have tied-up the power procurement

and however, they are making sincere efforts for the sale of above surplus power. This communication cannot be construed to be as an absolute and unqualified acceptance resulting in a binding contract.

(c) The other correspondence between the parties also would show that M/s. Karamchand Thaper & Bros. (C.S)Ltd was making its sincere efforts to sell the surplus power. M/s. Karamchand Thaper & Brothers (C.S) Ltd by the letter dated 23.5.2009 conveyed the M.P Trading Company that they might make alternative arrangements as they have no buyers. Therefore, the Letter of Intent was neither accepted through the letter dated 30.4.2009 nor the subsequent correspondence would establish the acceptance by conduct. As such no concluded contract has emerged.

15. These are the findings given by the Member of the State Commission giving his dissenting views.

16. Bearing in mind the findings of both the Chairman and Member, let us now discuss the issue raised herein.

17. In the impugned order, the State Commission has concluded that a legally enforceable contract in terms of the relevant provisions of the Contract Act had already come into existence when the Letter of Intent dated 27.4.2009 was received, accepted and communicated through the letter dated 30.4.2009 by the Appellant.
18. Thus, the State Commission has decided only one of the issues regarding the objection raised by the Appellant with regard to nature of contract which is a preliminary issue before the State Commission. The State Commission after holding that there was a concluded contract, has adjourned the matter for deciding other issues namely as to whether there is any breach of contract committed by M/s. Karamchand Thaper & Bros. (C.S.)Ltd., and if so, the quantum of the compensation if any payable. The last portion of the impugned order of the State Commission which proceeds to go into the other issues, is as follows:

“30. Next issue before the Commission is to determine whether the Respondent is liable for the breach of contract or not and if there is breach of contract, the quantum of damages, if any, that are payable to the Petitioner. The Commission has decided to take-up these issues in the next hearing”.

19. In view of the fact that the other issues are pending before the State Commission, we are only concerned with the question as to whether legally enforceable contract in terms

of the relevant provisions of the contract Act had come into existence or not.

20. According to the Appellant, a valid, binding and concluded contract would come into existence only when the offer is accepted in absolute and unqualified terms under Section 7 of the Contract Act, but the Letter of Intent dated 27.4.2009 with a counter offer was never accepted by M/s. M P Power Trading Company Limited (R-1) and as such there could not be a binding contract.
21. On the other hand, the Learned Senior Counsel for the Respondent has strenuously contended that the facts and circumstances of the case would clearly establish that the offer and acceptance was complete by the conduct of the parties as contemplated Under Section 8 of the Indian Contract Act.
22. To appreciate the arguments advanced by the learned Senior Counsel of both the parties, it is appropriate to quote the provisions as contained in Section 7 and 8 of the Indian Contract Act. They are as follows:

“Section 7 Acceptance must be absolute

In order to convert a proposal into a promise the acceptance must-

- (1) *Be absolute and unqualified.*

(2) *Be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted; and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner and not otherwise; but; if he fails to do so, he accepts the acceptance”.*

23. As per this Section, the acceptance must be absolute , unconditional and unqualified

24. Let us now refer to Section 8 of the Indian Contract Act which reads as under:

“Section 8 Acceptance performing conditions, or receiving consideration:

“Performance of the conditions of proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal”.

25. The perusal of this Section shows that the said acceptance which must be absolute and unconditional need not always be expressed but the said acceptance may be implied or inferred from the conduct of the parties.

26. In this context, Section-9 of the Contract Act also is to be taken note of. The Section-9 of the Contract Act is as follows:-

Section 9 Promises, express and implied:

In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

27. The reading of this Section would reveal that a contract can be implied/inferred under this Section. A contract implied in fact requires meeting of minds. The courts may refuse to read an implied term into a contract which did not clearly indicate the nature of the term. However, when the correspondences and stipulations between the parties are clear, which necessarily arise out of the contract between the parties, they will be implied or inferred.
28. As indicated above, the Appellant relies upon Section 7 of the Indian Contract Act. On the contrary, the Respondent relies upon the Section 8 & 9 of the Indian Contract Act.
29. In support of the stand with reference to Section 7 of the Indian Contract Act, 1872 the Appellant has cited the following authorities:
- (a) Dresser Rand S.A. Vs M/s. Bindal Agro Chem Ltd., AIR 2006 SC 871
 - (b) D.S. Construction Ltd., Vs. RITES Ltd & Anr 127 (2006) Delhi Law Times 1

- (c) Zodiac Electricals Pvt Ltd., Vs. Union of India & Ors (1986) 3 SCC 522
- (d) Binani Metals Ltd Vs. Union of India 114 (2004) Delhi Law Times 637 (DB), Delhi High Court
- (e) Union of India Vs. Uttam Singh Duggal & Co. As reported in AIR 1972 Delhi 110
- (f) K. Sriramulyu V. Aswatha Narayana, reported in AIR 1968 sc 1028.

30. The relevant observations made in above decisions can be quoted as below:

- (a) **Dresser Rand S.A. Vs M/s. Bindal Agro Chem Ltd., AIR 2006 SC 871**

“It is now well settled that a letter of intent merely indicates a party’s intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract. It is no doubt true that a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that a detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties. But the question whether the letter of intent is merely an expression of an intention to place an order in future or whether is a final acceptance of the offer thereby leading to a

contract is a matter that has to be decided with reference to the terms of the letter”.

(b) **D.S. Construction Ltd., Vs. RITES Ltd & Anr 127 (2006) Delhi Law Times 1**

“10.....The offer or proposal had to be accepted in its entirety with the condition or not at all and, if the offer was not accepted in its entirety, then it would be a deemed refusal on the part of the plaintiff and, therefore, the defendant No.1 would not be entitled to forfeit the earnest money. There is no other clause which has been pointed out under which eh defendant No.1 could forfeit the earnest money in the circumstances obtaining tin this case.

13.....This principle is codified in India in Section 7 of the Contract Act which, inter alia, provides that ‘in order to convert a proposal into a promise, the acceptance must be absolute and unqualified....The counter-proposal made by the plaintiff was also not accepted by the defendant No.1. As such, no agreement was reached by and between the plaintiff and the defendant No.1 to extend the validity of the initial offer of 24.3.2003 upto 30.11.2003 upto 30.11.2003 ‘unconditionally”.

(c) **Zodiac Electricals Pvt Ltd., Vs. Union of India & Ors (1986) 3 SCC 522**

“2....It is, therefore, obvious that though in the opening part of this letter dated August 13, 1979 the DGS&D appeared to accept the offer contained in the tender of the Appellants, they did not unconditionally accept this offer, because they insisted that the Appellants should deposit by September 15, 1979 a sum of Rs.75,000 as

Security Deposit". The DGS&D thus added a condition which was contrary to the stipulation made in the offer of the Appellants. This letter dated August 13, 1979 could not possibly, therefore, be regarded as unconditional acceptance of the offer of the Appellants and in the circumstances it could not be possibly contended that a concluded contract had been arrived at between the parties by reason of this letter dated August 13, 1979. This letter dated August 13, 1979 was really in the nature of a counter offer made by the DGS&D to the Appellants. The question is whether this counter offer was accepted by the Appellants".

3.....It is undoubtedly true that in the first part of the telegram the Appellants used the expression, "we accept your advance order", but in the context of the second part of the telegram this expression can only mean that the Appellants were acknowledging receipt of the advance order which contained the counter offer. The telegram could not, therefore, be construed as amounting to unconditional acceptance of the counter offer made by the DGS&D".

(d) **Binani Metals Ltd Vs. Union of India 114 (2004) Delhi Law Times 637 (DB), Delhi High Court**

"22. It is a settled position in law that a notice inviting tenders merely indicate a readiness to receive offers. The offer comes from a person who submits the tender and there is no contract until the person asking for the tender accepts one of them. In this regard, we may refer to a judgment of the learned single bench of this Court with whom we are in respectful agreement in the case entitled as Delhi Development Authority Vs.

Bhasin Associates, reported at 79 (1999) DLT 363 holding that the tender notice is merely an invitation to contractors for making an offer and does not amount to an offer or proposal. Notice inviting tender issued by way of an advertisement is not a proposal within the meaning of Contract law but merely which invites a proposal. It is the bid that constitutes an offer. Therefore, unless the bid is accepted and the acceptance communicated to the bidder, there is no binding contract between the parties”.

In the instant case, there was no concluded contract between the parties in as much as the offer of the defendant was conditional and there was no acceptance of such offer made by the defendant and hence no breach of a legal duty or right. No liability can be fastened upon the defendant for breach of something which did not exist.

(e) *Union of India Vs. Uttam Singh Duggal & Co. As reported in AIR 1972 Delhi 110*

“10. In my opinion, this letter, called letter of acceptance, is only a counter offer and it cannot reasonably be construed to be acceptance of an offer.

.....

It is also significant to notice that this letter begins by communicating that the tender had been accepted on behalf of the President of India and the signatory of the letter namely Shri Ishwar Dayal, neither purports to accept it in the name of or on behalf of the President of India, nor does he purport to append his signatures for and on behalf of the President. The ultimate portion of the letter,

therefore, properly required the Appellant contractor to complete the formal agreement which was being prepared on the basis of the tender and, the letter of acceptance. This letter, therefore, constituted a counter offer which required absolute and unqualified acceptance on the part of the Appellant contractor.

.....

14.....As a matter of law, when there is variance between the offer and acceptance even in respect of any material term, acceptance cannot be said to be absolute and unqualified and the same will not result in the formation of a legal contract”.

- (f) *K. Sriramulyu V. Aswatha Narayana, reported in AIR 1968 sc 1028.*

“....It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case, there is a binding contract and the reference to the more formal document may be ignored. In other words, there may be a case where the signing of a further formal agreement is made a condition or term of the bargain and if the formal agreement is not approved and signed there is no concluded contract”.

31. The Respondent, in support of its contention on the basis of Section 8 of the Indian Contract Act has cited the following authorities:

- (a) Bhagwati Prasad Pawan Kumar v. Union of India, AIR 2006 SC 2337
- (b) McDermott International Inc. V. Burn Standard Co. Ltd, (2006)11 SCC 181
- (c) Union of India through General Manager Central Railway, T. Bombay v. Babulal Uttamchand Bhandari, AIR 1968 Bom 294
- (d) Shankarlal Narayandas Mundade v. The New Mofussil Co. Ltd and Ors reported in AIR 1946 PC 97

32. The relevant portion of the observations contained in above authorities is as under:

- (a) Bhagwati Prasad Pawan Kumar v. Union of India, AIR 2006 SC 2337

It is well settled that an offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. The decisions which we have noticed above also proceed on this principle. Each case much rest on its own facts. The courts must examine the evidence to find out whether in the facts and circumstances of the case the conduct of the "offeree" was such as amounted to an unequivocal acceptance of the offer made. If the

facts of the case disclose that there was no reservation in signifying acceptance by conduct, it must follow that the offer has been accepted by conduct. On the other hand if the evidence discloses that the “offeree” had reservation in accepting the offer, his conduct may not amount to acceptance of the offer in terms of Section 8 of the Contract Act”.

- (b) McDermott International Inc. V. Burn Standard Co. Ltd, (2006)11 SCC 181

“...It is true that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also right that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law....”.

- (c) Union of India through General Manager Central Railway, T. Bombay v. Babulal Uttamchand Bhandari, AIR 1968 Bom 294

“Section 8 is a further amplification of the principle where from the conduct of a party his acceptance is inferred. This section must be read along with Section 7. In order that acceptance of the proposal be inferred the acceptance of the consideration must be unconditional. Of course, if by any action

on the part of the acceptor the proposer cannot be restored to his former position, then the acceptor cannot be permitted to say that his acceptance should be treated as other than as per the original proposal. But in the absence of such estoppel being applicable the conditional acceptance cannot become absolute acceptance when there are no such words in Section 8”.

- (d) Shankarlal Narayandas Mundade v. The New Mofussil Co. Ltd and Ors reported in AIR 1946 PC 97

“9. But apart from the objection that the point was taken too late, their Lordships, with all due respect for the Judges of the High Court, are satisfied that it is without substance. In their Lordship’s opinion, the facts do not support the inference that the parties intended to be bound only when a formal agreement had been executed. On the contrary, their Lordships consider that there was ample evidence to prove that both parties intended to make, and believed that they had made, a binding oral agreement. Their desire and intention to put that agreement into formal shape does not affect its validity. It was contended by Counsel for the Respondent that the agreement was necessarily incomplete because it had been left to the solicitors to settle some of its terms and because (as counsel rightly submitted) a solicitor has no implied authority to make a contract on his client’s behalf. Their Lordships are of opinion, however, that no question as to a solicitor’s implied authority arises in this case. In their Lordship’s view, it is a fair inference from the evidence that Sir Shapurji authorized Mr. Manekshaw to put before the plaintiff for his acceptance the “usual” terms. In

the circumstances which have already been explained, this seems to their Lordships to have been a very natural and business like course for Sir Shapurji to take, and necessarily resulted, when the Appellant accepted the terms, in the formation of a binding contract”.

33. In the light of the above decisions, we shall discuss the issue taking note of the present facts of the case.
34. It cannot be debated that as per Section 7 of the Contract Act, the acceptance must be absolute and unqualified. However, Section 8 of the Contract Act provides the acceptance of offer by conduct as against the other modes of acceptance such as verbal or written communication, as contemplated under Section 7 and 9 of the Contract Act. Therefore, in a way Section 8 provides a unique provision in the Contract Act. Section 8 emphasises that the performance of the conditions of a proposal or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal is an acceptance of the proposal. It is based on the principle that if an offer is made subject to a condition, the offeree cannot accept the benefit under the offer without accepting the condition.
35. The Contract Act recognised both the express and implied acceptance of an offer. Implied acceptance is when acceptance of a proposal is not made in words. Of course, the word implied has not been used in Section 8 but since

acceptance which is not made in words, but by an act or conduct, Section 8 can be deemed to lay down instances of implied acceptance of a proposal in the light of Section-9.

36. If there exists a prior agreement among the parties laying down how the transactions shall be undertaken, that agreement shall determine whether in the subsequent transactions governed by the such agreement, there is an acceptance of proposal. If the agreement makes a provision for acceptance of the proposal by mere omission or silence, the failure to return the goods or papers, as the case may be, shall signify the acceptance of the proposal.
37. On the other hand, if there is no prior agreement to the implied acceptance of the proposal by not returning the goods or papers, mere omission or silence shall not signify the acceptance of the proposal. This interpretation of the Section 8 with reference to the acceptance of the conduct has been given in the Law of Contract by Shri T K Mukherjee.
38. Before dealing with this issue in the light of the facts and circumstances of the case, it would be appropriate to quote the relevant mandatory guidelines and well laid principles propounded by the various High Courts as well as Hon'ble Supreme Court in the various authorities quoted above. Let us refer to those guidelines which are given below:

- (a) It is well settled that a letter of intent merely indicates a party's intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract. However, a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is common in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that a detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties.
- (b) The offer or proposal had to be accepted in its entirety with the condition or not at all. If the offer was not accepted in its entirety, then it would be a deemed refusal on the part of the concerned party. This principle is codified in India in Section 7 of the Contract Act which provides that the acceptance must be absolute and unqualified.

- (c) Notice inviting tender is not a proposal within the meaning of Contract law. It merely invites a proposal. It is the bid that constitutes an offer. Therefore, unless the bid is accepted and the acceptance communicated to the bidder, there is no binding contract between the parties.
- (d) If the documents or letters relied upon as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed, will go through. In the former case, there is no enforceable contract because the condition is unfulfilled. In the latter case, there is a binding contract and the reference to the more formal document may be ignored.
- (e) It is well settled that an offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention of accepting the offer. Each case must rest on its own facts. The courts must examine the evidence to find out whether in the

facts and circumstances of the case the conduct of the “offeree” was such as amounted to an unequivocal acceptance of the offer made.

- (f) If the facts of the case disclose that there was no reservation in signifying acceptance by conduct, it must follow that the offer has been accepted by conduct. On the other hand if the evidence disclose that the “offeree” had reservation in accepting the offer, his conduct may not amount to acceptance of the offer in terms of Section 8 of the Contract Act.
- (g) The terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The letter correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract.
- (h) Section 8 of the Contract Act is amplification of the principle where from the conduct of a party his acceptance is inferred. This Section must be read along with Section 7. In order that acceptance of the proposal be inferred, the acceptance of the consideration must be

unconditional. If by any action on the part of the acceptor the proposer cannot be restored to his former position, then the acceptor cannot be permitted to say that his acceptance should be treated as other than as per the original proposal.

- (i) When there are ample materials to prove that both parties intended to make and believed that they had made, there will be a binding oral agreement. Their intention to put their agreement into formal shape does not affect its validity.

39. In the light of the above guidelines, let us now discuss the issue as to whether element of offer and acceptance have been established in the present case to conclude that there was a concluded contract.

40. Let us now recall the relevant dates and facts to consider the issue in question.

41. The MP Power Trading Company (R-1) is a Government Company. It is a Trading Licensee which undertakes transactions of sale and purchase of electricity. M/s. Karamchand Thaper & Bros (C.S) Ltd, the Appellant is also a Trading Licensee. The Appellant is entitled to undertake trading in electricity throughout India as it has obtained the

trading licence from the Central Electricity Regulatory Commission (Central Commission).

42. The M.P Power Trading Company (R-1) invited tenders on 16.4.2009 for sale of power on firm basis for the period between 16.7.2009 and 30.9.2009. In response to the above tender, the Appellant, M/s. Karamchand Thaper & Bros. (C.S) Ltd made an offer to the M.P Power Trading Company (R-1) through the letter dated 21.4.2009. Accepting the said offer, the M P Power Trading Company(R-1) issued a Letter of Intent dated 27.4.2009 in favour of the Appellant requiring its acceptance of the said Letter of Intent within three days failing which the M P Power Trading Company (R-1) would be free to take appropriate action as deemed fit. Accordingly, on 30.4.2009, the Appellant sent a letter to M/s. M P Power Trading Company thanking for the Letter of Intent and assuring that on the basis of the Letter of Intent, it would make all sincere efforts for sale of surplus power. Subsequently, M/s. M P Power Trading Company through the letter dated 7.5.2009 thanking it for the acceptance of the terms and conditions of the Letter of Intent, requested the Appellant to explore all the possibilities for scheduling of contracted power and initiate early action for obtaining advance bookings of transmission corridor as per the Central Commission's Regulations. It was also indicated in the letter dated 07.5.2009 that as per

compensation clause, compensation shall be applicable for the full/deficit amount of power as per the Letter of Intent.

43. Again on 22.5.2009, M/s. M P Power Trading Company sent a reminder letter to the Appellant requesting it to ensure reservation of transmission corridor. In the said letter, M/s. M P Power Trading Company requested the Appellant to initiate early action for obtaining advance bookings of transmission corridor on or before 25.5.2009 failing which M/s. M P Power Trading Company would take appropriate action including lodging of claim of compensation in accordance with the Letter of Intent. Only on receipt of this letter, the Appellant replied on 23.5.2009 intimating that since there was no probable buyer available to purchase the said power, M/s. M P Power Trading Company might look for the alternative arrangements for the sale. However, the Appellant within two days wrote another letter dated 25.5.2009 informing M/s. M P Power Trading Company(R-1) that it was participating in a tender enquiry issued by the Maharashtra State Electricity Distribution Company and was also making sincere efforts for sale of power in pursuance to Letter of Intent dated 27.4.2009 issued in their favour. Thereupon, through the letter dated 1.6.2009 and 25.6.2009, the Appellant went on writing letters to the M P Power Trading Company that it was taking sincere efforts by participating in the various tender enquires conducted in

Maharashtra, Tamil Nadu and other places in furtherance to the Letter of Intent issued by M/s. M.P Power Trading Company (R-1) in favour of the Appellant.

44. At this stage, on 20.7.2009, M/s. M P Power Trading Company requested the Appellant to open weekly revolving Letter of Credit. However, the Appellant failed to open the same. Therefore, M/s. M P Power Trading Company raised invoice dated 6.10.2009 directing the Appellant to pay compensation for the period 1.8.2009 to 31.8.2009 and 1.9.2009 to 30.9.2009. In response to the said invoice, the Appellant on 7.10.2009 sent a reply stating that the Appellant was not liable to pay any compensation. On receipt of the said letter, M/s. M P Power Trading Company issued a legal notice dated 19.1.2010 to the Appellant demanding the payment of compensation. On receipt of the same, the Appellant sent a reply on 6.2.2010 refusing to pay compensation on the ground that there was no concluded contract between the parties.

45. Aggrieved by the conduct of the Appellant, the M P Power Trading Company (R-1) approached the State Commission and filed the Petition for adjudication of the dispute in question. Ultimately, the State Commission having heard both the parties on the preliminary issue raised by the Appellant, passed the impugned order holding that there

was a concluded contract and kept the other issues pending before the State Commission for consideration.

46. In view of the above, facts, we are to confine ourselves with the limited question as to whether the contract was concluded or not.

47. The Appellant, M/s. Karamchand Thaper & Bros (C.S) Ltd has filed this Appeal challenging the impugned order of the State Commission on three grounds as under:

(a) The Letter of Intent issued by the M P Power Trading Company (R-1) cannot be construed to be accepting the offer made by the Appellant through its letter dated 21.4.2009.

(b) The Letter of Intent dated 27.4.2009 was in the nature of a counter-offer which required an absolute acceptance by the Appellant which has not been made in the present case.

(c) The letter dated 30.4.2009 sent by the Appellant does not show that there was absolute acceptance. As such, there was no concluded contract between the Appellant and M/s. M P Power Trading Company Ltd.

48. Elaborating these grounds, the Appellant has made the detailed submissions that M/s. M P Power Trading Company

is not entitled for compensation for breach of contract which was not concluded. The crux of the submissions are as follows:

- (a) For constituting breach of contract, there must be a concluded contract between the parties. Only when there is a concluded contract, the breach can be complained of. In the absence of a breach of concluded contract, there could not be any question of claiming compensation.
- (b) Merely because Letter of Intent was issued by M/s. M P Power Trading Company, it was not binding upon the M P Power Trading Company to provide the power during the contracted period. On the other hand, the M P Power Training Company retained itself the right for withdrawal partial or full power due to any reasons whatsoever through its Expression of Interest dated 16.4.2009.
- (c) The Appellant in response to the letter dated 16.4.2009 inviting tenders has written a letter on 21.4.2009 quoting their rates for purchase of surplus power which was subject to the various terms and conditions. In response to the Letter of Offer dated 21.4.2009, the M P Power Trading

Company issued a Letter of Intent dated 27.4.2009 putting the fresh conditions in the nature of a counter offer which was departed materially with various terms and conditions as stated in the letter of offer dated 21.4.2009. Since its counter offer had not been accepted by the Appellant and no PPA was entered into between them, the contract had not come into existence.

49. We have carefully considered these submissions and given our anxious consideration.
50. Admittedly, in this case, there is no agreement entered into between the parties for the sale of surplus power available with M/s. M P Power Trading Company. As indicated above, the main contention of the Appellant is that M/s. M P Power Trading Company had not entered into Power Purchase Agreement with the Appellant and mere Letter of Intent issued by the M P Trading Company cannot be construed to be a concluded contract and that therefore, the Appellant is not liable to compensate M/s. M P Power Trading Company for the alleged breach of contract.
51. At the outset, it shall be stated that this contention urged by the Appellant deserves outright rejection as it is a settled law that valid contract can also exist between the parties by way

of conduct as per Section 8 of the Contract Act. Mere signing of the PPA, does not conclude a contract. Signing of contract is only a formality. The interpretation clause of the relevant provisions of the contract Act clearly indicates that the agreement can be reached by the process of offer and acceptance through the conduct as well. Therefore, we have to consider the issue on the basis of available materials on record and decide as to whether the elements of offer and acceptance have been established in this case through the conduct of the parties.

52. The process of consideration of the above aspects involves two phases:

- (a) The First Phase would require the consideration of
 - (i) the document dated 16.4.2009 inviting tenders;
 - (ii) the document dated 21.4.2009 giving the offer by the Appellant
 - (iii) Letter of Intent which was issued by M/s. M P Power Trading Company in favour of the Appellant on 27.4.2009 and
 - (iv) the letter dated 30.4.2009 sent by the Appellant in response to the said letter to show that there was offer and acceptance.
- (b) The Second Phase would involve the other letters correspondence between the Appellant and M/s. M P Power Trading Company on various dates

namely (i) the letter 7.5.2009 and 22.5.2009 sent by M P Power Trading Company to the Appellant (ii) the letters dated 15.5.2009, 19.5.2009, 23.5.2009, 25.5.2009, 1.6.2009 and 25.6.2009 sent by the Appellant to M P Power Trading Company which would show the conduct of the Appellant indicating its acceptance to the Letter of Intent.

53. Let us now deal with the documents which are required to be considered in the **First Phase**.

54. Let us first deal with the letter dated 16.4.2009 inviting for the tenders. The relevant portion of the said letter is as follows:

“M.P. Power Trading Company Ltd. intends to sell short term power to traders, Utilities and Generating Companies etc., during the period 16th July,09 to 30th September, 09 on Firm/As and When Available Day Ahead Basis. The quantum of power and detailed terms and conditions are given hereunder:-

S.No.	Month	Duration	Quantum (in MW)
1.	July'09	Night Hrs-00.00 to 06.00 hrs Day Hrs -06.00 to 18.00 hrs Evening Hrs-18.00 to 24.00 hrs	200 200 200
2.	Aug'09	Night Hrs-00.00 to 06.00 hrs Day Hrs -06.00 to 18.00 hrs Evening Hrs-18.00 to 24.00 hrs	200 200 200

3.	Sept'09	Night Hrs-00.00 to 06.00 hrs Day Hrs -06.00 to 18.00 hrs Evening Hrs-18.00 to 24.00 hrs	200 200 200

The detailed terms and conditions for sale of power are given here under:-

1. **Delivery Point** :-The delivery point shall be the point of inter connection between MP Transmission System and CTU (the point of PGCIL system) in the State of MP.

.....

5. **Payment**:- Payment will be deposited by the buyer in the designated account of MP Tradeco at Jabalpur within 7 days from the date of receipt of the bill. The Account number shall be indicated by the Finance & Accounts Wing of MP Tradeco while issuing the bills.

7.**Surcharge**:- A surcharge of 1.25% per month shall be applied to all the payments outstanding after the 30th day from the date of issue of the bill. Surcharge shall be calculated on day-to-day basis.

8. **Payment of Security Mechanism**:- The buyer shall provide weekly revolving letter of credit equivalent to 30 days of energy billing in favour of MP Tradeco, Jabalpur. All LC charges viz, opening, operation/negotiation, recoupment, shall be borne by the prospective buyer.

9. **Compensation for default**: The Buyer has to explore all the possibilities for scheduling of contracted power. The compensation clause shall be applicable for the Firm power w.e.f. 16th July 09 to 30th

Sept,09 and shall be applicable for the quantum of power for which Open Access is granted by the Nodal Agency. However, the buyer has to apply to the Nodal Agency for the full quantum of power as per PPA/Letter of Intent well within time as per CERC guidelines and all possibilities should be explored for obtaining advance booking as per Clause 9 to 12 of CERC Regulation No.L-7/105(121)/2007 dated 21.1.09 and amendment made time to time, failing which the compensation shall be applicable for the full/deficit quantum of power in the Open Access application for the period 16th July 09 to 30th Sept, 09 as per one of the following rates:

*(i) @Rs.2/kWh
OR*

*(ii) @ Rs.50% of the offered rate
OR*

(iii) @ 100% of the offered rate.

MP Power Trading Company Limited/SLDC of M.P shall have the right to surrender the corridor already booked. The trader/utility shall have to accept the request of M.P Tradeco for surrender of corridor, if any, however, in case of surrender of corridor, the Open Access charges and other charges as per CERC Regulations in force, shall be payable by the party who has requested for cancellation of corridor.

The bidders are requested to quote the tariff separately for all the three cases of compensation indicated about the following conditions:

- (a) Compensation applicable on both sides i.e. trader/utility and MP Tradeco,*
- (b) Compensation applicable only on trader/utility and not on MP Tradeco*

(c) No compensation on either side.

The MP Tradeco may decide on any of the compensation at the time of placement of the Letter of Intent.

12. The quantum of power for sale indicated in this enquiry are only “tentative” which may increase or decrease as per availability. MP Power Trading Company may reject any or all enquiries or accept any enquiry in part or full as considered advantageous to the MP Tradeco, whether it is the highest offer or not. MP Tradeco may split the quantities amongst more than one selected bidders. The decision of the MP Power Company Limited shall be final and binding on the bidders.

In case MP Tradeco withdraws partial or full power due to any reason whatsoever, the contract quantum shall stand modified to the extent without any liability on either side. In case MP Tradeco increases the quantum of power for any month/period due to any reason whatsoever, the contract quantum shall be increased upto the quantum as quoted by the bidder.

*14. **Dispute Resolution:** All differences or disputes between the parties arising out of or in connection with this matter shall be referred to the Appropriate Commission under Electricity Act, 2003.*

15.....

*It is requested to kindly quote your rate at the delivery point mentioned in Clause-1 above for purchase of above said power (in the prescribed format attached as Annexure-A). Your offer along with the documents as per Para-11 must reach this office latest by 24.4.2009 upto 15.00 hrs. The offers will be opened at 15.30 hours on the same day. The envelopes must be confidential and super scribed with the “**Offer for***

sale of power by MP Tradeco for the period 16th July 09 to 30th Sept. 09” enquiry number and its date. After finalisation of the enquiry, agreement for sale of power would be executed”.

55. The above letter would include all the conditions with reference to payment security mechanism, compensation for default, quantum of power for sale, etc., and also about the Forum in which the dispute could be referred to and resolved.
56. In response to the letter inviting the tender on 16.4.2009, the Appellant vide its letter dated 21.4.2009 submitted its offer to purchase surplus power from M/s. M P Power Trading Company Limited. The relevant portion of the letter is as follows:

“Dear Sir,

Subject: Short Term Enquiry for sale of power on Firm Basis/As and When available Day Ahead Basis by MP Tradeco for the period 16th July, 2009 to 30th September, 2009.

Ref: Your Enquiry No.05-01/Sale/Enquiry/734 dated 16.04.2009

We are pleased to submit our offer for the purchase of surplus power from M.P Power Trading Company Ltd. (M.P Tradeco) for the period 16th July, 2009 to 30th September, 2009 on Firm Basis/As and When Available Day Ahead Basis as per the details given below.

1 to 4.....

5. Payment: *Payment will be deposited at Jabalpur in the designated account of MP Tradeco indicated by the Finance and Accounts Wing of MP Tradeco within 7 days from the date of receipt of the bills.*

.....

7. Surcharge: *A surcharge of 1.25% per month shall be applied to all the payments outstanding after the 30th day from the date of issue of the bill. Surcharge shall be calculated on day to day basis.*

8. Payment Security Mechanism: *KCT shall provide weekly revolving letter of credit (LC) equivalent to 30 days of energy billing in favour of MP Tradeco, Jabalpur. All LC charges viz. opening, operation/negotiation, recoument shall be borne by KCT.*

9. Compensation of default: *As per offer Form in Annexure "A" enclosed.*

14. Dispute Resolution: *All differences or disputes between the parties arising out of or in connection with this matter shall be referred to the Appropriate Commission under Electricity Act, 2003.*

16. *On award of the contract, Power Purchase Agreement (PPA) shall be signed with MP Tradeco as per Terms & Conditions for sale/purchase of power as per ruling of CERC issued from time to time.*

Thanking you and assuring you our best services at all times to come".

57. The above letter dated 21.4.2009 sent by the Appellant to the Respondent, would show that the offer for purchase of surplus power from M/s. M P Power Trading Company was

made by the Appellant accepting all the conditions which have been provided in Letter of Enquiry dated 16.4.2009.

58. Accepting this offer, M/s. M P Power Trading Company by the letter dated 27.4.2009, issued the Letter of Intent reiterating the earlier conditions incorporated in the letter dated 16.4.2009. The relevant portion of the Letter of Intent is as follows:

“This has a reference to your offer No.PT/KCT-MP Tradeco/2104/2009-10 dated 21.4.2009 against this office enquiry No.05-01/Sale/Enquiry/734 dated 16.04.09 for sale of power by MP Tradeco, Letter of Interest (LOI) is hereby placed for sale of power under the following quantum, duration, rates, and other terms and conditions:

1.Period, Rate, Duration & Quantum

S.No.	Month	Duration	Quantum (in MW)	Rate (Rs./kWh)
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On Firm Basis (with Compensation):

1.	<i>July'09 (from 16th July 09 to 31st July 09)</i>	<i>00.00 to 06.00 hrs 06.00 to 18.00 hrs 18.00 to 24.00 hrs</i>	<i>200 100 100</i>	<i>6.11 6.28 6.57</i>
2.	<i>August 09</i>	<i>00.00 to 06.00 hrs 06.00 to 18.00 hrs 18.00 to 24.00 hrs</i>	<i>200 100 100</i>	<i>6.11 6.28 6.57</i>
3.	<i>September 09</i>	<i>00.00 to 06.00 hrs 06.00 to 18.00 hrs 18.00 to 24.00 hrs</i>	<i>200 100 100</i>	<i>6.14 6.31 6.60</i>

5. Payment: *Payment will be deposited by M/s. KCT in the designated account of MP Tradeco at Jabalpur within 7 days from the date of receipt of the bill. The account number shall be indicated by the Finance & Accounts Wing of MP Tradeco while issuing the bills.*

In case, M/s. KCT does not make timely payment of M.P Power Trading Co. Ltd dues, MP Power Trading Company Ltd will have the right to terminate the prevailing arrangement for sale of power and/or offer the same to some alternate customer(s).

8. Payment Security Mechanism: *M/s. KCT shall provide weekly revolving letter of credit equivalent to 30 days of energy billing in favour of MP Tradeco, Jabalpur. All LC charges viz opening, operation/negotiation, recouplement, shall be borne by M/s. KCT.*

The credit shall be available to M.P Tradeco for all the dues not paid/ outstanding including but not limited to energy/compensation/penalty/ open access charges/ surcharges etc. within the validity period of L.C.

M.P Tradeco may not commence flow of power in absence of adequate payment security mechanism. In the event of failure to provide “payment security mechanism”, before the start of flow of power, M.P.Tradeco shall reserve the right to cancel the award or not to schedule the power at its discretion. The L.C will be used only as a back up mechanism.

9. Compensation for default:

M/s. KCT has to explore all the possibilities for scheduling of contracted power. The compensation clause shall be applicable for the Firm Power w.e.f. 16th July, 2009 to 30th Sept, 2009 and shall be applicable for the quantum of power for which Open Access is granted by the Nodal Agency. However, M/s. KCT has

to apply to the Nodal Agency for the full quantum of power as per PPA/Letter of Intent well within time as per CERC guidelines and all possibilities should be explored for obtaining advance booking as per Clause 9 to 12 of CERC Regulation No.L-7/105(121)/2007 dated 21.1.08 and amendment made time to time, failing which the compensation shall be applicable for the full/deficit quantum of power in the Open Access application or the period 16th July, 2009 to 30th Sept.09 @ of Rs.2/kWh.

MP Power Trading Company Limited/SLDC of M.P shall have the right to surrender the corridor already booked. M/s. KCT shall have to accept the request of M.P Tradeco for surrender of corridor, if any, however, in case of surrender of corridor, the Open Access Charges and other charges as per CERC Regulations in force, shall be payable by the party who has requested for cancellation of corridor.

Compensation clause –*shall be applicable on both i.e. M/s. KCT and MP Tradeco.*

10. Open Access: *The power shall be scheduled and dispatched as per the relevant provisions of CERC (Open access in Inter State Transmission) Regulation, 2008 issued vide CERC notification No.L-7/105(121)/2007-CERC dated 25.1.2008 effective from 1.4.2008 and “Procedure for Reservation of Transmission Capacity to Short Term Open Access” dated 28.1.2008, and as amended from time to time (Regulations). M.P Tradeco shall not be responsible for any unscheduled interchange (UI) liability, if any.*

M/s. KCT shall apply for open access to the nodal agency for transaction of above power.

The MP Tradeco shall have the right to cancel Open Access at any time due to any unforeseen

circumstances. M/s. KCT shall have to respond immediately and arrange to cancel Open Access on request of MP Tradeco.

.....

Your acceptance may please be sent through fax within three days failing which MP Tadecco will be free to take appropriate action as deemed fit in the matter. Subsequently, an agreement for sale of power shall be executed.

Thanking you”.

59. The above letter of Intent dated 27.4.2009 would show that M/s. M P Power Trading Company accepting the offer letter dated 21.4.2009, issued the Letter of Intent reiterating the conditions and also providing the right of M/s. M P Power Trading Company to terminate the prevailing arrangements between the parties for sale of power. This Letter of Intent specifically states that the Appellant shall send the intimation about its acceptance of the Letter of Intent within three days and if the Appellant fails to give response within three days, M/s. M P Power Trading Company would be free to take appropriate action as deemed fit in the matter.
60. Pursuant to this Letter of Intent, the Appellant sent a letter dated 30.4.2009 within three days i.e. from the date of issuance of the Letter of Intent thanking M/s. M P Power Trading Company for issuing the Letter of Intent in its favour and assuring M/s. M P Power Trading Company that it

would make all sincere and rigorous efforts for the sale of surplus power. Let us quote the said letter:

“PTC/KCT-MP Tradeco/3004/2009-10/

*Chief General Manager (Commercial),
M.P.Power Trading Co.,Ltd.,
Shakti Bhawan, Vidyug Nagar,
Jabalpur-482008*

Dear Sir,

*Sub: Sale of Surplus Power from MP Tradeco for the
16th July, 2009 to 30th September, 2009*

*Ref: Letter of Intent No.05-01/Sale/TE-734/811 dated
27.4.2009*

We are thankful for the issue of above referred Letter of Intent (LOI) in our favour for the sale of Firm Power available with MP Tradeco during the period 16th July, 2009 to 30th September, 2009 with compensation on both sides. In this connection it is submitted as under:

1. That sincere efforts have been made by offering this surplus power available to the following deficit State power Utilities and Private Distribution Companies.

(a) Punjab State Electricity Board, Patiala

(b) Haryana Power Procurement Centre, Panchkula, Haryana

(c) Maharashtra State Electricity Distribution Company Ltd., Mumbai

(d) Tata power Company Limited, Mumbai

(e) Rajasthan Power Procurement Centre, Jaipur

(f) North Delhi Power Limited (NDPL), New Delhi

(g) BSES Rajdhani Power Limited, New Delhi

(h) BSES Yamuna Power Limited, New Delhi

2. That due to General Parliament Elections in the country, most of the Head of Departments of State Power Utilities are over busy with the Election Process and have hardly any time left for taking decisions in this regard. Further, you will also appreciate that there was hardly 2 to 3 days available after the issue of above referred LOI late in the evening on 27.04.2009 for getting the required LOI/order issued from the buyer for initiating the application for the advance reservation of transmission corridor by 30th April, 09 for the month of July, 2009 with the nodal RLDC.

3. That State Power Utilities/Private Distribution Companies, who were taken into confidence before submitting the offer have tied up power procurement for the above said period from the other power producers due to the late issuance of LOI (Letter of Intent) by MP Tradeco.

We are making our all sincere and rigorous efforts for the sale of above said surplus power.

Thanking you and assuring you our best services at all times to come.

Yours faithfully,

For Karam Chand Thaper & Bors (CS) Lytd.

*Sd/-
(General Manager)"*

61. This letter dated 30.4.2009, conveys three aspects.

62. **First aspect** is that the Appellant promptly within three days from the date of the issuance of Letter of Intent, as mandated, sent a reply to M/s. M P Power Trading Company(R-1) thanking for the issue of Letter of Intent in favour of the Appellant for the sale of firm power available with M/s. M P Power Trading Company (R-1) during the period from 16.7.2009 to 30.9.2009 with a compensation clause of both sides.
63. **Second aspect** is the assurance of the Appellant that that sincere efforts would be made by the Appellant for selling this surplus power supplied by M/s. M P Power Trading Company to 8 deficit State Power Utilities and Private Distribution Companies situated at places such as Patiala, Panchkula, Mumbai, Jaipur and New Delhi.
64. **Third aspect** is that the State Power Utilities/Private Distribution Companies who were taken into confidence before submitting the offer have tied-up power procurement for the above said period from other power producers due to the late issuance of Letter of Intent and they are making all sincere and rigorous efforts for the sale of above said surplus power.
65. The perusal of this letter of the Appellant dated 30.4.2009 intimating their stand to the M P Power Trading Company in response to the Letter of Intent would show that the

Appellant did not raise any objection with reference to the additional conditions which is said to be the counter offer. On the other hand, it has been clearly stated in its letter dated 30.4.2009 that the Appellant acting in furtherance of the said Letter of Intent was making efforts to sell the said surplus power under the terms of the Letter of Intent. Therefore, it cannot be stated that the Letter of Intent dated 27.4.2009 issued by the M P Power Trading Company was in the nature of a counter offer and the Appellant was not agreeable to the said counter offer. In other words, the Appellant through its letter dated 30.4.2009 did not claim that the additional conditions which was referred to in the Letter of Intent was a counter offer and they are not accepting the said counter offer. On the other hand, the fact remains that they thanked for issuing the Letter of Intent in their favour and also assured that it was making all sincere and rigorous efforts for sale of surplus power under the terms of the Letter of Intent.

66. Thus, it is clear that in response to the letter dated 16.4.2009, offer was made by the Appellant through the letter dated 21.4.2009. Accepting the said offer, M/s. M P Power Trading Company (R-1) issued a Letter of Intent dated 27.4.2009 in favour of the Appellant which in turn through its letter dated 30.4.2009 indicated its acceptance to the Letter of Intent by assuring that the Appellant would

make all efforts to sell the surplus power under the terms of the Letter of Intent. This would clearly show that the Appellant was ready to act upon the Letter of Intent by expressing its willingness to sell the surplus power to the Utilities under the terms of Letter of Intent. When such being the case, we are at loss to understand that as to how the Appellant could claim that the letter dated 30.4.2009 cannot be construed to be the acceptance of the Letter of Intent issued by M/s. M P Power Trading Company on 27.4.2009.

67. In this context, we are constrained to refer one more sad feature. The main contention of the Appellant is that the Letter of Intent issued by M/s. M P Power Trading Company was never accepted by the Appellant as it is a counter offer. As indicated above, if it is a counter offer, the Appellant ought to have pointed out that they are not agreeable to this in its immediate reply dated 30.4.2009 which was sent within three days as required by M/s. M P Power Trading Company. Admittedly, this objection, regarding the alleged counter offer as indicated above, was not raised in the letter. On the other hand, the Appellant thanked the M P Power Trading Company for the issue of Letter of Intent. That apart, M/s. M P Power Trading Company on receipt of the letter dated 30.4.2009, also sent a reply to the Appellant dated 7.5.2009 thanking the Appellant for having accepted

the Letter of Intent through its letter dated 30.4.2009. The Appellant never denied its acceptance as claimed by M P Trading Company in its letter dated 7.5.2009 in its subsequent letters. This letter dated 7.5.2009 clearly indicates that an impression had been created by the Appellant in the minds of M/s. M P Power Trading Company that its Letter of Intent had been accepted by the Appellant.

68. Thus, the main document in this case which is relied upon by the State Commission and the M P Trading Co (R-1) to substantiate the fact that there was a concluded contract, is the letter dated 30.4.2009 sent by the Appellant to the M P Trading Company (R-1), within 3 days thanking M/s. M P Power Trading Company for having issued the Letter of Intent in their favour and assuring that they would take all steps to sell the surplus power in pursuance of the said Letter of Intent.

69. According to the Appellant, the letter dated 30.4.2009 cannot be construed to be the acceptance. Strangely, the Appellant has not mentioned anything about this letter dated 30.4.2009 either in the list of dates, Synopsis or in the Facts of the case in the Appeal paper book. Not only that, no grounds have been raised with reference to the letter dated 30.4.2009 pleading that the said letter cannot be construed to be the acceptance of the Letter of Intent. There is no

reason given by the Appellant for the failure to refer to this important document in this Appeal even though the said document is a clinching one.

70. *In the absence of any reference to the material document namely the letter dated 30.4.2009 and in the absence of any ground raised with reference to the said document in this Appeal, it has to be inferred as rightly pointed out by the Respondent that M/s. Karamchand Thaper & Brothers (C.S.) Ltd (the Appellant), has for the reasons best known to it, has suppressed the material fact.*
71. *It is a cardinal principle of law that the party seeking the relief by approaching the Court should come with clean hands. The Appellant has not adduced any reason, as to why it has failed to refer to the document dated 30.4.2009 either in the Synopsis or list of dates or in the facts of this case or raised any ground in this Appeal. In other words, the Appellant has not pleaded in the Appeal that the letter dated 30.4.2009 could not be construed to be the acceptance of the Letter of Intent and as such, there was no concluded contract. This conduct of the Appellant of the failure to refer to this document which is a clinching document to decide the issue creates an impression in our mind that the Appellant has not come with the clean hands before this Tribunal.*

(The Contents in Paragraphs 70 and 71 above are expunged as per the orders of Hon'ble Court dated 8.2.2013 in RP No.1 of 2013 and the same is shown in Italics)

72. Whatever may be the reason for failure to refer to this document in the ground of Appeal, we are more concerned with the question as to whether there was a concluded contract in the light of the admitted documents available on record produced by both the parties. On a careful analysis of those documents, as discussed above, it has to be held that the documents relating to the First Phase dated 16.4.2009, 21.4.2009, 27.4.2009 and 30.4.2009 would clearly indicate that offer which was made by the Appellant was accepted by M/s. M P Power trading Company through the Letter of Intent and the said Letter of Intent was also accepted by the Appellant without raising any objection through their letter dated 30.4.2009.
73. Let us now refer to the other documents which are required to be considered in the **Second Phase**.
74. The second Phase would involve the other letter correspondence between the Appellant and the MP Power Trading Company on various dates i.e. on 7.5.2009, 15.5.2009, 19.5.2009, 22.5.2009, 23.5.2009, 25.5.2009, 1.6.2009 and 25.6.2009 which are relied upon by the Respondent to show the conduct of the Appellant having accepted the Letter of Intent issued by M/s. M P Power Trading Company and acted upon the same.

75. Let us now deal with these documents which relate to the aspect of the Second Phase.

76. The first document is the letter dated 7.5.2009 sent by the M/s. M P Power Trading Company to the Appellant in response to the letter dated 30.4.2009 sent by the Appellant M/s. Karam Chand Thaper & Bros (C.S) Ltd. In the said letter, the MP Power Trading Company has clearly mentioned that they are also thankful to the Appellant for accepting the terms and conditions of the Letter of Intent issued in their favour. Let us now quote the said letter:

“Sub: Sale of Surplus power by MP Tradeco for the period from 16th July, 09 to 30th Sept, 09 against enquiry No.05-01/Sale/Enquiry/734 dated 16.04.2009.

Ref: (i) This office Lol No.05-01/Sale/TE-734/811 dt 27.4.09

(ii) Your letter No.PT/KCT-MP Tradeco/3004/2009-10 dt 30.4.09

Dear Sir,

Kindly refer this office Lol No.811 dt 27.4.09 placed on M/s. KCT for sale of surplus power by MP Tradeco from 16th July, 09 to 30th Sept, 09 in different time blocks. We are also thankful to you for accepting terms and conditions of Lol No.811.

Regarding issue of Lol, it is to clear that M P Tradeco had placed Lol well in time within there days after opening of enquiry i.e. on 27.4.09, therefore, the

point raised by you regarding late issuance of Lol is not acceptable.

It may also be mentioned that as per clause No.9 of our Lol No.811 dated 27.4.09, M/s. KCT has to explore all the possibilities for scheduling of contracted power and as per compensation clause, compensation shall be applicable for the full/deficit quantum of power as per Lol. It is noticed that first opportunity for reservation of transmission corridor as per clause 9 to 12 of CERC Regulation i.e. submission of application 3 months in advance has been lost.

Kindly initiate an early action for obtaining advance booking of transmission corridor as per clause 9 to 12 of CERC Regulation L-7/105(121)/2007 dt 21.1.08 and amendment made time to time.

Thanking You”.

77. In this letter, as indicated above, the M P Power Trading Company specifically recorded that “We are also thankful to you for accepting the terms and conditions of Lol (Letter of Intent) “. In the letter, it was intimated to the Appellant that first opportunity for reservation of transmission corridor as per Clause 9 to 12 of CERC Regulation i.e. submission of application 3 months in advance has been lost. Therefore, the MP Power Trading Company requested the Appellant to initiate early action for advance bookings of the transmission corridors as per CERC Regulations. This letter shows that M/s. M P Power Trading Company, on noticing that there was an acceptance by the Appellant without any

reservations, asked the Appellant to initiate further action or steps in line with the letter of Intent dated 27.4.2009.

78. As indicated above, in the letter dated 30.4.2009, the Appellant on receipt of the Letter of Intent dated 27.4.2009 specifically recorded that they are thankful for the issue of the above referred Lol for the sale of firm power available with M/s. M P Power Trading Company during the period from 16th July, 2009 to 30th September, 2009 with compensation on both sides. In response to this letter, the MP Power Trading Company (R-1) sent a reply letter dated 7.5.2009 specifically mentioning that “we are also thankful to you for accepting the terms and conditions of Letter of Intent”. Thus, the Letter of Intent dated 27.4.2009 has been accepted which is absolute, by the Appellant through the letter dated 30.4.2009. Only on that acceptance, the M P Power Trading Company requested the Appellant through their letter dated 7.5.2009 to take further action in pursuance of the said Letter of Intent. As indicated above, there was no letter in reply objecting to the letter dated 7.5.2009 in which the M P Trading Company thanked the Appellant for having accepted the Letter of Intent.

79. The next document is dated **15.5.2009**, the letter sent by the Appellant to M/s. M P Power Trading Company. Instead of disputing the correctness of the M P Power Trading

Company's averment made in its letter dated 7.5.2009 regarding the acceptance of Letter of Intent by the Appellant, the Appellant kept on writing letters dated 15.5.2009 and 19.5.2009 to M/s. M P Power Trading Company informing about the progress made in furtherance to the Letter of Intent. The Appellant's letter dated 15.5.2009 in response to M/s. M P Power Trading Company's letter dated 7.5.2009 is reproduced below:

“ Vide our letter No.PT/KCT-MP Tradeco/3004/2009-10 dated 30.4.2009, we have already submitted that as per Clause 9 of the subject cited LOI, “We are exploring all the possibilities for scheduling of surplus power from M P Tradeco for the period 16th July, 2009 to 30th September, 2009 and have sent officers immediately to various deficit State Power Utilities and Private Distribution Companies as per details given below:

- (a) Punjab State Electricity Board, Patiala*
- (b) Haryana Power Procurement Centre, Panchkula, Haryana*
- (c) Maharashtra State Electricity Distribution Company Ltd, Mumbai*
- (d) Tata Power Company Limited, Mumbai*
- (e) Rajasthan Power Procurement Centre, Jaipur*
- (f) North Delhi Power Limited (NDPL), New Delhi*
- (g) BSES Rajdahani Power Limited, New Delhi*

(h) *BSES Yamuna Power Limited, New Delhi*

It is very kindly submitted that NDPL (a Private Power Distribution Company in Delhi) and HPPC (State Procurement Utility of Haryana) were taken into confidence before submitting our offer to MP Tradeco. During follow up with NDPL against our above mentioned offer sent to them, we have been intimated by NDPL that they tied up power procurement for the above said period with Jindal Power and there is no additional requirement for this period. We are constantly in touch with HPPC, who are in the process of deciding very shortly for the purchase of surplus power for the period May'2009 to September'2009. As per past experience, you will very kindly also agree that the purchasers for the surplus power of above said period are mainly from Northern India only.

In view of our very long cordial business relation with MP Tradeco, we shall most sincerely make all out efforts to maintain our cordial relations with MP Tradeco.

Thanking you and assuring you our best services at all times to come”.

80. This letter dated 15.5.2009 sent by the Appellant would show that the Appellant informed the M P Power Trading Company that it was exploring all possibilities for scheduling of surplus power from the M P Power Trading Company for the period from 16th July, 2009 to 30th September, 2009 in terms of the Letter of Intent issued in favour of the Appellant. In addition to this letter dated 15.5.2009, the Appellant again wrote another letter dated 19.5.2009 on the similar lines.

These letters dated 15.5.2009 and 19.5.2009 sent by the Appellant clearly show that the Appellant is acting in furtherance of the said Letter of Intent.

81. The next document is dated **22.5.2009**. This document is a reminder letter sent by M/s. M P Power Trading Company to the Appellant requesting the Appellant to initiate early action for obtaining the advance bookings of the transmission corridors on or before 25.5.2009 failing which the M P Power Trading Company will lodge a claim of compensation in accordance with the conditions made in the Letter of Intent which was accepted earlier. The relevant portion of the letter is as follows:

“Sub: Sale of Surplus power by MP Tradeco for the period from 16th July, 09 to 30th Sept, 09 against enquiry No.05-01/Sale/Enquiry/734 dated 16.04.09.”

Ref: (i) This office Lol No.05-01/Sale/TE-734/811 dt 27.4.09

(ii) Your letter No.PT/KCT-MP Tradeco/3004/2009-10 dt 30.4.09

(iii) This office letter No.05-01/Sale/TE-734/897 dt.7.5.09

Dear Sir,

Kindly refer our Lol dated 27.4.09 placed to M/s. KCT for sale of surplus power by MP Tradeco from 16th July '09 to 30th Sept, 09 in different time blocks.

As per terms and conditions incorporated in the aforesaid Lol, M/s. KCT has to explore all the possibilities for scheduling of contracted power and as per clause No.9 compensation for default shall be applicable for full/deficit quantum of power. It is noticed that the first opportunity for reservation of transmission corridor as per clause 9 to 12 of CERC Regulation i.e. submission of application 3 months in advance has not been exercised. You were reminded vide our letter dt 7th May'09 to ensure reservation of transmission corridor in accordance with the provisions of CERC Regulation in force. You were also requested to initiate early action for obtaining advance booking of transmission corridor in accordance with the provisions of CERC Regulation dt 21.1.09 and amendment made time to time.

In case no application is submitted by 25th May'09 for reservation of transmission corridor against our Lol dt 27th April, 09, action as deemed to fit, including lodging of claim of compensation in accordance with provisions made in our Lol, shall be initiated, which you may please note.

Thanking you".

82. Even though there was no response to the letter dated 7.5.2009, the Appellant responded to the letter dated 22.5.2009 through their reply letter dated 23.5.2009 by sending a letter informing the M P Power Trading Company stating that there was no probable buyer with them for the sale of the surplus power and therefore, the M P Power Trading Company might look for the alternative

arrangements for the same. The relevant portion of the letter dated 23.5.2009 is as follows:

“Dear Sir,

Sub: LOI No.05-01/Sale/TE-734/811 dated 27.4.2009

Ref: 1. This Office letter Nos.

(i) PT/KCT-MP Tradeco/1505/2009-10 dated 15.5.2009 and

(ii) PT/KCT-MP Tradeco/1905/2009-10 dated 19.5.2009

2. Your letter No.05-01/1004 dated 22.5.2009

Vide this office letter No.PT/KCT-MP Tradeco / 3004/2009-10 dated 30.4.2009, it was very kindly submitted that due to late issue of subject cited LOI on 27.04.2009 late in the evening, the State Power Utilities/private Distribution Companies, who were taken into confidence before submitting the offer have already tied up power procurement for the above said period from the other power producers. Further there were hardly 2 to 3 days time only for getting the required LOI/Order issued from the buyer for initiating the application for the advance reservation of transmission corridor by 30th April'09 for the month of July'2009 with the nodal RLDC. However, sincere efforts were made and offers were sent immediately to all the other following deficit State Power Utilities and Private Distribution Companies all over India for the sale of surplus MP Power:

a) Punjab State Electricity Board, Patiala

b) Haryana Power Procurement Centre, Panchkula, Haryana

c) Maharashtra State Electricity Distribution Company Ltd, Mumbai

d) Tata Power Company Limited Mumbai

e) Rajasthan Power Procurement Centre, Jaipur

f) North Delhi Power Limited (NDPL), New Delhi

g) BSES Rajdhani Power Limited, New Delhi

h) BSES Yamuna Power Limited, New Delhi

In view of purchasers being mainly from Northern India only for the above said power, HPCC (State Power Procurement Utility of Haryana) were approached personally at the highest level for the sale of surplus MP power for the period July'2009 to September'2009 but HPCC have also shown their inability to purchase additional power for this period due to severe financial constraints with them.

In the light of above, we very kindly submit that presently there is no other probable buyer with us for the sale of said power and it is requested that MP Tradeco may look for alternative arrangement for the sale of above surplus power so that there is no financial loss to them.

Thanking you and assuring you of the best service at all the times to come.

Yours faithfully,

For Karam Chand Thaper & Bros (CS) Ltd,

Sd/-

(General Manager)".

83. Through this letter, it was intimated to M/s. M P Power Trading Company that the purchasers of Northern India have shown their inability to purchase additional power and as there was no probable buyer with them, M P Power Trading Company might look for the alternative arrangements for the same.

84. As indicated above, though the letter of Intent dated 27.4.2009 was accepted by the Appellant through letter dated 30.4.2009 and the Appellant received endorsement from M/s. M P Power trading Company for acceptance though letter dated 7.5.2009, for the first time on 23.5.2009, the Appellant slightly took a different stand to the effect that MP Power Trading Company might look for alternative arrangements that too when the Letter of reminder dated 22.5.2009 sent by M P Trading Company was received requesting to ensure reservation of transmission corridor or else they would resort to lodging the claim of compensation. But strangely, the Appellant, immediately after two days, swiftly restored to their original stand by sending letter dated 25.5.2009 stating that they are taking steps for the sale of surplus power of MP Trading Company as per the Letter of Intent by participating in the tender enquiry arranged by the MSEDCL of the Maharashtra State on the strength of the Letter of Intent. The relevant letter is as follows:

“Dear Sir,

Sub: LOI Nos.

- 1. 05-01/Sale/TE-734/811 dated 27.4.2009,*
- 2. 05-01/Sale/TE-734/810 dated 27.04.2009*

Ref: This office letter PT/KCT-MP Tradeco/2305/2009-10 dated 23.05.2009

In continuation to our above referred letter, it is very kindly submitted that Maharashtra State Electricity Distribution Company Limited (MSEDCL) have very recently issued tender enquiry for the purchase of 325 MW RTC Firm Power for the period 1st June’2009 to 31st May’2010 and the due date of opening of this tender enquiry is on 25.5.2009. We are participating in this tender enquiry for the sale of MP Surplus power as per subject cited LOIs and shall immediately update MP Tradeco about the outcome of this tender enquiry.

It is once again assured that we shall most sincerely make all out efforts to maintain our cordial relations with MP Tradeco.

Thanking you and assuring you our best services at all times to come”.

85. The perusal of the above letter would show that the Appellant has referred to the Letter of Intent dated 27.4.2009 in the said letter and also had proceeded to state that based on the said letter of intent, the Appellant was participating in the tender enquiry issued by MSEDCL of Maharashtra State. It is also stated that not only they would participate in

the tender enquiry for the sale of surplus power as per the Letter of Intent issued by them but also they would update the M P Power Trading Company about the outcome of the tender enquiry immediately thereafter.

86. From the perusal of the above letter, it is evident that the Appellant was acting in furtherance to the said letter of intent issued in their favour by intimating that the Appellant was participating in the tender enquiry and thereby they indicated that they are sincerely making all out efforts to sell the surplus power as per the Letter of Intent. As such, the Appellant acted upon the Letter of Intent by participating in the tender enquiry issued by Maharashtra State on the strength of the Letter of Intent.
87. In view of the above, the Appellant by conduct, through the letter dated 25.5.2009 endorsed the acceptance and affirmed the existence of the valid contract between the M P Power trading Company and the Appellant.
88. The next document is dated 1.6.2009, the letter sent by the Appellant to M/s. M P Power trading Company. This also is a letter sent by the Appellant to the M P Power Trading Company informing the M P Power Trading Company that it is going to participate in the tender enquiry issued by the Tamil Nadu Electricity Board by acting upon the Letter of Intent dated 27.4.2009. The said letter is quoted below:

“Dear Sir,

Sub: LOI Nos.

- 1. 05-01/Sale/TE-734/811 dated 27.4.2009,*
- 2. 05-01/Sale/TE-734/810 dated 27.04.2009*

Ref: This office letter PT/KCT-MP Tradeco/2305/2009-10 dated 25.05.2009

In continuation to our above referred letter, it is very kindly submitted that Tamil Nadu Electricity Board (TNEB) have very recently issued tender enquiry for the purchase of 500 MW RTC Firm Power for the period 1st June'2009 to 31st May'2010 and the due date of opening of this tender enquiry is on 03.06.2009 at 14:15 Hrs. We are participating in this tender enquiry for the sale of MP Surplus power as per subject cited LOIs and shall immediately update MP Tradeco about the outcome of this tender enquiry.

It is once again assured that we shall most sincerely make all out efforts to maintain our cordial relations with MP Tradeco.

Thanking you and assuring you our best services at all times to come”.

89. This letter would indicate the following features:

- (a) There is a reference about the Letter of Intent dated 27.4.2009.
- (b) This letter contains reference about the letter dated 25.5.2009 sent by the Appellant that they

would participate in the tender enquiry for the sale of power as per the letter of intent.

- (c) This letter also by referring to the Letter of Intent dated 27.4.2009, would indicate that the Appellant would be participating in the tender enquiry issued by The Tamil Nadu Electricity Board as per the letter of intent issued by M P Power trading company in their favour and they shall immediately inform the M P Power Trading Company about the outcome of the said enquiry. This letter also shows that the Appellant has also been participating in various tender enquiries in different States and acting upon the letter of intent issued by the M P Power trading Company. If there is no contract between the parties as alleged by the Appellant, there was no occasion for the Appellant to participate in the said tender enquiry and to update the outcome of the tender enquiry immediately thereafter. It is clear from the above letter that the Appellant decided to act upon the Letter of Intent and to participate in the said tender enquiry by consenting to the terms and conditions of the Letter of Intent by his own conduct.

90. The next document is the letter dated 25.6.2009. This is another letter sent by the Appellant to M P Power Trading Company intimating that they are participating in another tender enquiry for the sale of surplus power on the basis of the Letter of Intent issued by M P Power trading Company in favour of the Appellant in the Maharashtra State issued by MSEDCL. The relevant portion of the letter dated 25.6.2009 is reproduced below:

“Dear Sir,

Sub: LOI Nos.

- 1. 05-01/Sale/TE-734/811 dated 27.4.2009,*
- 2. 05-01/Sale/TE-734/810 dated 27.04.2009*

Ref: This office letter Nos.

- (i) PT/KCT-MP Tradeco/2305/2009-10 dated 25.05.2009*
- (ii) PT/KCT-MP Tradeco/0106/2009-10 dated 01.06.2009*

In continuation to our above referred letters, it is very kindly submitted that Maharashtra State Electricity Distribution Company Limited (MSEDCL) have again issued tender enquiry for the purchase of 400 MW RTC Power on FIRM BASIS for the period 11 July'2009 to 15th October, 2009 and the due date of opening of this tender enquiry is on 02.07.2009 We are participating in this tender enquiry for the sale of MP Surplus power as per subject cited LOIs and shall immediately update MP Tradeco about the outcome of this tender enquiry.

It is once again assured that we shall most sincerely make all out efforts to maintain our cordial relations with MP Tradeco.

Thanking you and assuring you our best services at all times to come”.

91. This letter also would show that they have decided to act upon the letter of intent and participate in the tender enquiry for the sale of surplus power. These things would again substantiate the fact that the Appellant was from the beginning acting in furtherance to the Letter of Intent issued by M P Power trading Company and the Appellant by its continuous letters sent to the M P Power Trading Company, has affirmed the existence of the valid contract between the Appellant and the M P Power trading Company. This letter also refers to the earlier letter dated 25.5.2009 and letter dated 1.6.2009 by referring to the said letter of Intent dated 27.4.2009.

92. At the risk of repetition, it is to be stated that from a bare perusal of the Appellant's letters dated 15.5.2009, 19.5.2009, 23.5.2009, 25.5.2009, 01.6.2009 and 25.6.2009, it is clear that the Appellant was acting in furtherance to the terms and conditions to the Letter of Intent. Under those circumstances, the contention urged by the Appellant that the Agreement was never entered into between the parties and that therefore, the Appellant is not liable to pay

compensation is not tenable. Apart from these letters, the Appellant sent another letter dated 9.7.2009 about the outcome of the tender enquiry issued by MSEDCL in Maharashtra State opened on 8.7.2009. The letter dated **9.7.2009** is reproduced below:

“PT/KCT-MP Tradeco/0907/2009-10 dt 09.07.2009

*Chief General Manager (Commercial)
M.P Power Trading Co. Ltd
Shakti Bhawan, Vidyut Nagar,
JABALPUR-482 008*

Dear Sir,

Sub: MSEDCL Tender Enquiry opened on 8.7.2009

*Ref: This office letter No.PT/KCT-MP Tradeco/2506/
/2009-10 dated 25.06.2009*

In continuation to our above referred letter, please find enclosed statement showing comparative rates quoted by Power Traders against subject cited tender enquired opened on 08.07.2009.

Thanking you and assuring you our best services at all times to come.

*Yours faithfully,
For Karam Chand Thaper & Bros. (CS) Ltd.,
Sd/-
(General Manager)”*

93. All these documents would show that the Appellant accepted the Letter of Intent and after accepting the same

the Appellant was acting in furtherance to the Letter of Intent by participating in various tender enquiries held in different States. Even in the letter dated 9.7.2009 quoted above, the Appellant stated that it acted upon the Letter of Intent by participating in the tender enquiry and intimated to the M P Power trading Company about the outcome of the tender enquiries, on the strength of the Letter of Intent issued in favour of the Appellant by M P Power trading Company. In fact, the plea that the contract was not concluded was raised by the Appellant only when the M P Power trading Company (R-1) raised invoice for compensation dated 6.10.2009 and subsequently sent legal notice dated 19.1.2010 and not before.

94. Even though the Letter of Intent mentioned that the agreement for the sale shall be executed after receipt of the acceptance from the Appellant, the failure to execute such an agreement as per the Letter of Intent will not make the contract transacted between the parties through various letters not concluded, as it is a mere formality.
95. As held by Hon'ble Supreme Court that it is well settled that an offer may be accepted by conduct and when it is clear that the offeree did the act with the intention of accepting the offer, it would amount to acceptance. If the facts of the case disclose that there was no reservation in signifying

acceptance by conduct, it must follow that the offer has been accepted by conduct. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. It is also well settled law that the letter correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract.

96. The Appellant was fully aware of the terms and condition of the enquiry made by MP Traders on 16.4.2009 as well as the Letter of Intent dated 27.4.2009. When such being the case, it cannot be contended that the Letter of Intent was a counter offer made by the Appellant.
97. If the Appellant was not agreeable to the terms of the Letter of Intent, it must have immediately objected to the said terms. This was not done. If the Appellant was not willing to accept the Letter of Intent, it would not have acted in furtherance to the Letter of Intent. As indicated above, from the beginning the Appellant had not shown any resentment to the terms and conditions of the Letter of Intent pursuant to the issuance of the same on 27.4.2009. On the contrary, the Appellant was acting upon the Letter of Intent by participating in various tender enquiries on the strength of

the Letter of Intent and informing the development to the M/s. M P Power Trading Company (R-1), then and there.

98. As mentioned earlier, the Appellant through its letter dated 15.5.2009, 19.5.2009, 23.5.2009, 25.5.2009, 1.6.2009 and 25.6.2009 has expressed its willingness to continue its efforts for sale of surplus power supplied by M P Trading Company as per the Letter of Intent. In other words, the Appellant admitted in these letters that it was repeatedly making efforts to sell the contracted power based on the Letter of Intent issued by M P Power Trading Company. The Appellant always had the intention of purchasing the surplus power from M P Power Trading Company through its conduct by participating in various tender enquiries on the strength of the Letter of Intent. The Appellant never contested or objected to the Letter of Intent.
99. On the other hand, the Appellant by its actions has consented to the contract between the M P Power Trading Company and the Appellant. The plea of the non existence of the valid contract was only taken by the Appellant for the first time after almost four months when the first invoice was raised by the M P Power Trading Company. Prior to that, at no point of time, the Appellant ever refuted the existence of the contract.

100. As held by the Hon'ble Supreme Court Section 7 clarifies that acceptance must be absolute and unqualified unless the proposer prescribes the manner in which it is to be accepted by the proposer, the proposer must within a reasonable time after receipt of the acceptance insists that his proposal should be accepted as required by him. If this is not done, the Section says "he accepts the acceptance". Section 8 is a further amplification of the principle where from the conduct of a party the acceptance is inferred. If by way of action on the part of the acceptor the proposer cannot be restored to his former position, then the acceptor cannot be permitted to say that his acceptance should be treated as other than the original proposal.

101. It is well settled that if the documents relied upon as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case, there is a binding contract and the reference to the more formal document may be ignored.

102. Bearing these principles in mind, if we look at the facts of the present case, it is evident that the offer and acceptance have been made and consequently, it has to be held that the contract was concluded.

103. **Summary of Our Findings:**

- (a) **The documents involved in the first phase namely the letter dated 16.4.2009 inviting tenders, document dated 21.4.2009 giving the offer by the Appellant, the letter of intent dated 27.4.2009 issued by M P Power Trading Company and the reply by the Appellant on 30.4.2009 in response to the said letter would clearly show that there was an offer by the Appellant in response to the tender invitation dated 16.4.2009 through the document dated 21.4.2009 and the same was accepted by issuing the letter of intent dated 27.4.2009 and in response to the Letter of Intent the Appellant wrote a reply letter thanking for the said Letter of Intent and assuring to take sincere efforts to sell the surplus power supplied by M/s. M P Power Trading Company on the basis of the Letter of Intent thereby accepting the Letter of Intent.**
- (b) **The other documents referred in the 2nd phase, namely 7.5.2009, 15.5.2009, 19.5.2009, 22.5.2009,**

25.5.2009, 25.6.2009, 1.6.2009 and 9.7.2009 would show that the Appellant was acting upon the said letter of Intent and participated in the tender enquiries issued by several States and constantly updated the outcome of the tender enquiries to the M P Power Trading Company. This conduct of the Appellant would clearly show that after accepting the Letter of Intent, the Appellant was acting upon the said Letter of Intent. Thus, the offer and acceptance have been clearly established in this case, thereby, the contract had come into existence.

104. In view of the findings referred to above, we conclude that we do not find any merit in the Appeal as there is no infirmity in the impugned order passed by the State Commission through the Chairman of the Commission. State Commission is directed to deal with other issues and pass an order in accordance with law after hearing the parties.

105. Accordingly, the Appeal is dismissed. No order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 11th Oct, 2012

~~√REPORTABLE/NON-REPORTABLE~~