

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this the 13th day of January, 2012

1. Sri M.R. Sreenivasa Murthy	Chairman
2. Sri Vishvanath Hiremath	Member
3. Sri K. Srinivasa Rao	Member

Case No. OP 48/2010

Between

**BANGALORE ELECTRICITY SUPPLY
COMPANY LIMITED**

Corporate Office
K.R. Circle
BANGALORE- 560 001
(Represented by its Chief General Manager)
[Petitioner represented by M/s.Justlaw, Advocates]

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Petitioner

And

1. VBC FERRO ALLOYS LIMITED

Registered Office
No.6-2-913/914, 3rd Floor, Progressive Towers
Khairathabad
HYDERABAD – 500 004
(Represented by its Managing Director)

2. PROGRESSIVE CONSTRUCTIONS LIMITED

Registered Office
7th Floor, Raghava North Block
Raghava Ratna Towers
Chirag Ali Lane Abids
HYDERABAD
(Represented by its Executive Director)

3. KONASEEMA GAS POWER LIMITED

No.6-2-913/914, 3rd Floor, Progressive Towers
Khairathabad
HYDERABAD – 500 004
(Represented by its Managing Director)
[Respondents represented by
M/s. Shridhar Prabhu Associates, Advocates]

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Respondents

1.0 The Petitioner Bangalore Electricity Supply Company Limited (BESCOM) has filed this Petition on 06.12.2010, originally praying for appointment of an Arbitrator to resolve the disputes between the Petitioner and the Respondents as per Power Purchase Agreement (hereinafter referred to as 'PPA') dated 27.2.2009; or in the alternative, to direct the Respondent by way of a mandatory injunction to commence and continue supply of power as per the terms of PPA dated 27.02.2009.

2.0 On Notice, the Petitioner and the Respondents appeared before the Commission at 3.00 P.M. on 23.12.2010 through their Counsels.

3.0 Before taking up the Petition for hearing, the Petitioner filed an Interlocutory Application on 06.01.2011 for amending the Prayers sought in the Petition for the reasons mentioned in the said I.A., as follows :

“(i) Direct the Respondent to commence and continue supply of power as per the terms of the Power Purchase Agreement dated 27.02.2009;

(ii) Declare that the Respondent is bound by the provisions of the PPA dated 27.02.2009 and is bound to adhere to the supply schedule provided therein;

(iii) Declare that the Respondent is in breach of the terms of the PPA dated 27.02.2009 and compensate the

Petitioners for the said breach and non-availability of power committed to be delivered under the PPA.

OR IN THE ALTERNATIVE

Appoint an arbitrator to resolve the disputes between the Petitioner and the Respondents as per the Power Purchase Agreement dated 27.02.2009;

(iv) Grant such other and further reliefs as this Hon'ble Commission may deem fit in the facts and circumstances of this case, in the ends of justice."

4.0 The Respondents filed their objections to the Petitioner's I.A., on 09.02.2011 objecting the amendments sought.

5.0 After considering the averments of both the parties on the I.A., for the reasons stated therein and hearing the Counsels, the Commission on 17.03.2011 allowed the I.A., and permitted the Petitioner to carryout the amendments in the original Petition and directed the Respondents to file their objections, if any, on the merits of the Petition as amended, within a period of two weeks.

6.0 The Petitioner has filed the amended Petition on 23.03.2011 and the Respondents have filed their objections to the said amended Petition on 05.05.2011. The Respondents have also filed their additional Statement of Objections on 11.08.2011.

- 7.0** The Petitioner has filed Rejoinder to the Statement of Objections of the Respondents on 11.08.2011. The Petitioner has also filed a list of documents / citations in support of its case on 08.09.2011.
- 8.0** It is submitted by the Petitioner that the Petitioner-Company is a Government Company and a Licensee under the provisions of the Electricity Act, 2003 for distribution of electricity in Bangalore and other areas; that the Respondents are Companies incorporated under the provisions of the Companies Act, 1956 and are *inter alia* engaged in the business of owning, operating and maintaining a generating station; that Respondent Nos.1 and 2 herein have jointly formed a Special Purpose Company by name M/s Konaseema Gas Power Limited, i.e., Respondent No.3 herein, with the object of generating power and Respondent No.1 is the Leader of the said Consortium.
- 9.0** The Petitioner has further submitted that Power Company of Karnataka (PCKL), which is also a Government Company, had called for bids on 27.05.2007 for purchase of 1500 Mega Watts (MW) of power on behalf of all the Electricity Distribution Companies of the State of Karnataka and that Respondent No.1 – VBC Ferro Alloys Ltd., in its capacity as leader of the Consortium, submitted its bid for supplying 600 MW of power from Respondent No.3-Konaseema Gas Power Ltd., as per the rates quoted therein.

- 10.0** The PCKL after scrutiny of the Respondent No.1's Bid and further negotiations, accepted the bid of the Respondents and issued a Letter of Intent (LoI) dated 16.2.2008 to procure power from Respondent No.1 for the capacity and the rate indicated therein. In the said LoI, as per bid conditions, Respondent No.1 was also called upon to furnish a Performance Bank Guarantee at the rate of Rs.4.00 Lakhs per MW, three months prior to commencement of first day supply of power.
- 11.0** Simultaneously, PCKL submitted the Bid received to the Commission on 10.06.2008 for its approval. This Commission, after seeking certain clarifications, conveyed its approval on 07.10.2008 to the Petitioner for purchase of power from Respondent No.1-VBC at the rate of Rs.3.7338 per unit, including short-term open access charges on the base rate of Rs.3.65 per unit.
- 12.0** Pursuant to issuance of LoI, PCKL called upon Respondent No.1-VBC on several occasions to execute a Power Purchase Agreement (PPA), as per the bid conditions.
- 13.0** Instead of signing the PPA, Respondent No.1-VBC filed Original Suit No.668 of 2008 in the City Civil Court, Hyderabad, seeking an order for permanent injunction restraining the Petitioner and other procurers from invoking the Bid Bond submitted by Respondent No.1. However, this Original Suit was

withdrawn by Respondent No.1-VBC on 09.02.2009 with the permission of the Court.

- 14.0** Subsequent to the withdrawal of the Suit, on 27.02.2009, Respondent No.1, the leader of the Consortium, came back and signed a Power Purchase Agreement (PPA) with the Petitioner and other procurers for supply of 80 MW of power to the Karnataka Power Transmission Company Limited (KPTCL) Periphery at a base rate of Rs.3.65 per unit with effect from 01.12.2008 and for supply of remaining power as per the scheduled dates agreed to in the PPA.
- 15.0** After signing the PPA, Respondent No.1-VBC on 03.03.2009 wrote to the Petitioner that it cannot supply 80 MW of power as agreed to in the PPA, due to non-availability of fuel to generate the power. However, PCKL insisted on 05.03.2009 and 25.03.2009 to supply the agreed power forthwith;
- 16.0** On 28.03.2009, the Respondent requested PCKL on 28.03.2009 to revise the schedule of quantum of power agreed to be supplied for the reasons stated therein. PCKL vide letter dated 15.04.2009 again rejected the request and reiterated that the Respondent has to supply power as per Schedule of PPA;

- 17.0** On 08.06.2009, Respondent No.1-VBC wrote to Petitioner, stating that the Respondent had not agreed to supply 80 MW of power from Phase-I as being insisted upon and the offer was made only to tide over the acute shortage of power in the State of Karnataka, but now is not in a position to supply power due to acute shortage of natural gas, and again sought for revision of the schedule of power supply, scheduled to commence from 01.12.2008.
- 18.0** As the Respondent started dragging its feet instead of adhering to the schedule of supply of power, the Petitioner filed an Arbitration Application bearing No.431 of 2009 before the City Civil Court, Bangalore, as per Clause 13.3.2 of the PPA and sought a direction against Respondents by way of a mandatory injunction to commence and continue to supply power as per the schedule agreed to in the PPA. However, this came to be withdrawn by it on filing of the Original Petition No.48/2011 before this Commission.
- 19.0** It is strongly contended by the Petitioner that the Respondent, after participating in the tender and signing the PPA, which is binding on both the parties, is bound to supply power to Petitioner, as per the schedule and that the Respondent has no justifiable grounds to renege from performing its obligations under Lol dated 16.02.2008 and PPA dated 27.02.2009, and therefore, this Commission may be pleased to issue orders as prayed for.

20.0 Per contra, it is contended on behalf the Respondents that this Commission lacks jurisdiction to adjudicate upon the issue raised by the Petitioner, that there is no cause of action to the Petitioner to file this Petition and that this Petition has been filed as a counter-blast to Respondent's Original Petition No.21 of 2010 filed before the Commission. It is further contended by the Petitioner that in law it cannot seek a specific performance of the PPA dated 27.02.2009, which is void, being an agreement to do the impossible, viz., supply of power from a date already expired. It is submitted that PCKL and ESCOMs having delayed the execution of PPA by over an year, which resulted in expiration of the validity period of 180 days of Respondents' Bid, cannot seek enforcement of the same. It is further urged that the PPA dated 27.02.2009 is unenforceable and non-est, since it is not approved by this Commission. It is further urged by the Respondents that by invoking the Respondent's Bank Guarantee of Rs.15 Crores, the petitioner has purportedly terminated the PPA. Hence, Petitioner is estopped now from seeking enforcement of PPA. It is further urged by the Respondents that the PPA cannot be specifically enforced under the provisions of the Specific Relief Act, as the parties to PPA have agreed on Liquidated Damages, which is sufficient compensation in the event of breach of contract.

21.0 The Respondents have also contended that the relief for specific performance, since it is an equitable relief, this Commission shall not grant

the same, as it would be unfair, unjust, inequitable and prejudicial to Respondents.

22.0 The Respondents have further urged that the Petition is defective due to non-joinder of parties, namely, PCKL, KPTCL and Government of Karnataka.

23.0 The Respondents have also denied all other Petition averments for the reasons stated in the Statement of objections.

24.0 We have considered the contentions raised in the Petition by the Petitioner and in the Statement of Objections by the Respondents. We have also perused all the documents / citations submitted by both the parties and have also heard the arguments put forth by both the Counsels eloquently.

25.0 The Issues that arise for the consideration and decision of this Commission are as follows :

25.1 **Issue No.1:** Whether this Commission has jurisdiction to adjudicate upon the dispute raised by the Petitioner-Company?

25.2 **Issue No.2:** Whether the PPA dated 27.2.2009 signed between the parties is binding on the parties?

25.3 **Issue No.3:** If the contract is binding, whether the Petitioner is entitled to seek enforcement of the same?

26.0 Issue No.1: Whether this Commission has jurisdiction to adjudicate upon the dispute raised by the Petitioner-Company?

26.1 The Respondent has raised a preliminary issue that this Commission has no jurisdiction to adjudicate upon the present dispute under Section 86(1)(f) of the Electricity Act, 2003, as Respondents 1 and 2, viz., VBC Ferro Alloys Limited and Progressive Constructions Limited, are not Generating Companies. Further, it is also contended that this Commission has no territorial jurisdiction to adjudicate the dispute, as the Respondents are situated outside Karnataka and the Power Purchase Agreement contemplates inter-State supply of power. Under Section 79(a) of the Electricity Act, 2003, it is only the Central Electricity Regulatory Commission (CERC), which can adjudicate the present dispute.

26.2 In our view, the contentions raised by the Respondent regarding jurisdiction is devoid of merit. It is not in dispute that the Respondents, together as a Consortium, had Bid for supply of electricity to be generated by Respondent No.3 to the Distribution Companies of Karnataka through Power Company of Karnataka Limited (PCKL) and this bid was accepted by PCKL on behalf of the Distribution Companies, including BESCO - the Petitioner. Therefore, Respondents 1 and 2, even

though are not Generating Companies *per se*, they are liable for action along with Respondent No.3, which is a Generating Company, as members of the Consortium that placed the bid. Accordingly, the Commission has jurisdiction to adjudicate upon the dispute that has arisen between the Petitioner and the Respondents under Section 86(1)(f) of the Electricity Act, 2003.

26.3 The contention of the Respondents that the Generating Plant is in Andhra Pradesh, i.e., outside Karnataka, and are going to supply power from Andhra Pradesh to the Distribution Companies at Karnataka and therefore, this Commission has no territorial jurisdiction to decide the dispute, cannot be accepted. It is not in dispute that the Petitioner through PCKL had invited bids for supply of electricity at Bangalore, Karnataka and the Respondents submitted their Bid in response to the said Invitation at Bangalore and the generated power has to be supplied to the Petitioner and others, who are Distribution Licensees of Karnataka and the dispute has arisen at Bangalore, Karnataka. Therefore, this Commission has territorial jurisdiction to adjudicate upon the dispute raised by the Petitioner.

26.4 The law on the jurisdiction of the State Electricity Regulatory Commissions is now well settled. In **Case No. OP 20 / 2009** filed by Kalyani Power Company, the Respondent-Power Company, located at Pune, Maharashtra, had raised similar contention as raised by the Respondent in

the present case. This Commission, considering the contention on jurisdiction of Karnataka Electricity Regulatory Commission, by its Order dated 21.10.2009, held as follows :

"11. The Electricity Act has been enacted as a special enactment to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and for constitution of the Regulatory Commissions. Section 174 of the Act provides for overriding effect over the general law.

Section 174 of the Act reads as under :-

"Act to have overriding effect – Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act".

12. The language of Section 86(1)(f) of the Act does not convey a meaning that the adjudicatory power of the Commission is limited to the licensees to whom licenses have been granted by this Commission. The word 'licensee' has been defined under the Act to mean "[Section 2(39)]– a person who has been granted a licence under Section 14". Section 86(1)(f) read with the definition of licensee does not make any distinction between the licensees. In our considered view it include all licensees irrespective of the fact which Commission has granted the licence.

Section 86(1)(f) of the Act states that the State Commission shall adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration.

Since Section 86(1)(f) being provision under special Act in our view it overrides the provisions of the general law for the time being in force, which provides for adjudication of disputes between two parties to a contract. As Section 86(1)(f) provides for adjudication of disputes between two licensees also this Commission shall have to consider the dispute filed before it for adjudication.

13. The Hon'ble Supreme Court while interpreting the provisions of Electricity Regulatory Commission Act, 1998, in the case of BSES Limited Vs. Tata Power Company Limited and others [reported in 2004(1)SCC 195] at Para 12, Page 206 has held the Regulatory Commission Act shall be interpreted in a broad manner and not in a narrow or restrictive sense in so far as the jurisdiction of the Commission is concerned so that the purpose for which the Act has been enacted may be achieved.

In our view, Electricity Act 2003 shall also have to be interpreted as held in the above case while considering the jurisdiction of the Commission for adjudication of disputes between licensees.

14. The Hon'ble Supreme Court in the case of M/s Gujarat Urja Vikas Nigam Ltd., Vs. Essar power Limited (which is relied upon by the petitioners) reported in 2008(4)SCC 755 has held "that Section 86(1)(f) of the Act is a special provision for adjudication of disputes between the licensees and the generating companies and where a statute provides for a thing to be done in a particular manner it has to be done in that manner and in no other manner. Section 86(1)(f) provides a special manner of making reference to an arbitrator in disputes between the licensee and a generating company. Hence by implication all other methods are barred".

15. The law laid down as above by the Hon'ble Supreme Court supports our view taken as above.

16. The contention of respondent that the transaction involves interstate transfer of power and hence this Commission has no territorial jurisdiction cannot be accepted as the agreement between petitioners and respondent has taken place within the territorial jurisdiction of this Commission. Mere transfer of power from Karnataka thereafter to Delhi does not take away the jurisdiction of this Commission. Only issues mentioned in clause 79(1)(c) & (d) are beyond the jurisdiction of this Commission and are to be dealt by CERC.

17. Therefore we hold that under Section 86(1)(f) of the Act, this Commission has jurisdiction to adjudicate the dispute that has arisen between the petitioners and the respondent."

26.5 The above Order of this Commission dated 21.10.2009 has been affirmed by the Hon'ble Appellate Tribunal for Electricity in **Appeal No. 200 of 2009**, by its Order dated 23.02.2011. This Judgment dated 23.02.2011 of the Hon'ble Appellate Tribunal for Electricity has been followed by the Hon'ble Appellate Tribunal for Electricity in a recent Appeal No.15 of 2011, decided on 04.11.2011. The Hon'ble Appellate Tribunal for Electricity in the said **Appeal No.15 of 2011** has held as follows :

"16. The reading of the above provision would reveal that the section is very widely worded and covers the entire process of the power procurement of a Distribution Licensee. The Regulatory jurisdiction of the State Commission extends the procurement of electricity from Generating Companies or licensee or from other sources. Such a procurement can be made from any place within or outside the State, inter-State or Intra State. In other words, all purchasers of electricity from the persons including the trading licensee like the Appellant herein falls under the regulatory jurisdiction of the State Commission.

18. A plain reading of the above provision would clearly show that the State Commission has jurisdiction to entertain disputes between the licensee and also the Generating Companies. Thus, the scope of Section 86 (1) (f) is very wide as it covers all disputes between the licensee which relate to the regulatory jurisdiction of the State Commission. In other words, there is no restriction in Section 86 (1) (f) regarding the nature of the licensee. Thus, all disputes relating to the regulatory jurisdiction of the State Commission which involves the Distribution Licensee or a trading licensee or a transmission licensee shall have to be adjudicated upon exclusively by the State Commission.

31. The location of the selling party is irrelevant. In this context, it would be worthwhile to refer to a decision rendered by this Tribunal in the case of Lanco Kondapalli Power Private Limited v Haryana Electricity Regulatory Commission reported in 2010 ELR (APTEL) 36. In this case this Tribunal has upheld the jurisdiction of the Haryana State Commission to adjudicate upon the dispute under Section

86 (1) (f) between the Distribution Licensee in Haryana and Generating Companies in the State of Orissa.

*"The present case involves a dispute between the Distribution Licensee of Karnataka, the Respondent and the Appellant which is an inter-State licensee. The Appellant is selling power to the Distribution Licensee Respondent in the State of Karnataka, thereby having a nexus to the State. Since the procurement of power by the Distribution Licensee from the Trading Licensee is being done in the State of Karnataka, the Appellant falls within the jurisdiction of the State Commission under Section 86(1)(b) of the Act. The procurement of power has a direct nexus with the State of Karnataka as the supply is to the Karnataka Distribution Licensee. There is no restriction on the location of the Trading Licensees to determine the jurisdiction of the State Commission. The supply of electricity, namely, the Appellant being at a different place does not oust the jurisdiction of the State Commission under Section 86(1)(f) to adjudicate upon the dispute between the licensees. **Therefore, we hold that so long as the Distribution Licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86(1)(f) to adjudicate upon the dispute.**"*

26.5 Accordingly, Issue No.1 is answered against the Respondents.

27.0 Issue No.2: Whether the PPA dated 27.2.2009 signed between the parties is binding on the parties?

27.1 It is submitted by the Petitioner that the PPA signed by the parties on 27.02.2009 has to be performed by the Respondents. Per contra, it is contended by the Respondents that the PPA dated 27.02.2009 has not been approved by the Commission, it does not create any right in favour of the Petitioner to enforce the same. The Respondent's Counsel, in support of his argument, referred to Section 25 of the Electricity Reforms Act, 1999. Further, he referred to the Judgment of the Hon'ble Appellate

Tribunal for Electricity in appeal No.125/2010, wherein it is held that, "in the absence of approval of the State Commission, the Power Purchase Agreements cannot be held as valid and binding." He has drawn our attention to the decision of the Hon'ble Supreme Court in **TATA POWER case (2009) 16 SCC 659**. He has also relied on the Judgments of the Hon'ble Supreme Court in **M.V. SHANKAR BHAT (AIR 2004 SC 636)** and in **VALJI KHIMJI's case (2008) 9 SCC 299**, in this regard.

27.2 It is submitted by the Respondents that, even assuming that the PPA dated 27.02,2009 is valid, the same has been terminated by the Petitioner as per Article 3.3.2, by its letter dated 22.06.2009 and has encashed the Bank Guarantee, therefore the said PPA would no longer survive for enforcement. It is also contended by the learned Counsel for the Respondents that as the PPA stipulates supply of power from 01.12.2008, which date is prior to the signing of the PPA, the PPA cannot be enforced, as it is impossible to perform from a date which has gone by.

27.3 In our view, the arguments advanced on behalf of the Respondents, though look attractive, deserve to be rejected on closer examination. It is observed from the records that when Power Corporation of Karnataka Ltd. (PCKL) on behalf of the Petitioner sought for approval for purchase of power at the rates obtained through the Bid from the Respondents, this Commission considered the same and has accorded approval for the same, vide its letter dated 7.10.2008. This has also been informed to the

Respondents by the PCKL, vide its letter dated 18.10.2008. The tariff and quantity of power are the heart and soul of any PPA. When this Commission has given its approval for these two, it amounts to approval of the Commission to the PPA. The stand taken by the Respondents that the PPA is not binding on it, as the Commission has not approved it, therefore, is contrary to the facts on record. Under Section 63 of the Electricity Act, 2003, when tariffs are obtained through Bids, the Commission cannot again determine the tariffs for incorporating the same in the PPA. In our view, the Contract between the parties for supply and purchase of electricity has come into existence, once the bid of the Respondents was accepted and this Commission has approved the quantity to be purchased according to the tariff obtained through the Bid. The reliance placed by the Respondents on the provisions of the Karnataka Electricity Reforms Act, 1999, has no application, so far as the power purchase under section 63 is concerned. The provisions of the Electricity Act, 2003 prevail over the Karnataka Electricity Reforms Act, 1999, and all power purchases have to be done only in accordance with the Electricity Act, 2003. Reference made by the learned Counsel for the Respondents to the Order of the Hon'ble Appellate Tribunal for Electricity in **Ind Bharath Energies Ltd.** case has no application to the present case, as the said Judgment was rendered in the context of Electricity Regulatory Commissions Act, 1998. Reference to the Judgment of the Hon'ble Supreme Court of India in **Tata Power Corporation Ltd. -Vs- Reliance Energy Ltd. and others** is of no help to the Respondents in any

way, as the power purchase has been approved by this Commission. Similarly, reference to the other Judgments will also not help the Respondents to support their case.

27.4 The contention of the Respondent is that, assuming that the PPA is a valid Agreement, since has been terminated by the Petitioner as per Clause 3.2.2 of the PPA, by its letter dated 22.6.2009 addressed to the State Bank of India, Hyderabad (Annexure-R28) and by encashing the Bank Guarantee, cannot seek enforcement of the Contract. We do not subscribe to this contention of the Respondent, as the letter written by the Petitioner to the State Bank of India, Hyderabad does not state that the PPA is terminated, as asserted. The said letter reads as follows :

"M/s VBC Ferro Alloys Ltd. are not maintaining the timeliness in terms of the Power Purchase Agreement (PPA) and are yet to obtain necessary approvals and clearances wherever required from RLDC, SLDC and other statutory bodies for supply of power. Further, the company has yet to furnish 'Performance Guarantee as per clause 3.1.11 of the PPA'.

In view of the inordinate delay on the part of M/s.VBC Ferro Alloys Ltd., the Bank Guarantee bearing No.0910309-BG0000195 for Rs.15 Crore issued by State Bank of India, Industrial Finance Branch, Hyderabad in favour of BESCO and furnished by the above-mentioned company is hereby invoked. The proceeds of the Bank Guarantee may please be handed over to the bearer of this letter Shri H. Madhusudana Sharma, Deputy Director, PCKL, Bangalore, whose signature is attested below. This letter shall be treated as the written demand by the 'Lead Procurer' in terms of the Bank Guarantee issued by the Bank."

The above letter does not mean that the Contract is terminated. It only means that one of the terms of the PPA is being enforced. This becomes

further clear from the letter addressed to the Respondent-M/s VBC Ferro Alloys Limited, vide BESCO's letter dated 2.7.2009, produced as Annexure-R29. The interpretation tried to be placed by the Respondents on clause 3.2.2. also cannot be accepted, as the Petitioner has not terminated the PPA. On the contrary, the Petitioner is enforcing the Contract, which is evident from this Petition. Encashment of the Bid Bond is not the same as claim for Liquidated Damages. Clause 3.2.2 of the PPA confers a right on the Petitioner to claim Liquidated Damages, if it elects to terminate the PPA, and not otherwise. When the Petitioner is seeking enforcement of the Contract, termination of the same does not arise. It is also the contention of the Respondents that financial closure would not be achieved because of inordinate delay by the Petitioner in signing the PPA. This also carries no substance, since soon after approval of tariff by the Commission, the Petitioner has invited the Respondents for signing the PPA as early as in October, 2008; procedural delays occurred only due to actions by the Respondents, before signing the PPA on 27.2.2009.

27.5 Before we conclude our finding on this issue, we may observe that the stand of the Respondents cannot be appreciated on the validity of the PPA. It is observed from the correspondence that the Respondent No.1 was keen to sign the PPA to get the funding from financial institutions and vigorously persuaded the PCKL to get the PPA executed by the Petitioner and others. Having got the PPA signed, the Respondents thereafter cannot turn around and contend that the PPA is not valid and binding on

them. The contentions of the Respondents that the PPA was signed under fraudulent inducement and the bidding process followed by PCKL was contrary to the Public Policy, etc., cannot hold water. The Respondents being professionally managed Companies, in our view, cannot plead fraudulent inducement, etc., that too when no material is also placed on record in support of the same. The Respondents, who are all Companies of repute and having participated in the Bidding process, outplaying the other Bidders, shall not be allowed to raise such contentions. If at all there is any inducement in signing of the PPA, it is by the Respondent No.1 and not by the Petitioner and others.

27.6 Accordingly, Issue No.2 is answered against the Respondents.

28.0 Issue No.3: If the Contract is binding, whether the Petitioner is entitled to seek enforcement of the same?

28.1 It is submitted by the Petitioner that the PPA signed by the Respondent has to be performed and that this Commission be pleased to issue a direction to the Respondents to perform the same. As against this, it is contended by the Respondents' Counsel that the Petitioner having terminated the PPA dated 27.02.2009 and invoked the Bank Guarantee for non-performance, cannot now seek enforcement of the terminated PPA. He further contended that as the PPA provides for payment of Liquidated Damages in case of breach of Contract, as per the settled law, no specific performance of the PPA can be ordered.

28.2 In this regard, we would like to respectfully refer to the decision rendered by the Hon'ble Appellate Tribunal for Electricity on 07.09.2011 in **Appeal No.184 of 2010** in the case of **Adani Power Limited –Vs- Gujarat Electricity Regulatory Commission and others**, which completely answers the contentions of the Respondent. The Hon'ble Appellate Tribunal for Electricity has held in that case, at paragraphs 117 and 118 that:

117. It is a settled law that the provision of liquidated damages in the PPA does not imply that there cannot be any specific enforcement of performance. In this context Section 23 of the Specific Relief Act, 1963 has to be referred to which is as follows:

“23. Liquidation of damages not a bar to specific performance

(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving, to the party in default an option of paying money in lieu of specific performance;

(2) When enforcing specific performance under this Section, the court shall not also decree payment of the sum so named in the contract”

118. So, the above provisions would make it clear that the specific performance is an appropriate remedy and such a relief is fully in consistent with the provisions of Section 63 of the Electricity Act. The contention of the Appellant that the provision of the Specific Relief Act, 1963 bar the remedy of specific performance in the present case is misplaced.

Section 10 of the Specific Relief Act, 1963 provides that the contracts may be specifically enforced in the Act agreed to be done as such the compensation in money for non-performance would not afford adequate relief."

It is submitted by the Petitioner that the State is reeling under a severe power crisis; that the State Government is exploring various means of augmenting supply of power; that one such effort is to enter into a long and medium term contracts to procure power from generators; that the Government of Karnataka had also to take recourse to Section 11 of the Electricity Act, 2003 in order to ensure minimum supply of electricity to consumers and that the problem gets compounded, if the Respondent fails to honour its contractual commitments.

As Commission, we have also observed that the State is facing acute shortage of power and the gap between the generation and supply is widening, year-after-year. There is an urgent need to bridge the gap between the generation and supply. We have also observed that the cost of power is going up, year-after-year, that too, when the State resorts to short-term procurement of power. Therefore, no amount of compensation can enable the Petitioner to get power in a time-bound manner. If the contracted power does not get supplied, the whole State and its economy will suffer. As held by the Hon'ble Appellate Tribunal in the above Order, the Liquidated Damages specified in the PPA, in our view, will not adequately compensate the Petitioner. Therefore, we hold

that the Petitioner is entitled to performance of the Contract dated 27.02.2009. Consequently, the Respondents have to honour the Contract.

28.3 Accordingly, Issue No.3 is answered against the Respondents.

29.0 In the light of the foregoing discussion, we allow this Petition and direct the Respondents to perform the PPA dated 27.2.2009 and supply electricity as agreed to.

Sd/-
(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K. SRINIVASA RAO)
MEMBER