

**\*HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**

**+ W.P.Nos.9844, 9867, 9869, 9870, 9871, 9872, 9873, 9874, 9875,  
9876, 9877, 9938, 10135, 10138, 10212, 10244, 10486, 10487,  
11175, 11872 and 12286 of 2019**

% 24-09-2019

WP.No.9844 of 2019

# ReNew Power Limited

having its corporate office at Commercial Block 1, Zone 6 Golf Course  
Road, DLF City, Ph-V, Gurgaon- 122009 Represented by its Authorized  
Representative Shri Satwik E and 8 others

... Petitioners

Vs.

\$ The State of Andhra Pradesh,  
Represented by its Principal Secretary, Energy Infrastructure and  
Investment Department, A. P.Secretariat, Velagapudi, Amaravati, Andhra  
Pradesh and 7 others

... Respondents

! Counsel for the petitioners: Sri Chall Gunaranjan rep., by senior  
counsels Sri Vikas Singh, Sri Sajan Poovayya, Sri Sanjay Sen, Sri  
Prakash Reddy and Sri P.Sri Raghuram.

! Counsel for the Respondents: learned Advocate General (A.P) and  
Assistant Solicitor General of India.

< Gist:

> Head Note:

? Cases referred:

- <sup>1</sup> 1999 (8) SCC 1
- <sup>2</sup> (2003) 2 SCC 107
- <sup>3</sup> 2014 (3) SCC 502
- <sup>4</sup> (2016) 13 SCC 515
- <sup>5</sup> 2017 (16) SCC 498
- <sup>6</sup> 2002 (2) SCC 507
- <sup>7</sup> 2017 14 SCC 80
- <sup>8</sup> AIR 1960 SC 588
- <sup>9</sup> 2013 (4) ALT 381
- <sup>10</sup> (2008) 2 SCC 672
- <sup>11</sup> 2006 4 SCC 683
- <sup>12</sup> 2004 (1) SCC 55
- <sup>13</sup> 2011 (12) SCC 400
- <sup>14</sup> (2010) 2 ALD 492
- <sup>15</sup> (2011) 5 SCC 214
- <sup>16</sup> AIR 1990 SC 699
- <sup>17</sup> (2006) 4 SCC 683
- <sup>18</sup> 2004 (3) SCC 553

**HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU**

**W.P.Nos.9844, 9867, 9869, 9870, 9871, 9872, 9873, 9874,  
9875, 9876, 9877, 9938, 10135, 10138, 10212, 10244, 10486,  
10487, 11175, 11872 and 12286 of 2019**

**COMMON ORDER :**

The batch of writ petitions have been filed by petitioners who are the solar and wind power generators in the State of Andhra Pradesh essentially claiming the following relief:

“To issue an appropriate writ, certiorari calling for the records regarding G.O.RT.No.63, Energy (Power-II) dated 01.07.2019 and all consequential proceedings and letter including the letter dated 12.07.2019 (impugned letter) and declare the said GO, letters and all consequential actions taken in furtherance thereto, as illegal, void and colourable exercise of power contrary to the provisions of the Electricity Act, 2003 and the petitioners' rights guaranteed under the Constitution of India and more particularly Articles 14 and 19(1) (g).”

The petitioners are all generators of electricity. They have established/set up Plants to generate Wind Power, Solar Power etc., and entered into agreements called “Power Project Agreements” (PPAs) with the DISCOMS, also known as the Power Distribution Companies, which distribute the power that is generated. In view of the fact that a number of writ petitions have been filed and were argued as a batch, the

array of the parties is not being separately listed. Facts in each case are not being reproduced as they are largely similar. For the sake of convenience, the petitioners are called generators; the Power Distribution Companies are referred to as “DISCOMS”, Government of Andhra Pradesh is referred to as (GoAP), the Government of India is referred to as (GOI), Ministry of Nuclear Energy is referred to as (NRE) and the A.P.Regulatory Commission is referred to as (APERC). The APERC is constituted under the Electricity Act, 2003, Act 36 of 2003 (for short ‘the 2003 Act’), which is a Central Enactment.

**Facts not in dispute:**

W.P.No.9871 of 2019 is taken up as the lead case in this batch.

The petitioners were invited as a part of the initiative taken by the GOI and GOAP to setup plants for generating electricity through alternative sources of energy in view of the heavy dependency of the country on fossil fuels. Pursuant thereto and in consequence of the policy initiatives of the GOI and the GoAP, the petitioners have set up their solar/wind power Plants. These Plants were set up years ago and have been functioning since then. As far as GoAP is concerned, its solar Policy was unveiled in 2012, 2015 and 2018 and the wind Policy was unveiled in 2008 and 2015. In the year 2014, a request for selection for bids were invited from parties

interested in generating solar power. The petitioners were successful bidders in the bidding process. In the year 2014, the generators entered into Power Project Agreements (PPAs) with the DISCOMS. The wind power generators entered into agreements in 2016-17 year with DISCOMS. The PPAs are valid for 25 years.

The peculiarity of these contracts is that the rate quoted by the generator of electricity had to be accepted by the APERC which has the statutory power under the Electricity Act, 2003 to fix the tariff/rate at which the power would be supplied for both the solar and wind generators. The process is a little different for solar/wind generators, but the role of APERC is present in both. The APERC is headed by a retired Judge of the High Court. He is assisted by two technical experts. After following the procedure prescribed under the Electricity Act, which also includes a public hearing, the tariff is “determined”/approved by the APERC. After the tariff was determined/approved, the petitioner companies started generating the power and supplying the same to the DISCOMS. Bills were being raised and being paid at the tariff rate determined by the APERC, since years by the DISCOMS.

**Present controversy:**

In the recent past, the GoAP felt that the tariff that was fixed was exorbitant and therefore the Government felt the need to take steps to reduce the “tariff”. On 01.07.2019,

GORt.No.63 was issued by the GoAP by which the Government constituted a High Level Negotiating Committee (HLNC) comprising of 9 members to review the high priced Wind and Solar agreements, to negotiate with generators, to bring down the prices and to make a suitable recommendation. The rationale behind step was that the high power purchase price has driven the DISCOMS into a financial black hole which was projected as approximately Rs.20,000/- crores as on July 2019. A 45 day target is given to the HLNC to negotiate with the purchasers and submit a report. Pursuant to this, a GO, a letter dated 12.07.2019 was also issued to all the purchasers of power. This letter refers to GORt.No.63. As far as the solar/wind generators are concerned, the letters states that the fixation of the tariff by APERC and the bid conducted by the DISCOMS did not reveal the true market price. The DISCOMS, General Manager felt that the correct rate is only Rs.2.44p. for solar power and Rs.2.43p. for wind power. Stating that the DISCOMS have suffered enormous financial losses and are unable to pay the bills, the CGM of the DISCOMS addressed a letter to purchasers to reduce the tariff to Rs.2.44p. per KWH to the solar generators and to Rs.2.43p. for the wind power generators.

This GORt.No.63 dated 01.07.2019; the letter dated 12.07.2019 which is addressed to suppliers and the related actions are the subject matter of the challenge in all these

writ petitions. In the letter dated 12.07.2019, it is clearly spelt out that if the tariff is not reduced, the DISCOMS have no alternative but to terminate the power project agreements. In addition to these two documents, the counsels appearing for the petitioners also drew this Courts attention to the review meeting held on 26.06.2019 which was chaired by the Hon'ble Chief Minister of the State of A.P. The minutes of the meeting are not really in dispute and they are also reproduced in many of the affidavits that are filed. The minutes are also filed as a document. As far as the solar and wind generators are concerned, it is pointed out that on that day in the review meeting of the Energy Department, it was decided (a) to issue recovery notices to all wind and solar PPAs for the loss caused to the Government. (b) the must run obligation in the wind and solar regulation of APERC should be challenged. (c) file a petition before the APERC to reduce and re-fix the wind FIT, keeping Thermal Plants and other sources on stand by, if wind/solar is stopped.

These events forced the generators/petitioners to file this batch of writ petitions.

**Submissions of the learned counsel for petitioners:**

All the learned counsels appearing for the petitioners highlighted the following: (a) the PPA is a negotiated contract, the terms of which are sacrosanct and cannot be unilaterally altered. (b) the price is "discovered" and determined by

APERC as per Sections 62, 63 and 64 of the 2003 Act, which includes a public hearing. (c) rates allegedly discovered in May, 2017 by Rajasthan cannot be used to rework or re-fix a rate decided in 2014-15. They argue that the rates of 2014-15 are as per the prevalent conditions and are not high as alleged. (d) the State of AP/GoAP has no role to play in this matter; the State cannot dictate terms to the APERC or to the generators, since there is a concluded contract between the petitioners and the DISCOMS. (e) the decisions taken by the Government are contrary to the GOI policies and also GoAP policies. (f) the decisions are violative of the provisions of the 2003 Act and also the fundamental rights of the petitioners. (g) the minutes of the meeting clearly show the pre-conceived mind of the GoAP to arm twist the suppliers to accept the prices suggested. (h) all of them urge that pursuant to this meeting etc., the DISCOMS have curtailed the power generators. This coupled with the deliberate failure to pay the bills has driven the generators to their knees. Hence, they seek directions against the curtailment of power generation also.

The above are the general submissions.

Sri Vikas Singh, learned senior counsel took the lead in arguing the cases. According to him, the subject governing 'electricity' is in the Concurrent List of the Constitution of India. Learned senior counsel submits that once a Central

Act, namely, the Electricity Act, 2003 (the 2003 Act) is in place, the State cannot legislate on this or issue directions. He submits that the State Act or the State actions cannot be repugnant to the Central Act. Learned senior counsel also relies upon the objects and reasons for enacting the 2003 Act, particularly, para 1.3 of the objects and reasons which states that one of the major reasons why the 2003 Act was enacted was to distance the Government from the determination of the tariffs. He points out that it is with this avowed object, the Electricity Regulatory Commission Act, was enacted in the year, 1998. He also points out that as there was a need to harmonize and rationalize the Indian Electricity Act, 1910, Electricity Supply Act, 1948 and the Electricity Regulatory Commission Act, 1998 a new self-contained comprehensive legislation, namely the 2003 Act, was enacted.

Basing on this, learned senior counsel argues that the determination of tariff is no longer a Government function and that the 2003 Act, is a self-contained legislation. He also points out that the process of negotiation and fixation of rates is a long drawn process, which has been concluded by the APERC. He relies upon the consent letter dated 21.02.2015 by which the APERC conveyed its consent to adopt the tariff under section 63 of the 2003 Act. He drew the attention of the Court to Sections 62 and 63 of the 2003 Act and the drawn process by which the tariff is determined.



Learned senior counsel also argued that the rate that was determined in 2015 is a reasonable rate based on prevalent rates and that it is not at all exorbitant as urged by the State. He also argued that the State does not have the power to enter into these areas and that at best, under the 2003 Act, it only can give directions in matters of “policy”. Senior counsel asserts vehemently that issue of tariff is not an area in which the State can interfere. Therefore, he questions the directions of the State as contained in the minutes of the meeting dated 26.06.2019 which were followed by the impugned G.O. and the letter. Learned senior counsel also argues that sanctity of the contract should be preserved at all cost. It is his contention that once a contract is signed, it is the contract alone which would prevail and that neither the State nor the DISCOMS can give a direction to the petitioners to unilaterally reduce their tariff. He also submits that the letter that is addressed is a virtual termination letter, which clearly states that if the rates are not reduced, the contracts will have to be terminated. Learned counsel also filed a compilation of the case laws. Of the 16 cases that are cited and allied upon, learned senior counsel essentially relied upon ***Raghunath G. Panhale (Dead) By Lrs. vs. Chaganlal Sundarji***<sup>1</sup> and ***Harbanslal Sahnia v. Indian Oil Corporation Ltd.***,<sup>2</sup> for the proposition that even if there is an

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<sup>1</sup> 1999 (8) SCC 1

<sup>2</sup> (2003) 2 SCC 107

effective alternative remedy, a writ is maintainable, when the actions of the State are not as per law or in violation of principles of natural justice etc. He also points out that as the proceedings are wholly without jurisdiction, a writ is maintainable. He also relies upon ***Dipak Babaria v. State of Gujarat***<sup>3</sup>, and argues that when the statute provides a method for doing a thing, it has to be done in the manner or not at all. He also relies upon ***Bangalore Electricity Supply Company Limited v. Konark Power Projects Limited***<sup>4</sup> and ***Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power (India) Private Limited***<sup>5</sup> for arguing that the Commission cannot vary the tariff agreed and that the terms of the power purchase agreement (which is the concluded contract) alone should prevail. He also argues relying upon ***State of Haryana v. State of Punjab***<sup>6</sup> that merely because there is a change in the Government, the decisions taken by the earlier Government cannot be ignored. Lastly, he relies upon ***Energy Watchdog v. Central Electricity Regulatory commission***<sup>7</sup> and argues that the regulatory power of approving tariff is given to the APERC only and the State has no jurisdiction to enter into that area.

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<sup>3</sup> 2014 (3) SCC 502

<sup>4</sup> (2016) 13 SCC 515

<sup>5</sup> 2017 (16) SCC 498

<sup>6</sup> 2002 (2) SCC 507

<sup>7</sup> 2017 14 SCC 80

Sri Sajan Poovayya, learned senior counsel who argued after Sri Vikas Singh, adopted the essential arguments that were advanced earlier. He also reiterates that the State has no power to enter into this area as there is a Central Act holding the field. He points out that the Electricity Act is a complete code in itself and that its power under Sections 61 and 62 of the 2003 Act, of fixing tariff has been validly exercised. He points out that if the State was dissatisfied with the said order, it had the option of filing an appeal before the APTEL under Section 111 of the 2003 Act. He submits that as the State has failed to file an appeal, the order passed by the APERC fixing the tariff has become final. He also stresses the point that the sanctity of the contract should be upheld and that the same cannot be changed at the whims and fancies of the Government in power. He points out that the petitioners have invested huge sums of money and have borrowed equally large sums of the money to establish these Plants. They have calculated a return of investment based upon the tariff agreed etc. Therefore, he submits that if the same is curtailed or refused, it would virtually destroy the substratum of their financial arrangement and would drive them into debt. He also points out that the 2003 Act and the power purchase agreement which have been entered into are totally overlooked/ignored in this matter despite the fact that the State has absolutely no role to play in this area. Relying on the audited accounts of the DISCOMS, he argues that the

reasons for their losses are (a) subsidies given to certain groups (b) transmission loss etc., and not because of the allegedly huge tariff. He also argued that the prices discovered in 2015 are roughly on par throughout the country. He is also filed a compilation of case laws containing 21 cases. Of these, learned senior counsel relies upon the well known case of ***Energy Watchdog*** (7 supra) and argues that neither party can avoid the terms and conditions of the concluded contract. He also argues in the alternative that an unexpected turn of events including a rise or fall in price cannot be a ground to claim performance of contract at a different rate. He relies upon well known case of ***Alopi Parshad & Sons Ltd., v. Union of India***<sup>8</sup>, which is regarded as the *locus classicus* on the subject. He also relies upon ***National Energy Trading and Service Ltd., v. Central Power Distribution Company of A.P. Ltd.***<sup>9</sup> to argue that once the rate is fixed, even the APERC cannot interfere in the matter again and upon ***Delhi Development Authority v. Joint Action Committee, Allottee of SFS Flats***<sup>10</sup> to argue that once a contract has been concluded, the same cannot be altered or modified unless the same is permitted by the contract or as per law. He points out that in the case on hand, there is no clause in the contract or in the 2003 Act,

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<sup>8</sup> AIR 1960 SC 588

<sup>9</sup> 2013 (4) ALT 381

<sup>10</sup> (2008) 2 SCC 672

which permits the State to unilaterally decide a new rate. Lastly, he relies upon ***State of Karnataka v. All India Manufacturers Organization***<sup>11</sup> and argues that a succeeding Government is also bound to follow the contracts that were entered into by the previous Government. Both Sri Vikas Singh and Sri Poovayya rely on the letter dated 09.07.2019 addressed by the Union Minister, wherein he advised the State not to cancel the PPAs and to abide by the terms of the PPA.

Learned senior counsel Sri Sanjay Sen continued the arguments. He also essentially made submissions on the same lines and argued that the State cannot step in and change the terms and conditions of a concluded contract, in the absence of a provision to that effect in the contract or in the absence of any statutory power. Learned counsel also argues that the losses caused to the DISCOMS were not caused due to the high tariffs, but they were in fact caused, because of the fact that the Government is subsidizing the power and selling it to certain sections of the society. Learned senior counsel also argues that once the State enters into a private contract, they cannot claim any special privilege and that the State is also bound by the terms of the contract. Learned senior counsel also adopts the argument made by other senior counsels. He also points out that the GoAP has

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<sup>11</sup> 2006 4 SCC 683

taken a pre-meditated step to cancel/terminate the agreement on the ground that loss is caused and the tariffs are high. He argues that the petitioner was not given any notice. He argues that the action of the State smacks of arbitrariness and is violative of Article 14 of the Constitution. He states that it does not meet the test of reasonableness. He also filed a compilation of case laws.

Sri Prakash Reddy, learned senior counsel appearing for some of the petitioners also argues on similar lines. Learned senior counsel very vehemently contends that a State is bound to act fairly and that the letters issued clearly show that the State has already determined to terminate the contract. He relies upon the contents of the letter which state that the generators should reduce the price. He submits that virtually no alternative is left to the generators and they were ordered to reduce the price to 2.44/2.43 or face the threat of termination. Learned senior counsel also drew the attention of this Court to the terms of the contract and also the provisions of the 2003 Act, particularly Sections 62 and 63 of the 2003 Act, and argued that the State has no power to issue such directions and that the subsequent actions in issuing the GO or the letter are void and illegal. Factually also, the learned senior counsel drew the attention of this Court to the prevalent rates in the neighboring states and argued that the rates discovered in 2014-2015 were not very high as alleged. Therefore, he submits that both on fact and

in law, the decision taken by the State was wrong. He argues that the petitioners are being arm twisted into compliance by the deliberate inaction of the DISCOMS to pay the regular bills and by the State action to curtail the generation of power etc.

Sri P.Sri Raghuram, learned senior counsel continued the submissions. He argued that the GoAP has taken a partisan stand and is indulging in virtual arm twisting. Executive power is being used to deny legitimate contractual claims as per him and this is violative of Articles 14 and 19. He submits that judicial review is possible in such matters. He also argues that the alleged losses to the DISCOMS are due to their own actions and inactions. He points out that bilateral agreements are being trampled upon by unilateral actions. He also relies upon case law to support his submission particularly ***Central Dairy Farm v. Glindia Ltd.***<sup>12</sup>. He submits that the terms of the PPA are firm and binding on both the parties. As per him the generators are being told in clear terms -to obey or perish.

In WP.No.10138 of 2019 Sri M.Karthik Pavan Kumar, learned counsel argues that the petitioner company is promoted by four Central Government Public Sector undertakings namely NTPC; Grid Corporation of India Ltd., NHPC Ltd., and Power Finance Corporation Ltd. He points

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<sup>12</sup> 2004 (1) SCC 55

out that the Unit Trust of India; Life Insurance Corporation are stake holders in the petitioner company. He adopts all the arguments advanced and contends that the actions of the GoAP in (a) seeking a reduction in tariff and (b) non-payments of bills are indirectly causing a loss to the National Exchequer only. He submits that absolutely no allegations of 'high pricing' etc., can be attributed to these public sector undertakings which have come forward to invest in the alternate power sector as a part of the global and governmental initiative to reduce dependency on fossil fuels. He argues that the prices/tariff was fixed as per the statute and in a very transparent manner.

**Submissions of the Union of India/Additional Solicitor General:**

Appearing for the Union of India, learned Additional Solicitor General strongly argued on the basis of the written instructions against the actions of the GoAP and submitted that the cancellation of the contracts in this case (PPA's) is not at all warranted. It is his submission that any cancellation or modification of terms of a concluded contract would lead to endless complications and financial losses to the State exchequer. He submits that once the contracts are concluded, the State cannot unilaterally ask for their amendments in the absence of fraud etc., being established. He also relies upon the letter dated 09.07.2019, which is addressed by the Minister of State for Power to the GoAP,



which is on the same lines. Therefore, the contention of the learned Assistant Solicitor General is that PPA's are validly entered documents; that the rates are also valid and they cannot be amended or touched, particularly, at the behest of the State.

**Submissions of the learned Advocate General for GoAP:**

In reply to this, learned Advocate General relying upon the counter affidavit filed by the Secretary, Energy, GOAP argues that the State is not terminating the contract. He points out that the State has decided not to terminate the contract and has in fact decided to approach the APERC itself. He characterizes the actions of the GoAP in issuing the GO; the letter etc., as steps in trying to bring the parties to the negotiation table. Relying on the contents, he argues that the GoAP wanted to only negotiate and bring down the high price and/or file a petition before APERC to re-fix the tariff. As per him, these committees etc., were a mere starting point for the proposed dialogue. Learned counsel points out that OP.No.17 of 2019 has already been filed before the APERC for various reliefs including determination of the tariff. He points out that almost all the petitioners who are before this Court are respondents in the said OP. Therefore, he submits that parties should approach APERC as they have clearly indicated that they are not interested in the negotiation. He argues that a writ petition is not

maintainable. He relies upon ***Uttar Pradesh Power Corporation Ltd. vs. N.T.P.C. Ltd.***<sup>13</sup> to argue that it is the APERC alone that can decide this issue. Learned Advocate General also submits that factually, the cost of power in AP is higher than in other states and in the interest of justice and in public interest, the impugned order was issued to reduce the tariff, benefit the public and to save the DISCOMS from impending financial disaster. Learned Advocate General also argues that sections 11, 65 and 108 of the Electricity Act give the power to the GoAP to issue directions and that the Government is therefore competent in issuing the directions. He argues that electricity is in the concurrent list (entry 38) and that the power of the State exists in such matters and hence, it is exercised. Lastly, he submits that the Government, being the custodian of the public interest, is duty bound to protect the State from financial crisis, if the prices quoted are too high. He states that only a few players who have cornered the market are benefiting from the high rates. He has given a sealed cover to this Court which as per him contain documents/data to back his case of wrong doings. As it is a matter under investigation, he requested this Court alone to look into the same. Therefore, he submits that in “public interest” the orders were issued. Learned Advocate General submits that the contentions of the learned counsels for the petitioners are therefore, not correct. He

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<sup>13</sup> 2011 (12) SCC 400

argued that the State has concurrent power and that the exercise of this power is not repugnant to the 2003 Act. He therefore, argues that all the parties should approach the APERC alone where they can claim appropriate relief. He points out that in the counter affidavit also the stand of the State is made clear. The purpose behind the GO was to explore the possibility of mutually acceptable solution to the problem.

His conclusions, therefore, are (a) the State is not interested in terminating the contract; (b) as attempts to negotiate have failed, all the parties should approach/agitate their cases before APERC in OP.No.17 of 2019. (c) that as the State (GoAP) does not wish to terminate the contract and has decided to pursue its remedies in OP.No.17 of 2019, no further orders are needed in these writ petitions.

**Rejoinder:**

In reply to this, Sri P.Sri Raghu Ram, learned senior counsel argues that arbitrary State action cannot be wished away. He submits that the charge in the stand of the GoAP is because of their realization that the impugned letter/GO etc., will not stand the test of law. He argues that the impugned GO/letter cannot be left on the record and must be set aside. He points out from a plain language reading of the M.O.M dated 01.07.2019 that the Officers were directed to 'take action and report'; that in para 3 (a) it is concluded that the

price is high and recovery notices must be issued. He argues that the State is now taking shelter under OP.No.17 of 2019. He points out that the said OP was initially filed in September, 2018. After complying with some objections, it was re-submitted in February, 2019 which is long prior to the letters/GOs etc., which are impugned in the present writ petitions. He argues that the GoAP has realized the fallacy in its stand and is therefore falling back on OP.No.17 of 2019. He points out that none of the sections in the 2003 Act, relied on by the learned Advocate General give the power to the State to interfere in the contract. He, therefore, submits that the GO/letter etc., must be quashed.

Sri Prakash Reddy, learned senior counsel also argued in rejoinder that the contention that three players have cornered the entire market and that they have 63% of the wind only is not a correct statement. It is his contention that the petitioners who are said to have cornered 63% of the market or companies have invested and acquired other generators after the PPAs were entered into. Therefore, it is his contention that the 63% of the generating capacity was not in existence at the time the PPAs were entered into with a few players. Learned senior counsel also took the Court through Section 11, 65 and 108 of the 2003 Act and argued that under these three sections, the State does not have the power to give directions to re-fix the tariff. It is his contention

that the prices have been fixed after a comparative study was done and that the issue cannot be reopened.

Arguing after Sri Prakash Reddy, in continuation of his earlier rejoinder, Sri P.Sri Raghuram, senior counsel states that the attempt of the State to give documents in a sealed covers and suggesting that there was some suggestion of wrong doing is not correct. According to him, the respondent is a party to a contract and if they have any documents, which they wish to rely upon, they to file the same before the Court and serve a copy to the parties to enable them to comment on the same. Therefore, he submits that the documents which are filed in a sealed cover during the course of the submissions of the learned Advocate General cannot be looked into. He again reiterates that the writ of certiorari that they have sought for should be allowed and the GO and letter must be quashed.

Sri Sajan Poovayya, learned senior counsel for the petitioners in WP.Nos.9871 and 9875 of 2019 argues that all the solar power generators have their tariffs confirmed under Section 63 of the 2003 Act, which is a result of a transparent process. Therefore, he submits that once the tariff was fixed, it cannot be reopened. He also relies upon Article 162 of the Constitution of India and submits that the executive power of a State can only extend to an area which is not covered by a Central Statute. He submits that the executive power of a

State shall always be subject to and limited by the executive power conferred by the Constitution of India or by any law made by parliament. It is his contention that once the tariff has been determined pursuant to Section 63 of the 2003 Act, the State cannot give further directions. Relying upon the Full Bench decision in ***T.Muralidhar Rao v. State of Andhra Pradesh***<sup>14</sup>, the learned senior counsel contends that the State cannot go against the provisions of the Constitution or any law. He relies upon paras 179 to 182 of the said judgment. In that case, the learned senior counsel points out that despite the existence of a Backward Classes Commission, an advisor to the Government was entrusted with certain duties with regard to enumeration of backward classes by an executive order. The Full Bench of the A.P.High Court held that once there is a statutory commission that has been appointed, the further appointment of the Advisor is pro tanto invalid and that he cannot be stepping into the functions of a commission that has been formed under a Statute. As per him, a similar fact scenario is present in the present case too. Learned counsel also relies upon an order of the Delhi High Court in WP.(c).No.4821 of 2010 and argues that any order issued by a State would be an interference with the functions of the State Government. In that case before the Division Bench of the Delhi High Court, an order was given by the State to the Commission “not to pass” a

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<sup>14</sup> (2010) 2 ALD 492

tariff order. The Division Bench held that this was an unwarranted interdiction. It was clearly held that under Section 108 of the 2003 Act, the State can issue policy directions but not preemptory directions. Learned senior counsel also quoted **P.H.Paul Manoj Pandian v. P.Veldurai**<sup>15</sup> and argued relying on para 47 that once the central law occupies a field, it will not be open to the State in exercise of its executive power to prescribe any action in the same field by an executive order.

Lastly, learned senior counsel points out that under the 2003 Act, Section 185 deals with repeal and saving. Learned counsel relies upon Section 185 (3) of the 2003 Act and points out that certain enactments which are mentioned in the schedule shall continue to apply to the States in which they are applicable if they are not in-consistent with the 2003 Act. In the schedule, the A.P. Electricity Reforms Act, 1998 is mentioned in Sl.3. Learned senior counsel drew the attention of this Court to Section 11 (e) of the A.P. Electricity Reforms Act, 1998 which states that power of the commission extends to regulating the purchase, distribution supply, quality of service tariff etc. He points out that this is not in-consistent with the 2003 Act. Then, he relies upon Section 12 of this 1998 Act, which states that any policy decision given by the State cannot interfere with the functions and the powers of

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<sup>15</sup> (2011) 5 SCC 214

the Commission including the determination of the tariffs. Therefore, learned senior counsel submits that the constitution of the High Level Negotiation Committee or the GOs issued are all contrary to law. He also prays for quashing of the GO/letter etc.

**Determination:**

In the case on hand, as pointed out earlier, the *raison d'être* for the State/GoAP to issue the impugned letter and the G.O is because the State feels that the prices being charged by the various petitioners are very high. While the object is laudable, the question is does the State/GoAP have such power?

A few facts which are clearly visible are, (a) the State is not a party to the contract/PPAs. The DISCOM (a department of the State), is the signatory to the contract-the PPA's. DISCOMS have entered into a commercial contract after a process of bidding/price fixation etc.

(b) Various parties, including public sector companies have come forward to bid in this case. As pointed out, the investments in this case are also made by foreign pension funds. This is clear from the Central Minister letter dated 09.07.2019. Institutional investors like LIC of India, Union Trust of India and others have also invested in these projects.



The larger issue that remains is the power of the State/GoAP to unilaterally amend the contract. As per the well settled law on the subject, which need not be highlighted here, a contract can be modified by mutual consent of the parties or as per the contract or by law. In this case, the petitioners are not consenting to the modification of the contract. The terms of the contract do not permit unilateral alteration or alteration of the terms at the behest of a third party. The law on this is also well settled to be reproduced here. Even in cases of standard term contracts, the Hon'ble Supreme Court held that a party is bound by the terms though he has not read them etc.,(***Bihar State Electricity Board, Patna v. Green Rubber Industries***<sup>16</sup>).

As can be seen from the provisions of the 2003 Act, the three sections relied upon by the learned Advocate General are not really applicable. Section 11 of the 2003 Act, talks of directions that can be given by the appropriate Government in extraordinary circumstances. The expression "extraordinary circumstances" is defined in the explanation as arising out of a threat to the security of the State, public order or natural calamity or such other circumstances. Therefore, it is clear that the present scenario is not covered by the Section. Next Section relied upon is Section 65 of the 2003 Act, which gives the power to the State to grant subsidy

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<sup>16</sup> AIR 1990 SC 699

to any consumer or class of consumers in the tariff that is determined. However, this is coupled with a duty that the State Government shall provide in advance the amount to compensate the generator, because of the subsidy. This also clearly not applicable. Section 108 of the 2003 Act, talks of the directions that the State can give to the State Commission. The State Commission shall be guided by such direction in matters of policy. It is clear that this section is also applicable only for matters relating to “policy” as rightly pointed out by the learned senior counsel. The question of determination or re-determination of tariff is not a policy decision.

Apart from all the above, Article 162 of the Constitution of India and the case law on Article 162, in the opinion of this Court, are squarely applicable to the facts and circumstances of the case. Once there is a law governing the field, particularly, a central law, the State Government in exercise of its executive power cannot pass any orders which would trench upon or occupy and intrude in to the area occupied by the State Commission. The decision of the Full Bench of the A.P.High Court reported in **T.Muralidhar Rao** (14 supra), in the opinion of this Court very squarely applies to the facts and circumstances of the case. As long as the 2003 Act is on the statute book, the executive cannot, in the opinion of this Court in exercise of its executory power supplant,

supplement, ignore or act contrary to it. (borrowing a phrase from the Hon'ble Full Bench).

The decision of the Supreme Court in **P.H.Paul Manoj Pandian's** case (15 supra) also applies to this case. Last, but not the least, Section 12 of the A.P. Electricity Reforms Act, also mandates that the power of the State can extend only to give policy directions including over all planning and coordination, but they shall not adversely affect or interfere with the functions and powers of the Commissions including the parties and tariffs.

In view of the fact that this Court is holding in the other batch of writ petitions (WP.Nos.2401 of 2019, 5710 of 2019 and batch) that all the issues are to be raised in OP.No.17 of 2019 before the APERC, this Court is not entering into the depth of the controversy.

Thus, this Court holds that a third party to the contract cannot give directions to modify the contract. If the DISCOMS feel that the tariff is high they have to avail the statutory remedies only subject to limitation *res judicata* etc. State should act as a 'model' employer. Fairness, reasonableness and transparency must be the core values as per which the State must act. If the state action is viewed against the large volume of case law on "fairness of State action" it is clear that it falls short of the expected standards.

The writ petition is, therefore, allowed. Both the GORt.No.63 of 2019 dated 01.07.2019 issued by the GoAP (respondent No.1) and the letter dated 12.07.2019 issued by APSPDCL and all related/consequential actions taken are set aside. The finding of the Hon'ble Supreme Court in ***State of Karnataka v. All India Manufacturers Organisation***<sup>17</sup> in para 62 are reproduced here for the sake of good order:

“62. In these circumstances, we find no reason to interfere with the said directions of the High Court. In the future also, we make it clear that while the State Government and its instrumentalities are entitled to exercise their contractual rights under the FWA, they must do so fairly, reasonably and without mala fides; in the event that they do not do so, the Court will be entitled to interfere with the same.”

**Payments due and the financial quagmire:**

The plea that is raised by the petitioners namely that their bills have not been paid and that the DISCOMS are using some subtle and not so subtle methods in order to force them to reduce the rate needs to be addressed at this stage. A large number of interlocutory applications have been filed seeking directions to the respondents to refrain from arbitrarily curtailing generation; seeking payment of the outstanding dues etc. Some writs contain this prayer too; either directly or as a prayer not to take coercive steps.

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<sup>17</sup> (2006) 4 SCC 683

The petitioners have invested money and have also borrowed money for establishing the project, where the return of investment, the tariff etc., is the basis for financial assistance rendered by the institutions. Therefore, it is urged by the learned senior counsel for the petitioners that if any alteration or modification is carried out at the behest of the State, the entire financial edifice of the petitioners will collapse like a pack of cards. All the parties have entered into long term PPAs and have submitted these PPAs to their investors who have relied on the representations and have advanced the finances. PPAs have been acted upon and the bills raised were also honoured till lately. This is an issue that cannot be totally overlooked. This is an alternative submission made by the senior counsels while arguing that the actions of the State are not correct.

This Court is of the opinion that these actions of the State/DISCOMS would have a debilitating effect. This Court does not find any rationale or support of law for these actions. As a party to the contract, the DISCOMS are bound to discharge their functions as per the contract that is entered in to till the same is varied, modified or set aside. A party to a contract cannot state that he will not follow the terms of the contract. He is bound by the same. In this case, the respondents being a "State" under Article 12 are expected to behave as model employers. Unfortunately they did not.

This Court has also noticed the argument of the State that the rates are high. Therefore, they have come forward with a rate of Rs.2.44p for the solar power and Rs.2.43p for the wind power and asked the petitioners to raise bills as per this “suggested” rate. On the other hand, the petitioners who are manufactures are contending that once power is manufactured, it cannot be stored and it is in fact sold to the consumer. They state that the DISCOMS have realised the money due for the power that has been supplied by them and utilised/used by the consumers. They argued that the losses, if any, are caused because of issues like transmission losses, subsidies given to other sections of the society and other consumers and not because of the high prices. They pray that should be paid at the contractual rates only.

Keeping in view the submissions made by both the parties and (a) as the petitioners need liquidity and consequential lubrication to keep the “wind mills” moving and (b) as the losses of the DISCOMS are high for whatever reason, this Court is of the opinion that the respondents/DISCOMS should be directed to honour the bills of the wind purchasers and solar purchasers and to pay the same at the “interim” rate of Rs.2.44p for solar power and Rs.2.43p for wind power. All the pending and future bills of all the petitioners should be paid at this interim rate. This interim arrangement is being suggested by this Court in order to balance the interest of both the parties. The argument that

the petitioners will soon become NPA and their financiers would initiate insolvency and other proceedings can not be lost sight of. The State's claim that they are bleeding cannot be lost sight of either. Hence, this interim arrangement. By making a payment at this rate the petitioners or DISCOMS are not losing any of their rights. By submitting a bill; by processing the bill; by paying the bill and by receiving the bill neither party will lose its rights. It is only an interim measure that is suggested till the dispute is resolved by the APERC. A time frame of six months was also suggested to APERC in the other batch of writ petitions to dispose the case. This Court draws sustenance from ***ABL International Ltd., v. Export Credit Guarantee Corporation of India Ltd.***,<sup>18</sup> wherein at para 27, it was held as follows:

“27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition :-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.” (Emphasis supplied)

**Curtailment:**

All the learned senior counsels who argued in the batch argued about the State/respondents action in curtailing the

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<sup>18</sup> 2004 (3) SCC 553

power, failure to pay the bills and also the actions in disconnecting the evacuation of power etc.

Learned senior counsel argued IA.No.9 of 2019 filed in W.P.No.9844 of 2019 for which separate orders are passed. This was a case of abrupt disconnection of a generator to a sub-station from which the generated power is evacuated.

During the course of hearing in IA.No.9 of 2019, the learned Advocate General justified the State action by stating that the action was taken in that particular case because of a representation given by another generator. He, therefore, justified the action of the State and argued that the initial action was illegal; that in the interest of grid safety etc., the action was taken. However, Mr.Sajan Poovayya, learned senior counsel in the course of his rejoinder argument has filed a document downloaded from website of the A.P.TRANSCO (Transmission Corporation to Andhra Pradesh Limited), which clearly shows that the solar power has been curtailed on the ground that the "price quoted" is too high. Learned senior counsel points out that this downloaded document is for the period from 01.08.2019 to 01.09.2019, which includes the period during which the writ petitions were being heard.

This Court had already given an order dated 25.07.2019 to the respondents restraining them from taking coercive steps, but steps continued to be taken. Permission was not



taken from the Court before complete curtailment in IA.No.9 of 2019 in WP.No.9844 of 2019. Once this Court was seized of the matter, permission must have been sought as there was no glaring emergency to disconnect the petitioners' right to evacuate.

This Court after hearing all the learned counsels is of the opinion that the terms of the contract have to be honoured. The State cannot give a direction to the DISCOMS or to the generators that the price is high. This matter of "price" has to be determined as per law. The respondents cannot use tactics like this. Until it is determined that the price is high or for similarly determined reasons by which the contract is amended, the curtailment of the power for any reason whatsoever cannot be ordered. Except for the reasons which are mentioned in the PPA or as per the Electricity Regulation Act, 2003 etc., curtailment cannot be ordered either directly or indirectly. Even if the price is high, it can lead to a monetary claim or adjustment/set off etc., but not curtailment of power or stoppage of evacuation etc.

In view of the fact that these sort of orders will have serious consequences, apart from financial consequences all the generators are entitled to a notice before any such action is taken except in a very grave and sudden emergency. This action should also be supported by reasons which are strong

and germane. Therefore, the respondents are once again directed not to take any coercive steps of any nature including curtailing production, stopping evacuation or the like except after giving due notice to the generators and as per the PPAs; the Regulation and 2003 Act. Therefore, this Court holds any restriction can only be imposed if it is as per the agreement or it has the sanction of law.

With these observations, this batch of writ petitions are allowed setting aside the GOMs.No.63 of 2019 dated 01.07.2019; the letter dated 12.07.2019 and all related and consequential actions.

As a sequel, all the miscellaneous applications, if any pending, shall stand closed.

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D.V.S.S.SOMAYAJULU,J

Date : 24.09.2019

Note: L.R. Copy be marked.

KLP