2025 INSC 1057

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3005 OF 2015

M/s. KKK Hydro Power Limited … Appellant

versus

Himachal Pradesh State Electricity Board Limited and others … Respondents

J U D G M E N T

SANJAY KUMAR, J

1. By way of this appeal filed under Section 125 of the Electricity Act, 2003[1], M/s. KKK Hydro Power Limited, Faridabad, Haryana, calls in question the judgment dated 17.10.2014 passed by the Appellate Tribunal for Electricity, New Delhi[2], in Appeal No. 198 of 2013. In turn, Appeal No. 198 of 2013 was also filed by M/s. KKK Hydro Power Limited, the appellant herein, against the order dated 05.07.2013 of the Himachal Pradesh Electricity Regulatory Commission[3], rejecting its petition for payment of arrears at an enhanced tariff for the electricity supplied by it to the Himachal Pradesh State Electricity Board Limited[4].

1 for short, 'the Act of 2003'
2 for short, 'the APTEL'
3 for short, 'the Commission'
4 for short, 'the HPSEB'

2. IA No. 4 of 2016 filed by the Commission seeking to be impleaded as a party respondent in this appeal is allowed and the Commission is brought on record as respondent No. 4.

3. By the impugned judgment dated 17.10.2014, the APTEL allowed the appellant's appeal in part and held that the tariff for its 3 MW hydel power plant under the Power Purchase Agreement[5] dated 30.03.2000 required no redetermination but the tariff for its additional 1.90 MW hydel power plant, commissioned on 10.07.2008, required to be redetermined as per the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Cogeneration by Distribution Licensee) Regulations, 2007[6]. The APTEL further directed that, as the entire capacity of the appellant's power project was to be injected and evacuated from the same bus bars, a common tariff had to be determined for the power project as a whole and held that the common tariff would be the weighted average of the respective tariffs for the 3 MW and 1.90 MW plants. The appellant was held entitled to arrears on account of the difference in tariff for the period for which payment had already been made as per the existing tariff. The Commission's order dated 05.07.2013 was set aside to that extent and the Commission was directed to pass a consequential order within a timeframe.

---

5 for short, 'the PPA'

6 for short, 'the Regulations of 2007'

4. Pursuant to the above direction, the Commission determined the tariff as per the weighted average and quantified it at ₹2.60/- per Kilowatt hour (kWh), *vide* order dated 11.06.2015. In accordance therewith, the appellant and the HPSEB filed a joint petition, bearing No. 106 of 2015, seeking approval of the supplementary PPA dated 03.11.2015 entered into by and between them, stipulating the new tariff as per the weighted average. Reference was made therein to the orders of the Commission and the APTEL dated 11.06.2015 and 17.10.2014 respectively and the tariff of ₹2.60/- per kWh was incorporated for the entire project of 4.90 MW capacity with effect from 14.07.2008. Be that as it may.

5. The factual narrative needs recounting from scratch to properly gauge the issues raised in this appeal. The Government of Himachal Pradesh[7] and the appellant executed Implementation Agreement[8] dated 30.03.2000, whereby the appellant was to establish Baragran Hydro Electric Power Project of 3 MW capacity on Sanjoin Nallah, a tributary of River Beas, in District Kullu. Pursuant to this IA, the appellant and the GoHP executed a PPA on the same day, i.e., 30.03.2000. Clause 6.2 of the said PPA, titled 'Tariff for Net Saleable Energy', fixed the price to be paid by the HPSEB to the appellant at a fixed rate of ₹2.50/- per kWh. It was stated therein that 'this rate is firm and fixed and shall not be

[7] for short, 'the GoHP'
[8] for short, 'the IA'

changed due to any reason whatsoever'. The PPA was to be in force for a period of 40 years from the synchronization date of the first unit of the project.

6. It was only thereafter, i.e., on 30.12.2000, that the Commission came to be constituted under the Electricity Regulatory Commissions Act, 1998. The 3 MW hydel power project was commissioned by the appellant on 05.08.2004. While so, on 05.02.2005, the appellant sought the approval of the GoHP to augment the capacity of its power project by increasing it to 4.90 MW. Accepting its request, the GoHP forwarded a draft IA to the appellant under letter dated 06.09.2006, wherein it proposed that royalty for water usage, in the shape of free power to be given to GoHP, would continue as per the IA for the existing 3 MW plant, but it would be waived for the upgraded 1.90 MW plant for 12 years, reckoned from the Commercial Operation Date of the third turbine, and beyond the period of 12 years, the royalty would be 12% for the next 18 years and beyond that, 18%. This proposal was in modification of clause 13.1 of the earlier IA dated 30.03.2000, which stated that royalty for water usage, in the shape of free power @ 10% of deliverable energy, would be leviable but it would be waived for 15 years from the Commercial Operation Date.

7. A supplementary IA was then executed by the GoHP and the appellant on 05.07.2007, wherein both parties agreed that the project for

the revised capacity of 4.90 MW should be implemented, subject to the terms and conditions mentioned therein. Clauses 13 and 13.1 of this supplementary IA dealt with the GoHP's rights on water and stated that royalty for water usage, in the shape of free power, from the appellant's 4.90 MW power project would be waived for 12 years, reckoned after 30 months from the date of signing of the supplementary IA and beyond the period of 12 years, the royalty would be @ 12% for the next 18 years and beyond that, @ 18%. This was in alteration of the earlier understanding.

8. Thereafter, on 04.12.2007, on the joint petition of the HPSEB and the appellant, the Commission conditionally approved the draft PPA submitted by them in accordance with the supplementary IA dated 05.07.2007 for the revised capacity of 4.90 MW. The relevant portion of the order reads as follows:

> 'The Commission under sub-section (1)(b) of Section 86 of Electricity Act, 2003 grants consent to the said PPA, subject to the following observations: -
>
> i) The Model PPA approved by the Commission vide its order dated 24th March, 2003 provides for Government Guarantee and the same can only be omitted from the PPA with the approval of the Commission for which purpose the parties need to file a joint application within one month of the date of issue of this order.
>
> ii) The approved model PPA provides that the Company shall provide to the Board, free of cost, 10% of the energy generated by the project as measured at the

interconnection point commencing from the date falling 15 years from the date on which the Company synchronizes the first unit of the project. The stipulation made in this regard in the PPA submitted for approval is however on the basis of "Hydro Power Policy 2006" notified subsequently by the GoHP in December, 2006. The deviation can only be allowed after the parties file a joint application for necessary approval in this regard with the Commission.

iii) Construction Schedule attached to the Implementation Agreement PPA needs to be got approved as Appendix-B from the competent authority as per the standard Implementation Agreement and attached as such with the PPA.

iv) Page 2 of the Implementation Agreement is missing.

v) Tariff and other terms and conditions of the PPA shall be subject to the provisions of the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Cogeneration by Distribution Licensee) Regulations, 2007.' (*emphasis is ours*)

9. Pursuant to the conditional approval granted by the Commission, *vide* order dated 04.12.2007, the appellant and HPSEB executed PPA dated 11.03.2008. 'Project' was defined therein under clause 2.2.56 to mean Baragran Hydro Electric Project of 4.90 MW (revised) capacity. Clause 6.2 dealt with the 'Tariff for the Net Saleable Energy' and stated that the HPSEB would pay for the net saleable energy delivered to it by the appellant at a fixed rate of ₹2.50/- per kWh. It was further stated that 'this rate is firm and fixed without indexation and escalation and shall not

be changed due to any reason whatsoever'. However, another clause was added thereunder which reads as follows:

> 'Further, the tariff as per clause 6.2 above and other terms & conditions of the PPA shall be subject to the provisions of the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Cogeneration by Distribution Licensee) Regulations, 2007 and when such regulations are framed as per the HPERC order dated 04.12.2007 incase no. 241/2007 (Annexure-IV).'

10. Pursuant to the Regulations of 2007, the Commission issued the Tariff Order for 'Small Hydel Power Projects not exceeding 5 MW' on 18.12.2007. Clause 5.35 thereof stated that it would be applicable to all PPAs (not exceeding 5 MW) already approved by the Commission, with a specific clause that the tariff and other terms and conditions of the PPA shall be subject to the provisions of the Regulations of 2007, and also to the PPAs to be approved by the Commission thereafter. The tariff fixed by the Commission under this Tariff Order is ₹2.87/- per kWh.

11. Thereafter, the APTEL adjudicated two appeals filed against this tariff of ₹2.87/- per kWh for small hydel power projects of upto 5 MW and, by order dated 18.09.2009, the APTEL remanded the matter to the Commission to redetermine the tariff for such projects. Pursuant thereto, the Commission issued orders dated 09/10.02.2010, enhancing the tariff to ₹2.95/- per kWh.

12. On the strength of the Commission's orders dated 09/10.02.2010, the appellant approached the HPSEB on 01.04.2010 to execute a

supplementary PPA with the enhanced tariff of ₹2.95/- per kWh. Aggrieved by the lack of response, the appellant filed Petition No. 94 of 2010 before the Commission seeking a direction to the HPSEB to act upon its plea and execute a supplementary PPA, incorporating the tariff of ₹2.95/- per kWh. However, supplementary PPA dated 10.09.2010 came to be executed by the appellant and the HPSEB, without the intervention of the Commission, modifying the tariff from ₹2.50/- per kWh to ₹2.95/- per kWh. Pertinent to note, a caveat was added therein by the HPSEB that such enhancement would be without prejudice to its rights as available under law.

13. Pursuant to this supplementary PPA, the HPSEB started paying the appellant the higher tariff of ₹2.95/- per kWh. As arrears of payment at this enhanced tariff from April, 2008 to August, 2010 were not made and payments for that period had only been made at the initial tariff of ₹2.50/- per kWh, the appellant filed Petition No. 6 of 2011 before the Commission. Its prayer therein was to direct the HPSEB to pay the arrears of ₹2,77,50,960/- for the period in question. During the pendency of this petition, the HPSEB cleared the bill for the aforestated amount and stated that the same would be released in 5 installments of ₹55,50,192/- each. The first installment of ₹55,50,192/- was released by the HPSEB on 26.02.2011. According to the appellant, the only issue that survived thereafter in Petition No. 6 of 2011 was as to the interest

payable on the arrears from 11.03.2008 to 10.09.2010. While so, the HPSEB filed Petition No. 118 of 2012 before the Commission, seeking recall/modification/ clarification of its earlier conditional approval order dated 04.12.2007.

14. By common order dated 05.07.2013, the Commission dismissed Petition No. 6 of 2011 filed by the appellant for payment of arrears and also dismissed Petition No. 118 of 2012 filed by the HPSEB. Perusal of the order reflects that the following issues were framed for consideration:

1. Whether the Commission has the power to look into the agreement entered into or concluded prior to its existence?
2. Whether the observation No. (v) of the Commission's consent letter on PPA is relevant in the present case and if it is relevant what is the import of the regulations and the orders issued thereunder on tariff and other conditions?
3. Whether the provisions in the Model PPA have the binding force?
4. Whether the parties to the PPA have the power to amend/modify the PPA and if so does it require Commission's approval?
5. Whether the parties have executed the PPA, including the Supplementary PPA, in conformity with the approval accorded by the Commission?
6. Whether the petitioner is entitled to seek directions as prayed for in the petition?

15. As regards Issue No. 1, the Commission held that PPAs executed/ concluded prior to its existence had to be complied with in accordance with the stipulations made therein and it lacked the power to look into such PPAs. It held that neither the Act of 2003 nor the Regulations of

2007 framed thereunder provided for such interference. As regards Issue No. 2, the Commission held that there was no need to recall or modify the consent order dated 04.12.2007, the subject matter of the petition filed by the HPSEB. The Commission noted that the order dated 04.12.2007 made it clear that the consent conveyed thereunder for the PPA was subject to certain observations and it was for the parties to finalize and execute the PPA accordingly. As per the Commission, instead of proceeding on the basis of mere assumptions and presumptions, the parties ought to have worked out the terms and conditions of their PPA after due consideration of the Regulations of 2007, subject to which it had accorded its approval on 04.12.2007. The Commission observed that the confusion had arisen from the wrongful interpretation of the said observations by the parties and held that the supplementary PPA dated 10.09.2010 was not in conformity with the provisions of the Regulations of 2007, subject to which it had accorded its approval.

16. With regard to Issue No. 3, the Commission opined that the model PPA was generic in nature and its amendment would normally have prospective applicability. It was further observed that if the same impacted concluded PPAs, the parties would have to adopt the model PPA with the approval of the Commission on a case-to-case basis. As regards Issue No. 4, the Commission opined that a statutory duty is cast

on the regulated entities to align their existing and future contracts with the Regulations of 2007 and the PPA could be amended/modified only with the consent of both the parties and, further, whenever such modification involved a change in tariff, such amendment and modification could be made only with the approval of the Commission.

17. On Issue No. 5, the Commission observed that neither the Regulations of 2007 nor the Tariff Order dated 18.12.2007 issued thereunder contained any express provision to regulate tariff in relation to enhanced capacities of existing projects. The Commission pointed out that its order dated 04.12.2007 made it clear that it had conveyed its consent for the PPA subject to certain observations and it was for the parties to finalize and execute the PPA accordingly. As the parties had neither worked out the terms and conditions of their PPA in conformity with the consent given by it nor did they move a petition for review of their tariff, they had no power to do so unilaterally. On the last issue, viz., Issue No.6, with regard to the prayer of the appellant, the Commission noted that the appellant's 3 MW project had been commissioned in the year 2004 at the tariff of ₹2.50/- per kWh and even thereafter, energy generated from the revised capacity was also paid for under the PPA dated 11.03.2008 at the same rate. The Commission noted that the appellant could not take advantage of its own non-fulfilment of the conditions precedent to the execution of the supplementary PPA dated

10.09.2010, resulting in additional revenue of more than ₹1 crore per annum under a PPA, which was neither firm nor conclusive as it was subject to the HPSEB's rights under law. The Commission, therefore, held that it could not enforce the supplementary PPA. The Commission dismissed both the petitions accordingly. In effect, the Commission held that the appellant was entitled to payment @ ₹2.50/- per kWh for the entire 4.90 MW project. Aggrieved by the Commission's order, the appellant approached the APTEL, resulting in the passing of the impugned order dated 17.10.2014.

18. Perusal of the impugned order dated 17.10.2014 indicates that, after noting the findings of the Commission, the APTEL observed that the IA dated 30.03.2000 and the supplementary IA dated 05.07.2007 along with the PPA dated 30.03.2000 and the PPA dated 11.03.2008 dealt with one single project and there was only a capacity revision, which came about due to augmentation from 3 MW to 4.90 MW. The APTEL noted that the consequential PPA, on account of capacity revision, was signed after the Regulations of 2007 came into force. It also noted that, as per the *proviso* to Regulation 6 in the Regulations of 2007, there was no power to review the PPAs signed prior to existence of the Commission. As the energy generated from the original 3 MW plant did not fall within the purview of the Commission's regulation, *per* the APTEL, the only issue was to see how the incremental energy

needed to be regulated for purchase. The APTEL, therefore, found no mistake on the part of the Commission in including observation No. (v) in its approval order dated 04.12.2007, which made it clear that the consent of the Commission was conditional and it was for the parties to finalize and execute their PPA accordingly. The APTEL noted that both parties did not work out the terms and conditions of their PPA in conformity with the consent given by the Commission and they also failed to move a petition for review of the tariff thereafter.

19. The APTEL, therefore, opined that the appellant could not seek release of arrears on the basis of the supplementary PPA dated 10.09.2010, which was not in line with the approval accorded by the Commission. It noted that the supplementary PPA dated 10.09.2010 was not approved by the Commission at all and it did not meet the test of law. The APTEL observed that, as the PPA dated 30.03.2000 pertaining to the 3 MW plant was prior to the constitution of the Commission and as the said plant was commissioned on 05.08.2004 itself, i.e., prior to the notification of the Regulations of 2007, the appellant was not entitled to claim tariff for the said 3 MW plant on the basis of the enhanced tariff determined by the Commission under the Regulations of 2007.

20. The APTEL, however, noted that the augmented 1.90 MW capacity plant was planned after the commissioning of the 3 MW capacity plant, as an extension. The APTEL also noted that this 1.90 MW capacity plant

was commissioned on 10.07.2008, i.e., after the Regulations of 2007 and the Tariff Order dated 18.12.2007 came into effect. Reference was made to observation No. (v) in the Commission's order dated 04.12.2007 and it was pointed out that, as per the *proviso* to Regulation 6, as amended on 27.11.2007, the Commission was empowered to modify PPAs by reason of change in statutory laws/rules or the State policy. Therefore, in so far as the 1.90 MW plant was concerned, the APTEL opined that it would be subject to the tariff determined under the Regulations of 2007. The APTEL, accordingly, disagreed with the Commission's finding that the 1.90 MW plant would also have to be treated on par with the initial 3 MW plant and be bound by the same tariff of ₹2.50/- per kWh.

21. As regards the failure of the appellant to obtain the approval of the Commission for the supplementary PPA dated 10.09.2010, the APTEL opined that the said supplementary PPA was signed with the mutual consent of both parties, modifying the tariff of ₹2.50/- per kWh to ₹2.95/- per kWh and as the augmented 1.90 MW plant would be covered by the tariff determined under the Regulations of 2007, it held that the failure to seek approval of the supplementary PPA, in so far as the said plant was concerned, could not be held against the appellant. The APTEL further held that, in so far as the original 3 MW plant was concerned, in relation to which the PPA was executed on 30.03.2000, even before the

establishment of the Commission, the tariff thereunder could not have been modified by the parties even by mutual consent, as it was fixed and, therefore, the appellant could not seek benefit of the enhanced tariff for the said plant, notwithstanding the supplementary PPA dated 10.09.2010. The APTEL opined that, merely because the expanded unit was commissioned after notification of the Regulations of 2007, it did not give a right to the appellant to claim the higher tariff for the entire project.

22. The APTEL, accordingly, concluded that the Commission had correctly exercised its jurisdiction to examine the validity of the supplementary PPA dated 10.09.2010 entered into by the parties, purportedly on the basis of the Commission's order dated 04.12.2007. The APTEL held that the tariff for the 3 MW plant which was commissioned on 05.08.2004 under the PPA dated 30.03.2000, long prior to the notification of the Regulations of 2007, could not be redetermined thereunder. As regards the 1.90 MW plant, which was an extension of the 3 MW plant, the APTEL held that the same would be governed by the tariff determined as per the Regulations of 2007. Lastly, as the 1.90 MW capacity plant was also available at the same project site and the entire capacity of the project is to be injected and evacuated from the same bus bars, the APTEL directed that a common tariff be determined for the power project as a whole. Such tariff, as per the APTEL, would be the weighted average of the respective tariffs

envisaged for the 3 MW and 1.9 MW plants. The appellant was held entitled to payment of arrears on account of the difference in the tariff for the project as per these directions.

23. Having given thoughtful consideration to the matter, we are of the opinion that the APTEL misguided itself on certain crucial aspects. The Commission's Tariff Order dated 18.12.2007 worked out the levelized tariff for small hydel projects of upto 5MW at ₹2.87/- per kWh but in appeal, the APTEL remitted the matter to the Commission for reconsideration, *vide* its order dated 18.09.2009. Pursuant thereto, the Commission passed orders dated 09/10.02.2010 revising the tariff for such hydel power projects to ₹2.95/- per kWh. In the concluding paragraph of its order dated 09.10.2010, the Commission observed as under:

> 'The Commission is aware that after issuance of the SHP (Small Hydro Power Projects) Order dated Dec., 18, 2007 and till the issuance of this Order, the hydel power producers and the Board, have executed and signed the Power Procurement Agreements with the provision of the tariff of Rs.2.87/Unit for the power producer by the SHPs in this State. In order to give the benefit of increase of tariff of Rs.2.95/unit from Rs.2.87/Unit to the hydel power producers, who have executed the PPAs with the stipulation of Rs.2.87/Unit, such hydel power producers and the Board are directed to modify the clauses in PPAs, in accordance with law.'

24. Significantly, the appellant's PPA dated 11.03.2008 did not stipulate the tariff of ₹2.87/- per kWh, but only ₹2.50/- per kWh. *Per se*,

the aforestated direction in the concluding paragraph of the Commission's order dated 09.02.2010 did not apply to the appellant's supplementary PPA. However, by its letter dated 01.04.2010 addressed to the HPSEB, the appellant straightaway sought amendment of its PPA and requested for execution of a fresh PPA stipulating the higher tariff of ₹2.95/- per kWh. Aggrieved by the inaction on the part of the HPSEB, the appellant thereupon approached the Commission praying for a direction to the HPSEB to modify the PPA dated 11.03.2008 by enhancing the tariff from ₹2.50/- per kWh to ₹2.95/- per kWh. This petition was, however, rendered infructuous owing to the HPSEB addressing letter dated 12.07.2010 to the appellant requesting it to supply the draft of the amendments to be incorporated in the existing PPA dated 11.03.2008, so that the Commission's order dated 09.02.2010 could be implemented. Pursuant thereto, the supplementary PPA dated 10.09.2010 came to be executed by the appellant and the HPSEB. Therein, it was observed as under:

> 'The rate of Rs.2.50 per kilowatt hour appearing under clause 6.2, 6.4 & 16.5 in the PPA referred to above shall be taken as tariff at Rs.2.95 per kilowatt hour, as per HPERC Order dated 09.02.2010. This is without prejudice to the rights of second part as available under law.'

25. Pertinently, after the conditional approval of the initial draft PPA by the Commission, *vide* its order dated 04.12.2007, resulting in the PPA dated 11.03.2008, the subsequent supplementary PPA dated 10.09.2010

was never placed before the Commission for its approval. The earlier PPA dated 11.03.2008 can be sustained as it was based on the approval of the draft PPA by the Commission on 04.12.2007 but insofar as the supplementary PPA dated 10.09.2010 is concerned, no draft PPA was ever submitted to the Commission for its approval and it appears that the supplementary PPA dated 10.09.2010 was executed independently and unilaterally by the parties themselves, incorporating a tariff which was never subjected to the review and approval of the Commission. In this context, Section 86(1)(b) of the Act of 2003 assumes great significance. It reads as under:

> **'86. Functions of State Commission.** – (1) The State Commission shall discharge the following functions, namely: -
> (a). …..
> (b). regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;
> (c). ……. .'

26. This provision puts it beyond the pale of doubt that fixing of the price for the purchase of electricity is not a matter of private negotiation and agreement between a generating company and a distribution licensee. The price as well as the agreement, i.e., PPA, incorporating such price and providing for purchase of electricity at that price necessarily have to be reviewed and approved by the State Commission

under this provision. The order dated 09.02.2010 passed by the Commission, without reference to the appellant's case, required only those existing PPAs which stipulated the tariff of ₹2.87/- per kWh to be amended so as to give effect to the enhancement of tariff from ₹2.87/- per kWh to ₹2.95/- per kWh. This order had no application at all to the case of the appellant as its PPA dated 11.03.2008 did not stipulate the tariff of ₹2.87/- per kWh. In this scenario, the appellant and the HPSEB were bound to approach the Commission to secure its approval before they could effect any enhancement of the tariff stipulated in the PPA dated 11.03.2008. Without doing so, the appellant and the HPSEB, on their own and without the Commission's review and approval, enhanced the tariff from ₹2.50/- per kWh to ₹2.95/- per kWh under their supplementary PPA dated 10.09.2010!

27. Viewed thus, the Commission was fully justified in ignoring the supplementary PPA dated 10.09.2010 and asserting that it could not enforce it. However, the APTEL overlooked this crucial aspect and held that, insofar as the additional 1.90 MW plant was concerned, the supplementary PPA dated 10.09.2010 can be given effect to, by applying to it the tariff of ₹2.95/- stipulated therein. The observation of the APTEL that no adverse inference could be drawn against the appellant for not obtaining the approval of the Commission for the tariff agreed to by the

parties under this supplementary PPA 10.09.2010 completely overlooked the binding mandate of Section 86(1)(b) of the Act of 2003.

28. However, as the HPSEB did not choose to file an appeal against the APTEL's order and mutely accepted the direction therein to go before the Commission for computation of the weighted average so as to quantify the tariff for the entire 4.90 MW power project of the appellant, we choose not to interfere with the same at this late stage. It may be noted that the revised tariff of ₹2.60/- per kWh, on the basis of the weighted average computed by the Commission, stipulated in the supplementary PPA dated 03.11.2015 has been acted upon for a long time now and we would not wish to upset the apple cart and start the process all over again. More so, as the HPSEB did not even choose to file an appeal against the impugned order. We, however, hasten to clarify the legal position so as to obviate a similar error being committed in future.

29. Though, the appellant would seek to draw parity with power projects which entered into PPAs after establishment of the Commission, the very fact that its PPA was dated 30.03.2000 distinguishes it from such cases, and there can be no possibility of drawing parity as sought by it.

30. As regards the issue of royalty on water usage, the change in the GoHP's policy in that regard since the PPA dated 30.03.2000

undoubtedly had an adverse impact on the appellant. We may, however, note that Regulation 6 of the Regulations of 2007, which dealt with determination of tariff for electricity from renewable sources, came to be amended by the Commission, *vide* Notification dated 12.11.2007. The amendment of Regulation 6, to the extent relevant, reads as under:

> '**3. Amendment of regulation 6. –** In sub-regulation (1) of regulation 6 of the said regulations, -
>
> a) …….;
>
> b) …….; and
>
> c) for the second *proviso*, the following *proviso* shall be substituted, namely: -
>
> "Provided further that, -
>
> (i) where the power purchase agreement, approved prior to the commencement of these regulations, is not subject to the provisions of the Commission's regulations on power procurement from renewable sources; or
>
> (ii) where, after the approval of the power purchase agreements, there is change in the statutory laws, or rules, or the State Govt. Policy;
>
> (iii) the Commission, in order to promote co-generation or generation of electricity from renewable sources of energy, may, after recording reasons, by an order, review or modify such a power purchase agreement or a class of such power purchase agreements.'

It would, therefore, be open to the appellant to approach the Commission for appropriate relief under the amended *proviso* to Regulation 6 of the Regulations of 2007. We leave it at that.

31. On the above analysis, we hold that the appellant was granted relief by the APTEL, ignoring the mandate of Section 86(1)(b) of the Act

of 2003, but the HPSEB allowed the same to attain finality by not filing an appeal. We, therefore, stay our hand and do not interfere with the same at this late stage. We, however, clarify and affirm that a generating company and a distribution licensee cannot, by private agreement, execute a PPA on their own or stipulate tariff therein as per their choice, for supply of electricity within a State, without seeking the review and approval of the Electricity Regulatory Commission under Section 86(1) (b) of the Act of 2003.

32. In summation, the plea of the appellant that it should be extended the enhanced tariff of ₹2.95/- per kWh for the entire project, including the 3 MW plant covered by the PPA dated 30.03.2000, is bereft of merit.

33. The appeal is accordingly dismissed.

I.A. No. 4 of 2016 is allowed.

Registry to carry out necessary amendment in the cause title.

Other pending applications, if any, shall stand dismissed.

....., J.
SANJAY KUMAR

....., J.
N.V. ANJARIA

August 29, 2025

New Delhi.