

(2013) 07 AHC CK 0035
In the Allahabad High Court
Case No : Writ Petition No. 9892 (M/B) of 2008

M/s. Noida Power Company Limited

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 01-07-2013

Acts Referred:

Citation : (2013) 9 ADJ 351

Hon'ble Judges : Uma Nath Singh, J; Satish Chandra, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Uma Nath Singh, J.—Petitioner-M/s. Noida Power Company Limited (for short "the NPCL") by way of this writ petition, inter alia, has prayed for: (i) issuance of a writ in the nature of mandamus or any other appropriate writ, order or direction to respondent No. 1 to assign Power Purchase Agreements (for short "the PPAs") entered into with generating stations and held by respondent No. 2, the U.P. Power Corporation Ltd. (for short "the UPPCL") to the petitioner Company as per the provisions of the Electricity Act of 2003 read with National Electricity Policy and Tariff Policy as notified by the Government of India; (ii) supply of power as per its load profile to the petitioner Company which, according to the petitioner, works out to be 110 MVA (on the date of filing of writ petition) till the assignment of the PPAs is not done, and (iii) issuance of a suitable writ/direction for quashment of the notice/letter No. 479/SA (Com) dated 22.8.2008 issued by respondent No. 2 (the UPPCL) apart from other or further orders which this Court may deem appropriate in the facts and circumstances of the case. Brief facts of the case leading to filing of the instant writ petition are that in the year 1992 the Greater Noida Industrial Development Authority, (a body constituted by Government of Uttar Pradesh for the integral development of Greater Noida area and hereinafter to be referred to as "the Greater Noida Authority") promoted the petitioner Company as a public limited Company for the purpose of undertaking supply of electricity to consumers in the

Greater Noida area as separate venture distinct from the Uttar Pradesh State Electricity Board (hereinafter called "the UPSEB") which had been undertaking such distribution and supply of electricity in the State of U.P.

2. Pursuant to the above, vide Memorandum of Understanding dated 11th December, 1992 entered into between the Greater Noida Authority and the CESC Ltd. (now known as the CESC Ltd.), the CESC Ltd. joined hands with the Greater Noida Authority, as Co-promoters of the petitioner Company. The Greater Noida Authority which is a public authority of the Government of Uttar Pradesh holds 27% equity in the petitioner Company and the balance 73% is held by nominees of the CESC Ltd. The Chairman of the Greater Noida Industrial Development Authority has at all times been the ex officio Chairman of the petitioner Company. The purpose of the above special arrangement has been to provide the Greater Noida area which was being promoted as a distinct integrated industrial area in close proximity to Delhi to have dedicated electricity distribution under a public-private partnership whereby the day to day management and control were given to private sector but at the same time for the decision on policy matter, participation of the Greater Noida Authority was made necessary.

3. The petitioner-Company was granted a licence by the Government of U.P. u/s 3(1) of the Indian Electricity Act, 1910 (for short "the Act of 1910") on 30.8.1993 for distribution of Electricity in the area of Greater Noida. The said licence was subsequently amended by the Government of Uttar Pradesh to extend the licensed area of the petitioner Company. According to the petitioner, it has continued to be Distribution Licensee in the above area as per the licence u/s 3(1) of the Act of 1910 and also in terms of Section 2(6) of the Electricity (Supply) Act, 1948 (for short "the Supply Act of 1948"), Section 2(f) of the Electricity Regulatory Commissions Act, 1998 (for short "the Regulatory Commission Act of 1998") and Section 14(1) of the U.P. Electricity Reforms Act, 1999 (for short "the U.P. Act of 1999"). Moreover, consequent to the enactment of the Electricity Act of 2003, the petitioner Company became a deemed distribution licensee in terms of Section 14 thereof.

4. Pursuant to the above, on 15.11.1993, the petitioner Company entered into an agreement with the UPSEB for receiving supply of power for distribution in the Greater Noida notified area to the tune of 30 MVA to 45 MVA which was required by it at that point of time, vide Para 21 of the said agreement, the then existing distribution facilities/infrastructures, such as land, building, movable and immovable property, plant, equipment, etc of the UPSEB vested with the petitioner Company at an agreed price to be mutually settled with the UPSEB with provision to improve such facilities in future, as and when so required and to distribute the power to present and future consumers within the licensed area.

5. Under the agreement dated 15.11.1993 it was initially agreed that the UPSEB will supply power to the petitioner Company at the tentative rate of Rs. 1.66 per unit. This rate was required to be studied and revised by an independent

authority to be nominated by the State Government, after six months of petitioner's operations in terms of the licence. The agreement also envisaged that the petitioner Company has to supply electricity to its consumers at the same rate at which the UPSEB was supplying to its own consumers in the rest of the State. Thus, the condition of uniform retail tariff in the State for consumers was enforced.

6. However, the matter regarding the settlement of the price payable by the petitioner Company to the UPSEB for Bulk Supply of Power could not be finally reached between the petitioner Company and the UPSEB despite the State Government appointing a number of committees for the purpose. In the meanwhile, the period of 4 1/2 years as specified in the agreement dated 15.11.1993 also expired without the petitioner Company being able to establish generating station as envisaged in the said agreement. The reasons for non-establishment of generating station, according to the petitioner Company, were not attributable to it but to the respondents and these reasons were also beyond the reasonable control of the petitioner Company.

7. Thereafter, in a tripartite meeting dated 6.5.1999 held by the Chief Minister of U.P. along with the Chief Secretary, the Principal Secretary (Energy) and other senior officials of the Department of Energy, Senior officials of the UPSEB, and the petitioner, the NPCL, the issue/dispute of determination of bulk purchase price for the power supplied by the UPSEB to the petitioner Company was discussed, for the reason that the extended period of said agreement was expiring in the month of June 1999 and it was thus important that before that date the dispute was resolved. It was also informed that in the event, the power is distributed in the area from the captive power plant or in the event the power plant is not established, then if as per the agreement the rate of power supplied is doubled, the same will not be practical as in both the events the consumer tariff will be very high. Thus, it was suggested in the said meeting that the power from the proposed captive power plant of the petitioner Company be purchased and the petitioner Company be supplied power at the pooled cost. Further, the Principal Secretary (Energy) suggested that since the said agreement is expiring in June, 1999 it will be proper that the Board should consider entering into a new agreement with the petitioner Company after June 1999. In the said meeting, the Chief Secretary, the Principal Secretary (Energy) and the Chief Minister of the State expressed the view that it is the first experiment of giving power distribution to private sector, and in order to make the experiment a success, it is necessary to make efforts at all levels. It was also expressed that if this experiment fails, it will give very negative indications, the adverse effect of which will be on the efforts to give power distribution to private sector at other places. Thus, finally, it was decided in the said meeting that as per the suggestion of the Principal Secretary (Energy) the UPSEB and the petitioner Company should take steps to execute the new power purchase agreement after June, 1999.

8. Thus, according to the petitioner Company, the aforesaid exercise clearly

showed that the Government of U.P. wanted to continue supplying power to the petitioner Company by executing a new agreement and advised the UPSEB in this regard. It is also clear that the decision to execute the fresh agreement was taken with a clear understanding that such supply of power will be made from the power available to the State of U.P. from the Central Generating Stations and also the State owned generating stations. As per the decision taken in the above said meeting, the petitioner Company immediately vide its letter dated 28.5.1999 sent a draft of the new agreement to the UPSEB for immediate action in the matter. The petitioner Company thereafter continuously followed up on the execution of the new agreement vide its various letters dated 4.6.1999, 7.6.1999, 9.6.1999, 10.6.1999, 22.6.1999, 9.7.1999, 14.7.1999, 3.8.1999, 10.8.1999, 23.8.1999, 30.8.1999, 6.9.1999, 15.11.1999, 24.11.1999, 31.1.2000, 22.2.2000 and 3.3.2000 written at various levels to the UPSEB, the Principal Secretary (Energy) and the Chairman & M.D. of respondent No. 2. However, no response was received on the execution of the new power purchase agreement. In the meantime, the agreement dated 15.11.1993 was being extended by the UPSEB for short durations of 2 to 3 months.

9. During the subsistence of the agreement, the Parliament enacted the Regulatory Commissions Act of 1998 which came into force on 25.4.1998. The said Act provided for the establishment of Electricity Regulatory Commission (for short "the ERC") for the purpose of regulating electricity sector. Apart from the other functions, the ERC was also conferred with the functions of the determination of tariff of electricity. Thus, under the said Act, the Uttar Pradesh Electricity Regulatory Commission ("the UPERC") was established and constituted.

10. Thereafter, the State of Uttar Pradesh enacted the U.P. Electricity Reforms Act of 1999 (the U.P. Act of 1999) which came into force on 14.1.2000 and the UPSEB was unbundled into different corporations. That by virtue of Section 13 of the U.P. Act of 1999, the functions of transmission and distribution of electricity were conferred upon a new entity of the State Government viz. the U.P. Power Corporation Ltd. (the UPPCL), respondent No. 2 herein. Further, according to the petitioner, u/s 23(1) and (2) of the said Act a transfer scheme was also framed whereby all the assets and liabilities of the UPSEB were transferred to three companies. The assets and liabilities of the UPSEB as regards to generation of electricity were transferred to two generating companies and the assets and liabilities in regard to the transmission and distribution of business of the UPSEB were transferred to respondent No. 2. As per further averments on behalf of the petitioner Company, Section 23(4) of the aforesaid U.P. Act of 1999 envisaged that the State Government after consultation with the transferor (respondent No. 2 in the instant case) may require the transferor to draw up a transfer scheme to vest in a person any of the functions including distribution function, and also property, interest, right or liability which may have vested in the transferor and notify the same as statutory transfer scheme under the said Act. This goes on to show that the U.P. Act of 1999 envisaged the further transfer of rights and liabilities from respondent No. 2. After the lapse of some time, respondent No. 2

for the first time vide its letter dated 6.3.2000 wrote to the petitioner Company pursuant to the direction of the UPERC in the meeting held on 2.3.2000 that a new power purchase agreement between the petitioner Company and respondent No. 2 has to be submitted to the UPERC by 8.3.2000. However, respondent No. 2 at the same time imposed a pre-condition on the petitioner Company to give acceptance to the power purchase rates suggested by one of the Committees appointed by the State Government to determine the power purchase price so that the new power purchase agreement can be sent to the UPERC.

11. The petitioner Company vide its letter dated 7.3.2000 replied to the said letter of respondent No. 2 informing that its disagreement with the power purchase rates has already been communicated. It was also informed that the draft new agreement has already been forwarded by the petitioner Company vide its letter dated 28.5.1999 and the matter was also followed up subsequently. The petitioner Company reminded respondent No. 2 about a communication that comments/observations of respondent No. 2 will be sent by 6.3.2000. However, there was no response from respondent No. 2 to the said letter of the petitioner Company. The petitioner Company further vide its letter dated 19.7.2000 reminded respondent No. 2 about the execution of the new power purchase agreement and requested it to extend the agreement dated 15.11.1993 till the new agreement is finalised. During this time, the Chairman, Greater Noida Authority who happens to be the ex-officio Chairman of the petitioner Company also wrote a letter to the Principal Secretary (Energy) about the need of the new agreement to be executed between the petitioner Company and respondent No. 2. The Chairman in the letter stated:

The earlier Agreement which was to expire on 15.6.1998 was given a one year extension up to 15.6.1999 and thereafter is being extended on a temporary basis for short duration of 2-3 months. Meanwhile, the settlement of the power purchase price payable by the Company is also pending.

Since the disputes are of longstanding nature, and will take some time to be resolved, I would suggest that these be kept aside for deliberations to continue, and meanwhile, steps to be taken for formalizing the new Agreement, a draft which has been submitted by the Company vide its letter No. D/SC/6740, dated 28.5.99. If the new Agreement can be executed early, this will mean that the disputes will relate only to past period while a fresh beginning can be made based on a rational approach. An early action is necessary not only because precious time is being lost but also because new Agreement will require the approval of the U.P. Electricity Regulatory Commission in terms of the U.P. Electricity Reforms Act, 1999.

Despite all the above, no action was taken to execute the fresh agreement with the petitioner Company.

12. The petitioner Company, aggrieved by the recommendations of the last Committee appointed by the State Government to determine the bulk power

purchase price and insistence of respondent No. 2 on the petitioner Company to comply with the same, filed a writ petition bearing Writ Petition No. 1048 (MB) of 2000 before this Court. This Court vide its interim order dated 31.3.2000 directed the UPERC to fix the power purchase price in accordance with the provisions of the Regulatory Commissions Act of 1998 and directed that in the meantime the payments by the petitioner Company to the respondents were required to be made at the prevailing rate, i.e. Rs. 1.66 per unit. The UPERC after a detailed hearing, fixed the tariff for the year 1993-1994 as Rs. 1.39 per unit, for 1994-95 as Rs. 1.68 per unit, for 1995-96 as Rs. 1.73 per unit, for 1996-97 as Rs. 1.83 per unit, for 1997-98 as Rs. 1.92 per unit, for 1998-99 as Rs. 2.02 per unit and for the year 1999-2000 as Rs. 2.56 per unit vide its report dated 5.2.2001 which was submitted to this Court. The Court after due consideration and after extensively hearing the parties vide its judgment dated 10.11.2005 approved the rates as recommended by the UPERC. The said judgment has been challenged by respondent No. 2 before the Hon'ble Supreme Court of India, which is said to be pending. The Hon'ble Supreme Court has not granted any interim order in the matter.

13. During the pendency of writ petition before this Court, respondent No. 2 vide its letter dated 20.4.2001 informed that the agreement dated 15.11.1993 is being extended till the final disposal of writ petition and the terms and conditions as contained in the agreement dated 15.11.1993 will remain unchanged. It appears that subsequent to the decision taken in the meeting with the Energy Minister, Government of U.P. on 24.11.2001, the petitioner Company once again submitted a draft power purchase agreement to the respondents vide its letter No. P-42/62 dated 21.2.2002, letter No. P-42/61 dated 21.2.2002 and letter No. P-15/60 dated 21.2.2002. However, all these correspondence did not evoke any response from the respondents.

14. As per further averments in the writ petition, in the meantime, the Electricity Act of 2003 came into force, whereby the entire regime of electricity generation, transmission and distribution in the country has been changed. Under the Reforms process of the Electricity Act of 2003, vide Section 131 the existing Electricity Boards in all the States were to be unbundled by the State Governments and their assets and liabilities were required to be transferred under the transfer scheme to be framed u/s 131(1) to separate companies to be formed for the purpose of carrying out three different functions of generation, transmission and distribution as envisaged under the new Act. u/s 131(2) of the Electricity Act of 2003, properties, rights and liabilities of the Board are to be re-vested in various Government companies by dividing the said assets and liabilities of the UPSEB in such a manner that the generation, transmission and distribution functions remain distinct from each other. Reforms process was to be carried out by framing of a National Electricity Policy and Tariff Policy by the Central Government u/s 3 of the Act of 2003. Thus, the Central Government framed the statutory policies which amongst others also provided for devolving of the PPAs, entered into with generating companies, in favour of all distribution

companies in the State as per their load profile. Similarly, u/s 14 of the Electricity Act of 2003, different categories of licences are to be granted for the purpose of transmission, distribution and trading which are to be obtained from the appropriate Commission for carrying out different functions under the Electricity Act of 2003. Section 39 of the Electricity Act of 2003 further clarifies the position by creating a bar for the State to trade in the electricity. Section 131(4) of the Electricity Act of 2003 being pari-materia to Section 23(4) of the U.P. Act of 1999 provided for framing of the transfer scheme whereby all the rights and liabilities as regards distribution of electricity are required to be transferred to distribution Company in the States. According to the petitioner Company, it being a distribution licensee in the State and there being no fault on its part in regard to non-establishment of generation station and further considering the public utility services rendered by it towards supply of electricity to public at large like other distribution licensees in the State, it has right to claim the benefit of assignment/allocation as provided in the above policies. However, during four and half years, as stipulated in the agreement dated 15.11.1993 and even thereafter respondent No. 2 continued to supply the electricity upto 45 MVA. Despite the position being as aforesaid, respondent No. 2 for the reasons best known to it instead of suitably assigning the PPAs to the petitioner Company as per its load profile which the petitioner Company is entitled to by virtue of the provisions of the prevailing statute has on the contrary vide letter No. 479/SA (Com) dated 22.8.2008 which has also been referred to hereinabove sought to disturb the present arrangement of 45 MVA of power. It appears that in this background, the petitioner-Company had to file this writ petition.

15. The petitioner Company being a distribution licensee of electricity for Greater Noida area of State of U.P. under the Electricity Act of 2003 seems to be aggrieved by the act of commission and/or omission on the part of respondents in not assigning/allocating the existing Power Purchase Agreement. Respondent No. 2, the U.P. Power Corporation Ltd. holds the PPAs amongst distribution companies of State including the petitioner Company under the provisions of the Electricity Act of 2003 as also the statutory policy, namely, National Electricity Policy and Tariff Policy as notified by the Central Government in exercise of its powers u/s 3 of the Electricity Act of 2003 to enable distribution companies like the petitioner to meet the power requirements of consumers of State including the area of distribution of the petitioner-Company. Further, according to the petitioner under the National Electricity Policy and Tariff Policy (framed u/s 3 of the Electricity Act of 2003), the PPAs, after the reform process was introduced, are required to be suitably assigned/allocated amongst distribution companies in the State. Thus, it is alleged that the action of respondents in not assigning/allocating the said PPAs amongst distribution companies including the petitioner Company and instead keeping them vested in respondent No. 2 even after coming into force of the Electricity Act of 2003, National Electricity Policy and Tariff Policy is arbitrary and illegal. The petitioner-Company has also challenged the notice/letter No. 479/SA (Com) dated 22.8.2008 issued by respondent No. 2

whereby the said respondent has threatened to discontinue the supply of 45 MVA of power to the petitioner Company from 30.11.2008. The petitioner Company has also alleged that the respondents in a deliberate and mala fide attempt to harm the petitioner Company and to curtail its legal rights under the Electricity Act of 2003 are violating the mandatory provisions of the Electricity Act of 2003 and have thus rendered its purpose and objects nugatory. According to the petitioner Company, the efforts of respondents are designed to deprive it of its legitimate share of electricity which it requires for distribution to consumers of its licensed area. Petitioner Company has also questioned the action of respondents in keeping the PPAs with respondent No. 2 when the mandate of the Electricity Act of 2003 envisages them to be suitably assigned amongst all distribution-companies of State as discriminatory. Respondent No. 2 instead of fulfilling its obligations under the Electricity Act of 2003 is arbitrarily supplying all the power available to it from the Central Government owned Generating Stations and the State owned Generating Stations only to five distribution companies which are its fully owned subsidiaries and is denying the petitioner Company its legitimate share of power. Such action on the part of the respondents also tantamounts to discrimination between the people of the Greater Noida area and the people of rest of the State. The respondents are thus trying to create two classes amongst the people of State, namely, one that is being supplied electricity through distribution companies of respondent No. 2 and the other which is being supplied electricity through the petitioner Company. It is thus submitted by the petitioner Company that the action of respondents is without any basis and rationale which is not sustainable in law, for, it is violative of Article 14 of the Constitution of India. It is also an averment in the writ petition that the UPERC, the statutory regulator in the State, has also in its various orders advised the respondents herein to suitably assign/allocate the PPAs among all distribution companies in the State so as to promote a fair competition among such discoms. However, the respondents have ignored such orders passed by the UPERC in this regard from time to time. Since the assignment/allocation of the PPAs has to be done primarily by the State Government and the UPERC having jurisdiction only on the licensees is not in a position to issue binding directions to the State Government. Thus, in this background as also due to the arbitrary and illegal actions of the respondents, the petitioner Company is not left with any alternative remedy except to pray in writ petition. Action of the respondents in disturbing the present arrangement of supply of 45 MVA of power vide its notice/letter as aforesaid dated 22.8.2008 suffers from mala fide and intends to drive the petitioner-Company out of the business of distribution, which may create a situation of utter chaos in the area of Greater Noida, by throwing it in the state of complete darkness if the continued distribution supply as aforesaid is disturbed.

16. On the other hand, in short counter-affidavit filed on behalf of respondent No. 1, State of U.P., it is stated that the petitioner-Company was given a licence for the Greater Noida area in the year 1993 so that private investment in the

field of power sector could be brought in and private power generation would increase. This would not only have the effect of electrification of the licensee's own area of supply, but the power shortage of neighboring areas would also be met. However, the petitioner Company is not fulfilling its commitment and now wants to burden the already power starved State by demanding through this writ petition even the transfer of the PPAs in its favour which is held by the U.P. Power Corporation Limited (respondent No. 2). It is, in particular, emphasized in the counter-affidavit that in the agreement dated 15.11.1993 which was entered into between the petitioner and the erstwhile UPSEB, it was specifically agreed by the petitioner Company that they would install a power house within 4 1/2 years from the date of commencement of supply. However, no such power house has been set up or installed till date. The District Magistrate, Gautam Budha Nagar and the Commissioner, Meerut Division, have written to the State Government that the Noida Power Company Ltd. has miserably failed to perform its functions as a distribution licensee of the Greater Noida Area.

17. It is also submitted in the counter-affidavit that after the enforcement of the U.P. Act of 1999 the responsibility for grant of licenses for distribution of electricity is that of the UPERC. Further, the UPERC is also vested with the power of regulating the power purchase and procurement process of distribution utilities like in the case of petitioner Company. Further by Section 26 of the U.P. Act of 1999, the UPERC has been empowered to order the licensee to do or to abstain from doing such things as may be specified in such order for the purpose of securing compliance with the terms and conditions of the license granted to the licensee by the Regulatory Commission.

18. Besides, u/s 17 of the U.P. Act of 1999 it is the duty of the petitioner-Company to supply electricity to the area of Greater Noida and such duty is to be performed by the petitioner Company in terms of and on account of the licence held by it. The petitioner Company was given a notice as far back as on 22nd August 2008 that the arrangement for supply of 45 MVA of energy to it, by the UPPCL will be discontinued, yet it appears that the petitioner Company has not made any alternative arrangement so far for purchase of power.

19. It is also an averment that the order/notice dated 22nd August 2008 has been brought to the knowledge of the UPERC as well. The State Government also sent a letter dated 11th November, 2008 to the UPERC informing it about the filing of present writ petition with request to take appropriate steps in this regard. Thus, it has been requested to implead the UPERC as a necessary party to the writ petition.

20. The State Government has also undertaken that it shall take all steps to ensure continuous and uninterrupted power supply to the Greater Noida area after 30th November, 2008 so that the public of the area is not left stranded to face any inconvenience on account of disruption in the power supply.

21. The UPPCL, respondent No. 2, has filed a separate short counter-affidavit

stating, inter alia, that in terms of licence granted to the petitioner Company u/s 3(1) of "the Act of 1910", it is authorised to supply the electricity to the entire area of Greater Noida; that out of total 70 MVA which the petitioner Company is supplying to the Greater Noida area, 45 MVA is drawn from the UPPCL (respondent No. 2) and the rest 25 MVA is being drawn by the petitioner Company through open access mechanism from various other sources in accordance with the PPAs which the petitioner Company has directly entered into with the electricity power suppliers; that the earlier agreement dated 15.11.1993 was entered into between the petitioner Company and the UPSEB regarding the supply and distribution arrangement between them for a period of 4 1/2 years, thus, its life was only upto 30.6.1998; that the said agreement dated 15.11.1993 also enjoined upon the petitioner to set up its generating station within the period of 4 1/2 years and that the purchase price of electricity was to be determined by the UPSEB which initially was fixed tentatively at Rs. 1.66 per unit, however, it was revisable after every six months by independent authority. It is also urged in the counter-affidavit that the petitioner Company being dissatisfied with the respondents-authorities on the question of determination of purchase price, filed writ petition No. 1048 (MB) of 2000. The UPPCL during the pendency of the writ petition took a decision on 17.2.2001 that the terms and conditions of the agreement dated 15.11.1993 shall remain in force till the matter was finally decided. The writ petition was finally decided on 10.11.2005 and against the interim order dated 10.11.2005, the respondent No. 2, the UPPCL has filed a Special Leave Petition.

22. It has been emphasized that in terms of 1993 agreement the petitioner Company had to install its own generating station within a period of 4 1/2 years of the agreement, and thus, in terms thereof the hope and trust were reposed in the judgment and order dated 10.11.2005 whereby the writ petition was disposed of. It has been asserted that the U.P. Act of 1999 came into force on 14.1.2000 and the UPPCL became the legal heir of the UPSEB for the purpose of procurement, transmission and supply of electricity. Thus, u/s 13 of the U.P. Act of 1999, the UPPCL got complete rights in relation to all power purchase and transmission agreements entered into by the Board with various generating and transmission companies. Besides, in terms of Section 23(1) of the said Act a transfer scheme had to be prepared in respect of all the properties, interests, rights and liabilities of the UPSEB except the PPAs and the same were to vest initially in the State Government. Thereafter, by operation of Section 23(2) of the said Act they were to be re-vested by the State Government in accordance with the transfer scheme in a generating Company/other companies.

23. Another submission put forward in the counter-affidavit of the UPPCL is that when the UPSEB was in existence, it had entered into many PPAs with the generating companies, and thereunder, it was drawing electricity. Thus, by operation of Section 13, these PPAs stood transferred to the UPPCL and they were not to be further transferred to any other Company or entity. It is further submitted that in accordance with the statutory intendment, the UPPCL alone

became the legal successor of the UPSEB in relation to all power purchase agreements. It has been further contended that under the provisions of the U.P. Act of 1999, the power to issue licences etc., however, stood vested in the U.P. Electricity Regulatory Commission. Thus, this power is, now not, in the realm of the State Government of U.P. or the UPPCL. Another argument advanced by way of averments in the counter-affidavit of the UPPCL is that distribution of electricity in the area of Greater Noida has been provided to the petitioner Company under an exclusive licence issued to it. Thus, no other person, neither the State Government or the UPPCL can supply the electricity in the area of Greater Noida till such time that the licence granted to petitioner Company remains valid. If the petitioner Company is not in a position to fulfill the obligations under the licence, the UPERC may revoke the licence or make alternative arrangements for supply of power/electricity in that area.

24. u/s 185(3) of the aforesaid Act of 2003, which came into force on 10.6.2003, other enactments as specified in the schedule to the Act would apply in so far as they were not inconsistent with this Act. The U.P. Act of 1999 is also included in the schedule. Thus, according to the submission on behalf of the UPPCL in its counter-affidavit there is no inconsistency between the U.P. Act of 1999 and the Electricity Act of 2003. The U.P. Act of 1999, therefore, can validly apply in the State of U.P. In this background it is asserted that as per Section 14(c) of the U.P. Act of 1999, the petitioner Company is a licensee for supplying electricity to the Greater Noida area. Section-17 of the said Act (which is not inconsistent with Section 42 of the Electricity Act of 2003) provides that it would be the duty of a licensee to develop and maintain an efficient, coordinated and economical system of supply of electricity. Section 17(4) empowers the licensees to enter into arrangements for the purchase of electricity from any person or class of persons mentioned in Section 17(4)(a) and (b). By way of the above averments in the counter-affidavit of the UPPCL it has been asserted by the Corporation that the petitioner Company as a licensee has to make its own arrangement for the purchase of power for the purpose of fulfilling its responsibility for distribution of electricity in terms of its licence for its area of supply in Greater Noida. It has also been asserted that the UPPCL is the holder of various power purchase agreements by statutory intendment and there is no legal duty or provision to transfer such power purchase agreement to petitioner Company. The petitioner Company would have carried out the legal obligation, had it setup its own generating plant or by purchasing power from open market. In fact the petitioner Company had already entered PPAs with M/s. NCS Sugars-Andhra Pradesh, M/s. Adan-Gurgaon, M/s. Global Energy-New Delhi, and according to information given, some PPAs are still in the pipeline-like one with M/s. Kribhco Shyam Ltd.

25. It is further asserted that in the notice under challenge the petitioner Company had already been granted 3 months" further period to make its own arrangement expeditiously to meet its legal obligation in supplying the power to consumers of Greater Noida area. It is also emphasized that the petitioner Company cannot compel the UPPCL to supply electricity to it under an agreement

which has expired. The UPPCL is already facing shortage of electricity and the petitioner Company cannot demand electricity from the Corporation under a threat to disconnect the electricity connections of consumers of Greater Noida for which area it is statutorily responsible to supply electricity. Even vide the orders passed by U.P. Electricity Regulatory Commission dated 15.11.2005 and 1.12.2006, the Commission has been requiring the petitioner Company to establish its own generating facility and also to execute more Power Purchase Agreements. Now since various power exchanges have been established, the petitioner can immediately make alternative arrangement for purchase of power.

26. As regards the powers and duties of the UPERC, right from regulation of power sector in the State of U.P. to licensing, tariff fixation and approval of PPAs, all such matters are within its realm. Thus the UPPCL cannot be compelled in any manner to aid the petitioner Company in its profit making business. The Corporation is already having shortage of power and thus it is not prepared to cross subsidize the petitioner Company by purchasing expensive power and supplying it at a lower rate. The petitioner Company can purchase power from the open market and draw it through the open access mechanism for supplying to its consumers. Presently in order to meet the requirement of electricity of its own distribution area, the UPPCL has had to purchase power at the price ranging from Rs. 6.79 to Rs. 8.15 per unit. On the other hand, 45 MVA of power is being given to the petitioner Company by the UPPCL for a price of Rs. 2.47 per unit. Further on the said amount the UPPCL has to incur wheeling charges of Rs. 0.28 per unit which the petitioner Company is also disputing and refusing to pay. Thus, the UPPCL is being saddled with a huge liability which it is not prepared to take any further.

27. Vide rejoinder-affidavit dated 27.1.2009 filed by the petitioner Company, it has sought enforcement of legal entitlement for supply of power, inter alia, on the ground, namely, that the UPSEB, the predecessor of the UPPCL, had entered into various PPAs with the Central Generating Stations owned by the Central Government for the power which was allocated to the State of U.P. as per demand of power in the State and also on the basis of population as well as other relevant factors. Thus, the power had been allocated under the agreement for the benefit of entire population in the State. Similarly, the UPSEB and respondent No. 2 also entered into PPAs with the State Owned Generating Stations for the supply of power to the people of State of U.P. As the State Owned Generating Stations have been established from the resources of the State and the money received by the UPSEB and/or respondent No. 2 from the sale of electricity to the people of State, the people have an equitable right on the power generated from the State Owned Generating Stations.

28. The UPSEB was distributing powers to all consumers of State of U.P. including the Greater Noida area after drawing from two sources, namely, (i) the PPAs with Generating Stations belonging to Central Government Company like NTPC and NHPC, and (ii) the power generating stations belonging to the UPSEB. This was

the position prior to constitution of the petitioner Company, a joint venture Company, in which the Greater Noida Authority has 27% shareholding. It appears that the NPCL was granted a distribution licence for Greater Noida on 30.8.1993 even without entering into an agreement with the UPSEB. Thus, the petitioner Company had already acquired an enforceable statutory right u/s 18(b) of the Supply Act of 1948 for supply of electricity to it.

29. It is also mentioned that the agreement dated 15.11.1993 was only to fix the rate at which the petitioner licensee was to make payment for the purchase of electricity from the UPSEB. The petitioner appears to lay a great emphasis on the provisions of Section 18(a) and (b) of the Supply Act of 1948 so as to clarify the legal position which according to it may apply in this regard.

30. Referring to Section 27 of the Supply Act of 1948, it has been submitted that the UPSEB had the power as well as the obligations of a licensee under the Act of 1910 for distribution of power to all consumers in the State of U.P. Thus according to the petitioner Company, the function of the UPSEB was only to distribute the power which it was purchasing under the PPAs entered into with NTPC and NHPC as well as the power available in the stations owned by it to various consumers of the State. Thus, the position of the UPSEB was like a trustee in respect of PPAs, and all types of consumers of electricity were in the position of beneficiaries. In support of contention, C.R. Rao's Book on the Indian Trust Act, 1882 (vide page 52) has been referred to wherein some passages from the Halsbury's Laws of England have been quoted. Thus, according to the petitioner Company, the right of the UPSEB in power sector was only for the benefits of consumers of the entire State of U.P. and, as such, its function was only to equitably distribute its power among consumers of different areas of the State of U.P. The petitioner has also referred to the provisions of Section 17 of the Indian Trust Act, 1882 in support of his submission.

31. It is also the contention of the petitioner Company in the rejoinder-affidavit that the position of the UPSEB as a trustee has now been specifically articulated by the Statutory National Electricity Policy and Tariff Policy published by the Central Government u/s 3(2) of the Electricity Act of 2003. According to the petitioner-Company, even before coming into force of the Electricity Act of 2003 and publication of the Statutory National Electricity Policy and the National Tariff Policy, legal obligation of the UPSEB was already there to distribute the power equitably and proportionately according to load profile of consumers of different areas.

32. The real beneficiaries of power are consumers and the U.P. State Electricity Board/UPPCL or the NPCL or any other distribution companies only exist as medium for enforcing the rights of such beneficiaries equitably as required by Section 17 of the Indian Trusts Act, 1882. Even prior to 1993 all generating stations which have been set up by the UPSEB have been set up only from the funds received from all consumers of the State. This position would be clear from the provisions of Section 59 of the Supply Act of 1948. The consumers of

different areas of the State are entitled to the benefits of power generation and distribution according to their entitlement on the basis of their load profile. Consequently, consumers of Greater Noida area were equally entitled to get their share or part from the entire power bought in by the UPSEB or as generated by it. The UPPCL being the successor to the UPSEB is under obligation to supply the equitable share of power to consumers of different areas, and thus, the power has to be supplied to any entity whether the petitioner-Company or anybody else which is distributing power in that area. This has been claimed to be the basis of legal right of the petitioner-Company namely the NPCL to get its rightful share of power from the UPPCL for the benefits of consumers of that area, say 110 MVA as on the date of filing of the writ petition.

33. It is also noticeable that the petitioner-Company has placed abundant reliance on the agreement dated 15.11.1993 for the supply of 45 MVA power and on the issue of setting up of a power generating plant as per the terms of the said agreement, the petitioner has tried to answer by making prayer for the enforcement of its legal rights as claimed to have been provided under various provisions of the Electricity Act of 2003 read with the National Electricity Policy and the Tariff Policy for assignment/allocation of the existing Power Purchase Agreements with the Central Power Generating Station and the State owned Power Generating Stations, said to be possessed/held by respondent No. 2. It is an admitted fact that the UPPCL (respondent No. 2) is the legal successor of the UPSEB pursuant to coming into force of the U.P. Act of 1999. As envisaged vide the provisions of Section 23(1) and (2) of that Act, admittedly, a transfer scheme has already been framed. Thus, by the operation of transfer scheme, the profits, interests, rights and liabilities of the UPSEB have been re-vested in the UPPCL (respondent No. 2). Section 131 of the Electricity Act of 2003, is the substantive provision regarding the formulation of transfer scheme for the unbundled State Electricity Board. It is not clear as to whether a second transfer scheme, whereby the PPAs of the UPSEB which re-vested in the UPPCL (respondent No. 2) can be transferred to any other distribution Company, has been framed u/s 131(4) of the Electricity Act of 2003. The provisions of the Tariff Policy and the National Electricity Policy which envisaged the assignment/allocation of existing Power Purchase Agreements of the UPPCL with the Central Power Generating Station and the State Power Generating Stations to distribution companies of the State have also been placed reliance upon. Admittedly, these policies have been framed u/s 3 of the Electricity Act of 2003 and have thus cast a mandatory obligation upon the State Government to assign/allocate the Power Purchase Agreements of respondent No. 2 to distribution licensees of the State as per their load profile. It also seems that the aforesaid two statutory policies have been framed only in accordance with and in consonance with Section 131(4) of the Electricity Act of 2003 in order to give effect to the mandate of the aforesaid statutory policies. It is also noticeable in the rejoinder-affidavit that the provisions of the U.P. Act of 1999 are not totally in consonance with the provisions of the Electricity Act of 2003. Moreover, such various provisions of the

U.P. Act of 1999 which are inconsistent with the provisions of the Electricity Act of 2003, will be subservient to the provisions of the later Act, namely, the Electricity Act of 2003 by virtue of Section 185(3) thereof.

34. It is also an assertion of the petitioner that though the establishment of a power generating plant was one of the terms of the agreement dated 15.11.1993 with the UPSEB which has already expired but assignment/allocation of the Power Purchase Agreements is an independent legal right of the petitioner. The stand of the UPPCL that a distribution licensee is required to make its own arrangement for supply of power in its area of supply is clearly on the premise that seeking assignment/allocation of power as per its own entitlement under the Law, is not an effort to procure/purchase electricity. It is also an assertion that the legal entitlement of the petitioner to get the Power Purchase Agreements assigned/allocated to it as per the provisions of the Electricity Act of 2003, the National Electricity Policy and the Tariff Policy is independent of orders issued from time to time by the U.P. Electricity Regulatory Commission (the UPERC) whereby the petitioner has been directed to establish generating station or to execute more Power Purchase Agreements. In terms of averments on behalf of the petitioner there is no categorical answer to the submission of the petitioner as raised in the writ petition on the premises that the UPERC as per its various orders has categorically recommended assigning/allocation of existing Power Purchase Agreements to all distribution companies including the petitioner Company. It is also a submission of the petitioner that there is a complete misunderstanding of the provisions of the Electricity Act of 2003 insofar as it is referred to in support of the contention of respondent No. 2 that it would be required to subsidize the petitioner Company by purchasing expensive power and supplying it at a lower rate. The respondent cannot be compelled to do so in the profit business of the petitioner Company. On the contrary, towards the payment of tariffs of 45 MVA of power supplied by respondent No. 2 to the petitioner on the rate fixed by the UPERC, the petitioner has to make payment at a much higher rate than the pooled cost of procurement of power. It is contended that between 1993-2008 the quantum of power purchased by the petitioner and the profits that resulted to respondent No. 2, have been to the tune of more than Rs. 200 Crores. Thus, there is a complete denial of the fact that the respondent has been purchasing power at a much higher cost and supplying it to the petitioner at a lower rate. According to the petitioner, respondent No. 2 is holding Power Purchase Agreements with various Central generating stations and State owned generating stations. It is supplying power to its subsidiary distributing companies at a pooled cost whereas the petitioner has to pay for it at higher rate even though it has given a huge profit to respondent No. 2. The petitioner Company only wants the assignment/allocation of Power Purchase Agreements which the respondent corporation is holding with various Central generating stations and the State owned generating stations and it does not want assignment of any power or Power Purchase Agreements which respondent No. 2 has held with traders independently. Thus, the demands of petitioner-Company are only

confined to seeking enforcement of the legal provisions which make it entitled to the assignment/allocation of the Power Purchase Agreements with generating stations of the public sector and not the enforcement of any agreement between respondent No. 2 and the private generating stations.

35. According to the petitioner the Power Purchase Agreements being possessed by respondent No. 2 with the Central and State generating stations have been executed for the benefit of State and its population. Therefore, the population of the area which is being supplied electricity by the petitioner Company has equitable share on the resources of State, therefore, the petitioner being a distribution licensee can legitimately claim assignment/allocation of Power Purchase Agreements for the benefits of consumers of the area and for the purposes of distributing the said resources of the State to the people of Greater Noida area. It is also a submission of the petitioner that this rejoinder-affidavit be treated as rejoinder-affidavit to the counter-affidavit filed by both namely respondent No. 1 and respondent No. 2.

36. It is reiterated in the rejoinder-affidavit that the petitioner has sought to enforce its legal right under the Electricity Act of 2003 and the National Electricity Policy as well as the Tariff Policy for getting the assignment/allocation of the PPAs which respondent No. 2 holds with the Central Owned Power Generating Stations as well as State Owned Power Generating Stations. The agreement of 15.11.1993 was only to fix the rate at which the petitioner Company/licensee was to make payment for the supply of electricity to it by the UPSEB. u/s 26 of the Supply Act of 1948, the UPSEB had the power as well as obligations of a licensee under the Indian Electricity Act of 1910 for distribution of power to all consumers in the State. Essentially the function of the UPSEB was to distribute the power to consumers. In respect of PPAs, the UPSEB was holding them in the position of a trustee, and various consumers of the State were in the position of beneficiary. The UPSEB was thus required to equitably distribute the power among consumers of different areas of the State in terms of the provisions of Section 17 of the Indian Trusts Act of 1882. The position of the UPPCL as successor of UPSEB as a trustee is specifically articulated by the Statutory National Electricity Policy and the Tariff Policy published by the Central Government u/s 3(2) of the Electricity Act of 2003. Thus, Section 3(2) of the Electricity Act of 2003 obligated upon the UPPCL the successor of the UPSEB to distribute the power equitably in different areas according to load profile of consumers. Even before the enactment of the Electricity Act of 2003, the Statutory National Electricity Policy, and the National Tariff Policy, there was a legal obligation upon the erstwhile UPSEB to distribute power equitably and proportionately.

37. It is also the contention of petitioner Company that the Power Purchase Agreements can be subject-matter of the transfer scheme since they have been vested in respondent No. 2 by virtue of Section 13(3)(i)(c) of the U.P. Act of 1999. There is a denial of contention of the UPPCL that since the transfer scheme

has not been challenged by the petitioner Company, it has acquiesced to the said transfer scheme.

38. It is submitted that the Transfer Scheme of 2000 was framed on 14.1.2000 u/s 23(1) and (2) of the U.P. Act of 1999 by which the assets of the UPSEB including the Power Purchase Agreements were vested in the State Government and thereafter those were re-vested in respondent No. 2 u/s 23(2). In fact Section 23(4) thereafter contemplates a further transfer scheme to vest these assets in distribution companies which also includes the petitioner Company.

39. There is a denial of the argument that respondent No. 2 the UPPCL is buying power at a much higher rate than the supply rate to the petitioner. It is a submission of the petitioner Company that respondent No. 2 has recently started the practice of appointing private companies as franchisees in various districts of the State for distributing power on its behalf. It is submitted that in the franchisee agreement awarded till now respondent No. 2 has agreed to supply power to the said franchisees at a much lower rate than the pooled cost of power paid by respondent No. 2. This clearly shows the mala fide intention of respondent No. 2.

40. In the supplementary counter-affidavit dated 10.4.2009 filed on behalf of respondent No. 2, the UPPCL, it has been submitted that the petitioner Company has neither any legal nor any equitable right to ask for and get power purchase agreement held by respondent No. 2. It is also a submission that there is privity of contract between the erstwhile UPSEB and the Central Power Generating Stations in respect of the PPAs. The petitioner Company cannot seek the benefit from the existence of such an equitable right vested only in the people of State of U.P. and not in the petitioner Company. The Power Generating Stations in the State of U.P. were set up by the State or by the erstwhile UPSEB from its own resources and not necessarily from the money received by the Board from the sale of electricity to consumers of the State. The State of U.P. is primarily an agricultural State. A large part of the electricity generated, say about 17%, is supplied to the agricultural sector at a heavily subsidized rate of about 1.10 per unit. Even the realization of that amount becomes very difficult as the electricity is not provided on the basis of metered consumption but only on the basis of connected load and verification of BHP of the meters of tube-wells. There is no such admission by the respondent corporation, namely, the UPPCL: that the petitioner Company was constituted at the instance of the Greater Noida Authority. On the other hand, it is only a result of bilateral agreement between the parties. The petitioner Company has a licence for supply of electricity but correspondingly there is no duty upon the UPSEB apart from what had been agreed to and imposed thereunder on it by the agreement dated 15.11.1993 to supply electricity to the petitioner. Section 18 of the Supply Act of 1948 did not cast any statutory duty on the UPSEB to supply energy mainly because a person had a license under the Act of 1910. A licence only enables the licensee to supply energy and it does not create a right u/s 18 of the Supply Act of 1948 to acquire

electricity from the UPSEB. The UPSEB was an instrumentality of the State which was primarily engaged in the electrification of the State. If some PPAs had been entered into between it and some generating stations, the same did not create any relationship in the nature of a trust between the UPSEB and consumers or the petitioner. There is no relationship of trustee and beneficiaries. The concept of trustee as conceived of by the petitioner is neither recognized under the Indian Trust Act 1882 nor under any other law. Moreover, the petitioner cannot purport to act on behalf of the beneficiaries even assuming that the UPSEB was a trustee and consumers of electricity of the State were the beneficiaries.

41. Section 17 of the Indian Trust Act, 1882 has no application in the circumstances of the present case. The duty of the UPSEB was not that of a trustee as alleged by the petitioner but it was only in respect of the nature of work, it was engaged in, namely work of electrification of the entire State. The National Electricity Policy and the Tariff Policy did not make any stipulation for the transfer of PPAs. In fact, under these policies the PPAs need to be suitably assigned to distribution companies subject to mutual agreement. Thus, without mutual agreement, there can be no assignment of any PPA. The petitioner Noida Power Company Ltd. is not a successor of the UPSEB or the UPPCL, therefore, the PPAs cannot be assigned in favour of the petitioner Company. The UPSEB was generating revenue not only from its consumers but a major part of the revenue came from subventions in the form of loans, subsidies and grants given by the State of U.P. to it. Section 59 of the Act, does not indicate that generating stations have been funded only through the revenue received from consumers. It is also an argument in the supplementary counter-affidavit that there is neither any legal right nor equitable right of the petitioner to draw any electricity from the respondent Corporation without there being any agreement between the parties nor is there any duty cast upon the Corporation to supply power to the petitioner Company or to any entity even if such entity has a distribution licence. Moreover the petitioner Company has no authority to espouse the ostensible cause of its licensed area and its function is basically to supply electricity to the area in terms of the licence. The consumers of Greater Noida are wholly dissatisfied with the functioning of the petitioner and have made complaints to the district Magistrate and the Divisional Commissioner concerned. Moreover, it is not open for the petitioner Company to espouse the cause of consumers of Greater Noida on one hand, and on the other, commit blatant breach of the terms of agreement in not setting up of its own generating stations by the date specified in the agreement, namely, within 4 1/2 years of 1993, and also the undertaking given to this Court. Under the agreement, the petitioner Company was to be supplied 45 MVA energy (raised from 30 MVA) but, in fact, it was supplying between 70-75 MVA by purchasing the remainder from other agencies. Obviously, there is no prohibition for the petitioner from purchasing energy from any other source. The petitioner is wholly a commercial organization engaged in making profits from beginning at the expenses of the UPSEB/UPPCL. The petitioner Company has always been avoiding setting up of generating station for

supply of electricity to its licensed area in complete breach of commitment given in undertaking before the High Court. The petitioner after taking advantage of the agreement dated 15.11.1993 completely shirked its responsibility towards the people of Greater Noida Area. The petitioner Company, very well knew that under the National Electricity Policy, the Government of India would not permit any coal based power station for environmental reasons. The petitioner Company was not aware of the ground reality of the Geographical location of the proposed power plant at the time of agreement on 15.11.1993, thus, it lacked technical knowledge and foresight. The petitioner has asserted that the assets of the UPSEB sold to it were grossly over valued at Rs. 10.10 crores. Amount of 10.10 crores in comparison with the approximate estimate of Rs. 2 to 4 hundred crores, required for setting of a 50 to 100 MVA plant is only a minuscule percentage of the requisite financial backing for the setting up of the power plant. Clearly the petitioner could not and did not wish to arrange for the finance required for setting up of the power plant. The petitioner Company has been dilly-dallying with the issue and did nothing to set up the plant despite the order of a co-ordinate Bench of this Court in W.P. No. 1048(MB) of 2000 dated 10.11.2005. As per the provisions of New Thermal Power Generation Development Policy 2008 of the Government of U.P., the entire responsibility of fuel linkage was only on the developers who will submit a proposal to the Government of U.P. with clear intention for establishment of plant but that intention is conspicuous by absence vide the letter of the petitioner Company dated 30.8.2008 to the Principal Secretary (Energy), Government of U.P. The minutes of the meeting called by the then Chief Minister, cannot be used by the petitioner to absolve itself from its duty to set up a generating station for its licensed area.

42. Respondent No. 2 in its affidavit has also pleaded that the PPAs cannot be subject-matter of Transfer Scheme since they have vested absolutely in the UPPCL by operation of Section 13(3)(i)(c) of the U.P. Act of 1999; that neither the National Electricity Policy nor does the Tariff Policy provide for assigning or allocation of PPAs to the petitioner; that after the expiry of the agreement dated 15.11.1993 there is no right either under law or under any contract or in equity in favour of the petitioner to draw any electricity from the UPPCL, and that the UPPCL is the legal successor of the UPSEB in respect of PPAs, and thus by the operation of law these agreements have statutorily vested in the UPPCL. As per the Transfer Scheme u/s 23 of the U.P. Act of 1999, only the interest, right and liabilities of the Board could be transferred, and that have vested in the State Government. The Transfer Scheme cannot deal with any property which has vested in the UPPCL u/s 13(3)(c) of the aforesaid Act.

43. Respondent No. 2 has also submitted that the U.P. Act of 1999 is applicable throughout the State of U.P. and the Electricity Act of 2003 has no application in the State of U.P.; that the Transfer Scheme has already been prepared and notified, and the petitioner-Company not having challenged the same has in fact acquiesced in, with the same; that the petitioner has nowhere pleaded in the writ petition or anywhere else that the provisions of the U.P. Act of 1999 be declared

inconsistent with the provisions of the Electricity Act of 2003; that the UPERC has been requiring the petitioner to set up its generation stations but without caring for the same the petitioner is only interested to get PPAs of respondent No. 2 allocated to it even though there is no legal requirement for the same, and that the UPPCL is buying electricity from various sources apart from the PPAs with public sector generating stations held by it. Thus after taking into account the entire power purchased by respondent No. 2, a pooled cost of power procurement can be correctly arrived at. Moreover, there is no reason for the UPPCL to purchase power from the outside sources at a rate which enhances the pooled cost of power procurement. To allege that the huge profits have been made by respondent No. 2 because of the petitioner is not only a mischievous statement but is a deliberately incorrect one.

44. Besides the short counter-affidavit as aforesaid, respondent No. 2 has also filed a supplementary counter-affidavit and in reply thereto the petitioner has filed a rejoinder-affidavit sworn on 25.4.2009, particularly in order to deny the averment on behalf of the respondent that the petitioner has set up a completely new case. The petitioner on the contrary has only taken legal pleas in the earlier rejoinder filed on 27.1.2009. It is also the assertion that the petitioner has a legal right to get the power purchase agreements held by respondent No. 2. It has again asserted that the power purchase agreements were made between the Central Power Generating Stations and the erstwhile UPSEB. Thus, the UPSEB became entitled to supply or distribute power in the State of U.P. The petitioner-Company was granted distribution licence to distribute power in Greater Noida area in accordance with the due process of law and only after consulting the UPSEB as provided u/s 3 of the Act of 1910. The petitioner has referred to Section 18(b) of the Supply Act of 1948 to argue that after the grant of licence it was statutorily obligatory on the UPSEB to supply the power to the petitioner. Thereafter, the Electricity Act of 2003 came into force and thus u/s 3 thereof, the National Electricity Policy and the Tariff Policy were drawn. In terms of the law governing the subject-matter, it is required of respondent No. 2 that the power purchase agreements entered into between the UPSEB and the Central Power Supply Generating Stations (which is being held by it as the successor of the UPSEB) be assigned/allocated to all distribution companies including the petitioner. Under the power purchase agreements there was no absolute right or benefit that vested in the UPSEB. The agreements were entered into for the benefits of the people/consumers of the State. The allocation of power to the UPSEB was based on the population of the State and also as per the Gadgil Formula. Thus, it was not open for respondent No. 2 to discriminate with the petitioner. As such, the contention of respondent No. 2 that there was no duty imposed upon the UPSEB u/s 18 of the Supply Act of 1948 is totally misconceived.

45. It has also been submitted that there is a violation of Article 14 of the Constitution inasmuch as respondent No. 2, namely, the UPPCL is not doing any discrimination in the matter of supply of power to its subsidiary companies

distributing electricity in other areas of the State of U.P. except in the Greater Noida which is being supplied by the petitioner distribution Company. The petitioner-Company has not placed reliance on the agreement with the UPSEB. It has only sought the quashment of the notice primarily on the ground that it will cause irreparable loss to the petitioner Company as well as to the people/consumers of the Greater Noida area. The main emphasis of the petitioner Company is not on the agreements between the parties but on the assignment/allocation of power under the National Electricity Policy. According to the petitioner, if there is a requirement of mutual agreement in terms of clause 5.3.4 of the National Electricity Policy, it was only because of the requirement of applying a uniform distribution of power by the UPPCL respondent No. 2. The petitioner Company has sought equality purely in accordance with the provisions of law and the National Electricity Policy irrespective of the agreement with the UPSEB which expired sometime in 1998. It is also submitted that the petitioner Company being the successor of the UPSEB in respect of the Greater Noida area having taken over the assets of the UPSEB is entitled to get the proportionate share in the power purchase agreements, now held by respondent No. 2, the UPPCL. Since the power generating stations in the State are set up from the resources of the State, therefore, the people of the State have equitable right to get the power supply. In reply to the averments on behalf of respondent No. 2, the UPPCL, that consumers of the Greater Noida area had made complaints to the authorities against the petitioner Company regarding inadequate supply of electricity, it has been contended that initially as per the agreement the petitioner Company was to get 45 MVA power supply, but later, it was agreed to between the Company and respondent No. 2 to get the additional supply of 15 MVA but, in fact, it was not done. With great difficulties respondent No. 2 started supplying only 10 MVA which was later also discontinued, and finally, it was only under the order of the Allahabad Bench dated 19.12.2006 passed in Writ Petition No. 66435 of 2006 that the additional supply was resumed. It is also mentioned in the rejoinder-affidavit that the petitioner Company is a successful example of private sector participation in the power sector.

46. The Petitioner Company has passed its efficiency gains a feat not yet achieved by any of the respondent's subsidiaries. The UPERC vide its tariff order dated 1.9.2008 also lauded the operational performance of the petitioner Company vis-a-vis other distribution companies. It is the first and the only power distribution Company in India which has got ISO 9001:2001 certification for the entire operations. Further the efficiency of the petitioner Company in distribution of power has also earned the appreciation of United States Agency for International Development (USAID) vide its letter dated 15.12.2008. The petitioner-Company was also awarded a silver shield for meritorious performance in the rural distribution franchisees vide the Presidential award on 17.2.2009. It is also submitted that the petitioner over more than fifteen years period has paid more than Rs. 200 Crores to respondent No. 2 over and above the cost of power supply whereas it has earned only Rs. 21.39 Crores from the beginning till

2007-2008 as a reasonable return. Earlier, respondent No. 2 had consistently incurred losses in the Greater Noida area on account of inefficiency and huge transmissions and distribution losses. It is also a submission that the petitioner Company had made genuine efforts to set up its own generating plant but due to non-cooperative attitude of respondent No. 2 nothing had worked. It is also a contention of the petitioner in its rejoinder-affidavit that the assets of the UPSEB was over valued in 1993 at 10.10 Crores whereas on an independent valuation it had been determined to be less than Rs. 4 Crores. Besides, in 1993 out of 118 villages in the Greater Noida area, very few villages were electrified by the UPSEB. The petitioner has thereafter expanded distribution network to cover all the 118 villages of the Greater Noida at a huge cost. Today, the petitioner Company is not only supplying domestic power in the area but is also supplying agricultural power to the villagers of these 118 villages.

47. It is also a submission that the petitioner Company has invested about Rs. 275 crores in expanding distribution network in its area of supply. It is further submission of the petitioner that the issue of setting up of generating plant has been wrongly made a part of the agreement dated 15.11.1993. It was also agreed between the parties that after 1993 agreement came to an end, two separate and new agreements relating to (i) supply of power (ii) generation of power were required to be made. It has also been contended that respondent No. 2, the UPPCL has misread the new Thermal Power Generation Development Policy, 2008. The provisions of the policy as alleged by respondent No. 2 the UPPCL do not stipulate that the coal linkage has to be obtained before the grant of approval to the project by the State Government. The petitioner has stated to have made appropriate application to the concerned department of the Central Government requesting for a coal linkage. The said linkage can only be granted after the State Government grants the approval. The petitioner Company has alleged that the State Government is deliberately withholding such approval on untenable grounds so as to disentitle the petitioner Company from getting benefits of the Thermal Policy, 2008, and also in order to create hurdles in the setting up of the generation plant. There is no response from the State Government even after submitting repeated application, the last being in the month of March, 2009. Thus, it is not open for the respondents to allege that the petitioner Company is not trying to setup the power generating plant. There is also a denial of the argument of respondent No. 2 that the PPAs cannot be the subject-matter of transfer scheme once they have vested in respondent No. 2, the UPPCL, by virtue of Section 13(3)(i)(c) of the U.P. Act of 1999. The petitioner Company has also countered the contention of respondent No. 2 that it would not be entitled to claim benefits in the absence of challenge to the transfer scheme and, therefore, has acquiesced in, to the scheme. This submission has been repelled on the ground that the Transfer Scheme of 2000 was framed on 14.1.2000 u/s 23(1)(2) of the U.P. Act of 1999. Under the scheme, the assets of the UPSEB including the PPAs were vested in the State Government and thereafter re-vested in respondent No. 2 u/s 23(2). According to the petitioner,

Section 23(4) contemplates a further transfer scheme to vest these assets in distribution companies which also includes the petitioner Company.

48. There is a complete denial of the arguments of respondent No. 2 that it is supplying the power after purchasing it at a much higher rate than the rate being paid by the petitioner. On the other hand, it is emphasized that the petitioner wants its share for consumers of the Greater Noida area in accordance with the load profile and at the pooled cost. It is also a contention of the petitioner that it has paid over Rs. 200 crores to respondent No. 2 for the power supply at the rate higher than the pooled cost. It is further contention that this argument of respondent No. 2, the UPPCL, stands belied also for the reason that it has granted franchisee to private companies and agreed to supply power at a much lower rate than the pooled cost. Thus the argument raised by respondent No. 2, according to petitioner, is negated.

49. In the second supplementary counter-affidavit dated 8.5.2009 filed on behalf of the UPPCL, respondent No. 2, it has been submitted that in the northern region there are in total nine States including the State of Uttar Pradesh. As per 2001 census, the total population of these States was 307,208,883 out of which the population of Uttar Pradesh itself is 166,052,859 which constitutes 54.05% of the total population of the northern region. However, the share of allocation of power as has been given to the State of U.P. is only 32.36%. Similarly, though the population of Delhi is 4.49% but the power allocation is higher at 16.08%. The power allocation is made by the Ministry of Power, Government of India, while taking into account the installed capacity and the available capacity. For the past 5 years, 2004-05 to 2008-09, the installed capacity of the Central Power Generating Stations and the maximum available capacity would only show that even if the case setup by the petitioner Company is accepted, the petitioner Noida Power Company Limited is not entitled to get 110 MVA of energy as demanded by them on the basis of above principle. There is denial of the assertion of petitioner that respondent No. 2 the UPPCL is supplying power only to its five subsidiary distribution companies. It is claimed by respondent No. 2 that it has been supplying 45 MVA of power to the petitioner Company till the termination of the agreement and thereafter on the basis of interim order of this Court. It is also submitted that the U.P. Act of 1999 and the Electricity Act of 2003 do not entitle the petitioner to any allocation or assignment of any power purchase agreement. The order of the UPERC to that extent is inconsistent with the provisions of these two Acts. The petitioner has also conveniently ignored the fact that the UPERC has directed it to setup its own generating stations. The petitioner had given a solemn undertaking to the High Court to setup its generating station within a period of 4 years and thus if consumers of the Greater Noida area are under the threat of discontinuance of the power supply, it would be only because of inaction on the part of the petitioner Company. It has also been mentioned that in terms of the agreement dated 15.11.1993 the assets of the UPSEB were sold to the petitioner for a sum of Rs. 10.10 crores payable in 4 yearly installments (along with interest at the rate of 14% per

annum) but the petitioner-Company did not pay any amount and the payments were made with much delay and without any interest. The time frame for payment having expired, the petitioner was required to pay the interest but it has failed to do so and thus an amount of Rs. 13.02 crores is outstanding on this count. The interest liability was later set aside by the High Court and the matter challenging the same is said to be pending in the Supreme Court. It is also a submission that only the physical tangible assets like transformers, electricity poles and lines etc. were sold. The PPAs which are not capable of valuation were never sold or transferred by the UPSEB to the petitioner. According to the assessment of respondent No. 2, the petitioner is supplying 78% of power to the industries and commercial consumers, 5 to 7 % to the public and private institutions, 15% to the domestic sector and hardly 0.4% MVAs to the agriculture sector. It is also a submission that in terms of the agreement, the UPSEB was under obligation to supply 45 MVA power to the petitioner as it did not have any generating stations. Such supply of power was required by the petitioner at that point of time. Subsequently, an additional supply of 10 MVA power at marginal cost was made available to the petitioner w.e.f. 10th May, 2006. However, the cost of the power was not paid by the petitioner M/s. Noida Power Company even after the commitment. On the contrary the petitioner Company chose to litigate with the UPPCL before the UPERC and later also before the appellate authority. Now the matter is pending before Hon"ble the Apex Court.

50. It is also submitted that the loss as pointed out by the petitioner Company to the UPPCL for T & D losses on the basis of comparison is fallacious. The UPPCL has to supply electricity to different area of different utilities all over the State. The NPCL creates a very small segment of urban consumers in comparison, with the one, the UPPCL has to supply energy. Such segments include thousands of villages, Tehsils and cities whereas the petitioner Company caters to a limited consumer base in a small geographical area. For a relevant and rational comparison the petitioner should be compared with the adjoining Noida Electricity Urban Distribution Circle having similar consumer base. Figures show that the Noida circle of the UPPCL which is having consumer base of more than 5 times (1.70 lacs) than the NPCL has a current loss level at 8.83% only. Another factor to be highlighted is that this loss level includes all consumers including rural consumers. Thus, a more pragmatic comparison will be between Urban Distribution Division of Noida with the petitioner, the NPCL, with similar consumer base, wherein the current figure corresponds to line loss level of 5.4% (Electricity Urban Distribution Division III), 7.43% (Electricity Urban Distribution Division II) and 8.32% (Electricity Urban Distribution Division I).

51. In a further affidavit filed by the petitioner on 27.1.2010 certain new facts have been brought on record namely that the UPERC has passed 4 orders on 21.1.2010. Under the said orders it has granted four subsidiary distribution licenses to four distribution companies, namely, Paschimanchal Vidyut Vitran Nigam Limited, Purvanchal Vidyut Vitran Nigam Limited, Dakshinanchal Vidyut Vitran Nigam Limited and Madhyanchal Vidyut Vitran Nigam Limited for the retail

supply of electricity in the areas mentioned in Schedule I of the respective licences u/s 14 of the Electricity Act of 2003.

52. It is also mentioned in the affidavit that vide Clause 3 of the said licences, the licence of the UPPCL for distribution, retail and bulk supply has ceased to operate for the area mentioned in Schedule I of each of the four licences. The order so passed on 21.1.2010 has been reproduced as:

.....From the date of issue of this licence, the UPPCL Distribution, Retail and Bulk Supply Licence 2000 shall cease to operate in the area specified in Schedule I as there cannot be two distribution licensees in the same area on the same network.

Thus, an effort has been made to canvass that the UPPCL is no longer a distribution, retail and bulk supply licensees for the areas mentioned in the schedule of the respective licences which cover the entire State of U.P. except Kanpur and Greater Noida for which separate licences are operative in favour of other distribution companies. It is also an averment that the effect of the UPPCL not remaining a distribution licensee in the State of U.P. is that it cannot any more trade in electricity which it was carrying on by virtue of the last proviso to Section 14 which enables distribution licensees to trade in electricity without the requirement of obtaining a separate trading licence. Thus, now respondent No. 2, the UPPCL, is not empowered/entitled in law to purchase electricity from generating stations and reselling or supplying to distribution companies under the PPAs. Thus, these PPAs need to be allocated to all distribution companies in the State as per the National Electricity Policy and the Tariff Policy.

53. The UPPCL was also notified as the State Transmission Utility by the State Government vide the notification issued u/s 27B of the Act of 1910 on 14.1.2000. Thus, it is also a deemed transmission licensee under 1st and 2nd proviso of Section 14 of the Electricity Act of 2003. However, by virtue of 1st proviso to Section 39(1) of the Electricity Act of 2003 a State Transmission Utility is prohibited from engaging in the business of trading electricity. Further, the last proviso to Section 41 of the Electricity Act of 2003 prohibits any transmission licensee from entering into any contract or otherwise engaging in the business of trading in electricity. Thus, it is an argument that the UPPCL, respondent No. 2, being a State Transmission Utility and a deemed transmission licensee cannot engage in the purchase of electricity under the power purchase agreements from generating stations for reselling or supplying to distribution companies in the State. If it does, it will continue to act illegally and in contravention of the specific provisions of the Electricity Act of 2003.

54. Thus, it has become all the more necessary and urgent that the PPAs as held by the UPPCL with various generating companies, Central as well as State, be allocated to various distribution licensees in the State of U.P. in accordance with the National Electricity Policy and the Tariff Policy.

55. According to Shri Shanti Bhushan, learned Senior Counsel, earlier the task of

distribution of electricity in the area of Greater Noida was done by the UPSEB, the predecessor of the UPPCL, respondent No. 2 herein. The transmission and distribution losses at that time were more than 30% whereas during the period of distribution by the petitioner-Company, it has been brought down to 8%. It is also a submission that the transmission and distribution losses in the areas even served by the subsidiary companies of the UPPCL have been between 25 and 30%. The UPPCL has been procuring power from the Central and the State Power Generating Companies through the PPAs. The PPAs with the Central Power Generating Stations are essentially based on the allocation of power by the Central Government to various States on the basis of population of each State. Learned Senior Counsel contended that the petitioner Company has statutory right to get its rightful share of such power which the UPPCL procures for all consumers of the State so that it can distribute it to consumers of the area serviced by it. According to him, admittedly, there is no surviving contract between the petitioner-Company and the UPPCL, respondent No. 2, in regard to supply of power, yet under various provisions of the statute, the petitioner-Company has got enforceable statutory rights and that is why this writ petition has been filed. The petitioner-Company was granted a licence u/s 3 of the Act of 1910 to distribute electricity to consumers of Greater Noida area, therefore, it had statutory right to demand electricity from the erstwhile UPSEB for distribution to consumers in its licensed area u/s 18(b) of the Supply Act of 1948, which contains the duties of the State Electricity Boards to supply electricity to a licensee. In terms of Section 19 of the Supply Act of 1948, the UPSEB was competent to supply electricity to any licensee. Learned Senior Counsel also contended that the exclusive right to the petitioner-Company to supply electricity in Greater Noida area has been admitted in the counter-affidavit of the UPPCL dated 11.11.2008. In paragraph-17 thereof, it is mentioned as:

17. That the Noida Power Company holds the exclusive licence for distribution of electricity in the area of Greater Noida and no other person, neither the State or the U.P. Power Corporation can supply electricity in the area of supply of the petitioner...

56. According to Shri Shanti Bhushan, learned Senior Counsel, the statutory right of the petitioner-Company arose from Section 18(b) of the Supply Act of 1948 as under:

18. General duties of the Board-Subject to the provisions of this Act, the Board shall be charged with the following general duties namely:

(a)

(b) To supply electricity as soon as practicable to a licensee or other person requiring such supply if the Board is competent under this Act so to do.

57. The reason for enacting this provision was that initially the power was being allocated by the Central Government for consumers of the States in terms of

PPAs. Thus, all the licensees, distributing powers in different areas of the State, were given statutory right to demand the power required by them for their consumers from the State Electricity Board.

58. The UPPCL, respondent No. 2, was constituted u/s 13(1) of the U.P. Act of 1999. It, thus, became the legal successor of the UPSEB in relation to all power purchase and transmission agreements entered into by it with generating and transmission companies, including those owned and controlled by the Central Government.

59. u/s 13(4) of the U.P. Act of 1999, with the grant of licence to the UPPCL, it has been conferred such powers and can discharge such duties and perform such functions as used to be performed earlier by the UPSEB under the Act of 1910, the Supply Act of 1948, and the Rules framed thereunder as may be specified by the UPERC. The entire business of bulk supply, distribution and retail supply of electricity was granted to the UPPCL by the UPERC u/s 15 of the U.P. Act of 1999 in the year 2000 for the State of U.P. except retail supply and distribution in the area supplied by the Kanpur Electricity Supply Company Ltd. and the petitioner Noida Power Company Limited. However, Clause-8 of the General Conditions of the licence, as contained in Part-II thereof, there is a prohibition of undue preference. The said Clause is extracted as:

8. Prohibition of Undue Preference

8.1 In conduct of the Licensed Business, the Licensee shall not show undue preference to any person....

Clause 5.1.4 of the licence of the UPPCL, inter alia, also imposes obligation on the UPPCL to purchase energy required by it for not only distribution and retail supply by it, but also the licensee like the petitioner. The said condition reads as:

5.1.4. The Licensee shall purchase the energy required by the Licensee for Distribution and Retail Supply or for Bulk Supply to other Licensees in an economical manner and under a transfer and power purchase or procurement process and in accordance with the Regulations, guidelines, directions made by the Commission from time to time.

60. It is also an argument of learned Senior Counsel that the power which is available to the UPPCL from various Power Generating Companies is to the tune of 10178 MVA as noticed in the order dated 15.4.2008 passed by the UPERC. The order also mentions that the load profile of the petitioner-Company for supply of power to consumers of the Greater Noida area is more than 1% of the total load profile, and on that basis, the share of power to be supplied by the UPPCL to the petitioner-Company was worked out to be 110 MVA till 2008 and 147 MVA in 2011. Shri Shanti Bhushan, learned Senior Counsel also contends that Section 13 of the U.P. Act of 1999 does not vest the PPAs exclusively in respondent No. 2. The PPAs were re-vested by the State Government in the UPPCL respondent No. 2 by a transfer scheme framed u/s 23(2) of the U.P. Act of 1999. Moreover, after

coming into force of the Electricity Act of 2003, these PPAs are required to be assigned u/s 131(4) thereof to various distribution licensees as per their connected load profile. Under the U.P. Act of 1999, the UPSEB had to be unbundled and the functions of generation, transmission and distribution were to be separated and vested with different entities.

61. Under sub-section (1) of Section 23 of the U.P. Act of 1999, the State was required to prepare a transfer scheme to give effect to the objects of the Act and all properties and all interests, rights, and liabilities of the UPSEB were thereupon to vest in the State Government. Under sub-section (2) of Section 23, all the properties, interests, and liabilities that vested in the State Government under sub-section (1) of Section 23 were to be re-vested in the UPPCL and in a generating Company in accordance with the transfer scheme. Thereafter, under sub-section (4) of Section 23 of the U.P. Act of 1999, the State Government was to require the UPPCL to draw up a transfer scheme to vest in a person, referred to in this Section as transferee, any of the functions, including distribution function, property, interest, right or liability, which may have vested in the transferor, namely, the UPPCL and notify the same as a statutory transfer scheme under the Act. The provisions of Section 23 of the U.P. Act of 1999 were thereafter covered by and contained in Section 131 of the current Electricity Act, 2003. Section 131 of the Electricity Act is reproduced as:

131. Vesting of property of Board in State Government

(1) With effect from the date on which a transfer scheme, prepared by the State Government to give effect to the objects and purposes of this Act, is published or such further date as may be stipulated by the State Government (hereinafter in this Part referred to as the effective date), any property, interest in property, rights and liabilities which immediately before the effective date belonged to the State Electricity Board (hereinafter referred to as the Board) shall vest in the State Government on such terms as may be agreed between the State Government and the Board.

(2) Any property, interest in property, rights and liabilities vested in the State Government under sub-section (1) shall be re-vested by the State Government in a Government Company or in a Company or companies, in accordance with the transfer scheme so published along with such other property, interest in property, rights and liabilities of the State Government as may be stipulated in such scheme, on such terms and conditions as may be agreed between the State Government and such Company or companies being State Transmission Utility or generating Company or transmission licensee or distribution licensee, as the case may be:

Provided that the transfer value of any assets transferred hereunder shall be determined, as far as may be, based on revenue potential of such assets at such terms and conditions as may be agreed between the State Government and the State Transmission Utility or generating Company or transmission licensee or

distribution licensee, as the case may be.

(4) The State Government may, after consulting the Government Company or Company or companies being State Transmission Utility or generating Company or transmission licensee or distribution licensee, referred to in sub-section (2) (hereinafter referred to as the transferor), require such transferor to draw up a transfer scheme to vest in a transferee being any other generating Company or transmission licensee or distribution licensee the property, interest in property, rights and liabilities which have been vested in the transferor under this section, and publish such scheme as statutory transfer scheme under this Act.

62. Thus, according to learned Senior Counsel, Shri Shanti Bhushan, the provisions of Section 23 of the U.P. Act of 1999 are identical to the provisions as contained in Section 131 of the Electricity Act of 2003. The vesting of benefits of PPAs with the UPPCL, respondent No. 2, was only a transitory phase. On the contrary, the scheme as well as the object of the U.P. Act of 1999 and the specific provisions of Section 131 of the Electricity Act of 2003, provide that ultimately the benefits of the PPAs must stand assigned to the licensees themselves and must not be retained by the UPPCL whose role was merely transitory. Therefore, in order to ensure that the provisions of the Electricity Act of 2003 were complied with, the Central Government was given statutory power by Section 3 of the Electricity Act of 2003 to prepare a National Electricity Policy and a Tariff Policy. These policies were intended to have the force of law and were made binding on the Regulatory Commissions u/s 79(4) and 86(4) of the Electricity Act of 2003. That is how the National Electricity Policy and the Tariff Policy were framed by the Central Government. Relevant para/clause of the National Electricity Policy, being 5.3.4, is reproduced below:

5.3.4. The Act prohibits the State transmission utilities/transmission licensees from engaging in trading in electricity. Power purchase agreements (PPAs) with the generating companies would need to be suitably assigned to the Distribution Companies, subject to mutual agreement. To the extent necessary, such assignments can be done in a manner to take care of different load profiles of the Distribution Companies.

Similarly, paragraph 8.4(2) of the statutory tariff enforced by the Central Government u/s 3 of the Electricity Act of 2003, being apposite is also extracted as:

8.4 sub-para 2. The National Electricity Policy states that existing PPAs with the generating companies would need to be suitably assigned to the successor distribution companies. The State Government may make such assignments taking care of different load profiles of the distribution companies so that retail tariffs are uniform in the State for different categories of consumers. Thereafter the retail tariffs would reflect the relative efficiency of distribution companies in procuring power at competitive costs, controlling theft and reducing other distribution losses.

63. These statutory policies are binding on all the authorities. Thus, the PPAs which are at present being held by the UPPCL are required to be suitably assigned to different distribution licensees according to their load profile in such a manner that such distribution licensee gets the benefits of availability of power at cheaper rate as well as share the burden of expensive power so that consumers in the area of different distribution companies can equitably enjoy the benefits of all PPAs under the scheme issued on 14.1.2000 by the State Government as contemplated by sub-section (1) and (2) of Section 23 of the U.P. Act of 1999. The expression "liabilities" was defined in Clause-2(d) of the Scheme as including all liabilities, debts and obligations. The expression "undertaking" was defined in Clause-2 of the Scheme as meaning a block of properties, interest, rights and liabilities vested in the State Government under sub-section (1) of Section 23. Thus, under Schedule-C all the properties which include all debts and obligations belonging to the UPSEB stood transferred to the UPPCL under Clause-5(3) of the Scheme. The Notification issued in this regard on August 12, 2003 states thus:

In exercise of the powers under sub-section 4 of Section 131 of the Electricity Act 2003 and sub-section 4 of Section 23 of U.P. Electricity Reforms Act 1999, the Governor is pleased to notify the following scheme for providing and giving effect to the transfer of distribution undertakings of Uttar Pradesh Power Corporation Limited to the distribution companies, namely..

64. It is also a submission of learned Senior Counsel that u/s 12 of the Electricity Act of 2003, only three kinds of licences are now contemplated, namely transmission licence, distribution licence, and trading licence. Thus, according to learned Senior Counsel once the function of distribution has been assigned by the UPPCL to various discoms under the statutory scheme of 12.8.2003, the function of distribution no longer remains with the UPPCL. Moreover, the UPPCL does not have any licence for trading u/s 12 of the Electricity Act of 2003 and when it has assigned its function of distributing electricity to various discoms, it remains a transmission licensee unless it transfers the function of transmission through a transfer scheme in terms of Section 131 of the Electricity Act of 2003 to newly formed Government Company, namely, U.P. Power Transmission Company Ltd. Besides, u/s 41 (vide last proviso thereof), of the Electricity Act of 2003, there is a statutory bar on transmission licensee to enter into any contract or otherwise, engage in the business of trading electricity. Thus, as a transmission licensee, the UPPCL is not permitted to purchase electricity from the power generating companies, and sell it to various licensees, for, "trading" has been defined in Section 2(71) of the Electricity Act of 2003 as purchase of electricity for sale thereof. That is why, the UPPCL, in terms of the intention of the Act must assign the PPAs to distribution companies so that it does not thereafter purchase electricity on the basis of these PPAs with the power generating companies and sell it to various distribution licensees. In fact, in terms of Section 18(b) of the Supply Act of 1948, there is a statutory right in favour of a licensee to demand power from the State Electricity Board for

distribution to its consumers. They have a legally enforceable right to demand their share of power from bulk licensee, namely, the UPPCL in this case. The UPPCL holds the PPAs as a trustee for consumers of the State. The real beneficiaries of the power are consumers, and distribution companies only exist as medium for enforcing the right of beneficiaries equitably as required by Section 17 of the Indian Trust Act. It is a further submission of learned Senior Counsel that though the bulk of power is purchased by the UPPCL from the Central Power Generating Stations like NTPC and NHPC, but a substantial amount of power is also being generated by the State Power Generating Companies, namely, the U.P. Rajya Vidyut Utpadan Nigam Ltd. and U.P. Jal Vidyut Nigam Ltd. According to learned Senior Counsel, these companies are successors of the erstwhile UPSEB. These two entities came into existence by a transfer scheme u/s 23 of the U.P. Act of 1999. The monies with which these generating stations were established by the UPSEB were out of the revenue received from all consumers of the State of U.P. u/s 59 of the Supply Act of 1948. Learned Senior Counsel also referred to and relied upon various orders passed from time to time in favour of the petitioner Company establishing its legal right as claimed here in this writ petition. It is also a submission that though establishment of power generating Company was a condition of the agreement dated 15.11.1993 between the petitioner and the UPSEB, nonetheless, it was not able to set up generating stations because of various difficulties created in its way by the State Government. Learned Senior Counsel also placed reliance on the minutes of meeting held by the Chief Minister on 6.5.1999 to show that the UPSEB was bound by directives issued by the State Government u/s 78A of the Supply Act of 1948, which was not obeyed, for the purpose of entering into a new agreement after June 1999.

65. Shri Shanti Bhushan, learned Senior Counsel, placed reliance on Clause-3 of Statements of Objects and Reasons of the Electricity Act of 2003 as under:

With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the Regulatory Commissions, the need for harmonizing and rationalizing the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislation arose.

Learned Senior Counsel has also referred to U.P. Government's Power Policy 2003 and U.P. Government's Energy Policy, 2009 in extenso. The relevant extracts of 2003 policy are given below:

1.2. Formation of Distribution Companies

In the first phase of the programme, the autonomous companies were to be formed and corporatised due to the increasing requirement of specialization in the field of Generation, Transmission and Distribution. Subsequently as a further step towards making the entities more responsive to the customers and to

provide better service, the process of involving private entrepreneurs in the Distribution of Electricity was to be initiated and accelerated. Subsequently in the next phase the generation companies were to be privatized through competitive bidding.

2. Power Policy 2003 Objectives

.....To facilitate consumers benefiting from competition & towards this end encourage private sector participation in all areas viz. generation, transmission, distribution, trading and R & M.

6.2 Policy Details

The State Government recognizes that the operational efficiencies (T & D loss and collection efficiency, quality & reliability of supply) need to improve significantly to address the various issues that plague the sector at present. The State Government also recognizes that the operational efficiencies are inextricably linked to the governance of the sector. Industry structure and competition, which ensure commercial pressure on the utility, and private ownership sensitive to commercial pressures are the most powerful tools to improve efficiencies on a sustainable basis and ensure sector viability. In addition to reduction in system losses and improvement in profitability of the distribution business, the objective of the quality & reliable supply and also expansion of supply network especially in the rural areas has also to be achieved in an expeditious manner.

GOUP accordingly would pursue privatization of the distribution business in a priority basis. Private Sector Participation in the distribution business would be through a transparent and open process of competitive bidding.

While reduction of the burden on Government finances is one of the most important long-term objectives of the distribution privatization exercise, GOUP recognizes the need for continued support to the sector atleast during the transition period till the distribution entities turn around and become financially viable & self sustaining. GOUP is prepared to commit the necessary transition period support to ensure a successful turn around of the State power sector.

GOUP recognizes that the case for competition and private sector participation is as strong and relevant in the urban areas as in the rural for improving customer satisfaction and efficiency. GOUP would accordingly involve Private Sector participation for as large a consumer base as possible in the rural and urban areas. The actual earmarking of distribution areas for the purpose of distribution privatization would however depend on a number of factors including viability of the discoms on a self-sustaining basis, achieving an optimum balance between the various discoms, investor interest, etc. If need be, GOUP would consider reworking the configuration of the Distribution companies also.

The details of 2009 energy policy reads as:

8.1. Policy Details

The State Government recognizes that the operational efficiencies (T & D loss and collection efficiency, quality & reliability of supply) need to improve significantly to address the various issues that plague the sector at present. The State Government also recognizes that the operational efficiencies are inextricably linked to the governance of the sector. Industry structure and competition, which ensure commercial pressure on the utility and private ownership sensitive to commercial pressures, are the most powerful tools to improve efficiencies on a sustainable basis and ensure sector viability. In addition to reduction in system losses and improvement in profitability of the distribution business, the objective of the quality & reliable supply and also expansion of supply network especially in the rural areas has also to be achieved in an expeditious manner.

GOUP recognizes that the case for competition and private sector participation is as strong and relevant in the urban areas as in the rural for improving customer satisfaction and efficiency. GOUP would accordingly involve Private Sector participation for as large a consumer base as possible in the rural and urban areas.

GOUP accordingly would pursue private sector participation in the distribution business on a priority basis. Private Sector Participation in the distribution business would be through a transparent and open process of competitive bidding. Private sector participation in distribution business may be through franchisee model or in any other form.

Shri Shanti Bhushan, learned Senior Counsel, has also argued on the National Electricity Policy, 2005 in support of the pleadings of the writ petition. The relevant parts of this Policy as extracted by learned Senior Counsel in his written submissions are as under:

5.4.4Private sector participation in distribution needs to be encouraged for achieving the requisite reduction in transmission and distribution losses and improving the quality of service to the consumers.

5.8.9 Role of private participation in generation, transmission and distribution would become increasingly critical in view of the rapidly growing investment needs of the sector. The Central Government and the State Governments need to develop workable and successful models for public private partnership. This would also enable leveraging private investment with the public sector finances. Mechanisms for continuous dialogue with industry for streamlining procedures for encouraging private participation in power sector need to be put in place.

5.8.10 It would have to be clearly recognized that Power Sector will remain unviable until T & D losses are brought down significantly and rapidly. A large number of States have been reporting losses of over 40% in the recent years. By any standards, these are unsustainable and imply a steady decline of power

sector operations. Continuation of the present level of losses would not only pose a threat to the power sector operations but also jeopardize the growth prospects of the economy as a whole. No reforms can succeed in the midst of such large pilferages on a continuing basis.....

According to learned Senior Counsel, the Memorandum of Understanding between the Ministry of Power, Government of India, on 25.2.2000 would also support the contentions of the writ petition. The same on reproduction reads as:

I. Preamble:

Uttar Pradesh is committed to reforming its power sector with a view to providing commercial viability and quality power at affordable rates to all its citizens.

II. Reform Programme of Uttar Pradesh

UP would undertake segregation of transmission and distribution within UPPCL.

.....

If commercial viability in distribution is not achieved UP Government will privatize distribution.

Additional Allocation of power for Distribution.

The Government of India would allocate additional power from new central sector generating stations directly to the commercially viable distribution centres/ companies that emerge through the reform process and which demonstrate their capacity to pay for the power they need.

66. Thus, to sum up the submissions of Shri Shanti Bhushan, learned Senior Counsel, the petitioner-Company has right to seek allocation of PPAs. The petitioner-Company has an exclusive distribution licence for supply of power in the Greater Noida area. It is imperative that consumers of Greater Noida area get their rightful share of electricity from the UPPCL. The power received from the Central Power Generating Stations has to be allocated to the petitioner-Company on the basis of "Gadgil Formula" which takes into consideration the population of each State for allocation of electricity as one of the factors.

67. According to Shri Shanti Bhushan, learned Senior Counsel the total connected load of all distribution companies of the State was 28433 MVA approximately and the petitioner-Company's connected load was 309 MVA and, thus the connected load of the petitioner-Company was 1.08% of the total connected load of the State, and thus, it was entitled to 1.08% of the total power available with the UPPCL on the basis of all PPAs taken together. It was also mentioned in the writ petition that the total availability with the UPPCL in 2008 was 10178 MVA and therefore, 1.08% thereof came to about 110 MVA., to which the petitioner-Company was entitled in the year 2008.

68. In the year 2011 the total connected load of all the Uttar Pradesh distribution licensees is 31315 MVA out of which the connected load of the petitioner-

Company is 403.74 MVA. Thus, the petitioner-Company's share of connected load has gone up from 1.08% in 2008 to 1.29% in the year 2011. The availability of power with the UPPCL has also gone up during 2008 to 2011 from 10178 MVA to 11378 MVA. Thus, the petitioner-Company's entitlement has also gone up in the last three years from 110 MVA to 147 MVA. So when in accordance with the statutory policy framed and issued by the Central Government, the PPAs are allocated, they will have to be so allocated as to entitle the petitioner-Company to 147 MVA power from the UPPCL.

69. It is also a submission of learned Senior Counsel that instead of calculating the exact entitlement of the petitioner-Company, after laying down the principles, the Court may direct the UPERC to make the actual calculation of the petitioner-Company's entitlement.

70. It is also a submission of learned Senior Counsel that at some stage the agreement of 15.11.1993 had contemplated that the petitioner-Company would set up its own generating station and it, not having done so, was not entitled to get any power from the respondent. In this regard, it has been pointed out that such a stipulation in the agreement was only for the purpose to determine the rate at which electricity would be made available to the licensee by the UPSEB under the agreement. So far as the statutory right of the petitioner-Company to receive its rightful share of the power made available to the, respondents for the whole of the State is concerned, the establishment of generating station was not at all relevant for that. It is a further submission that on account of various acts of non-cooperation of the respondents, the petitioner-Company was not able to setup a generating station. In any case, the Government had given a direction on 6.5.1999 and had directed the State Electricity Board, the predecessor of respondent No. 2, to revise the agreement of 15.11.1993 so as to confine it to the supply of power and remove the provisions relating to setting up of a generating station by the petitioner-Company to be covered by a separate agreement, which would provide as to how and on what terms the power generated by such a generating station was to be shared between the petitioner-Company and the UPPCL. It is stated that it was also decided that the State Electricity Board and the NPCL would act according to the suggestion of the Principle Secretary (Energy) by entering into a new agreement after June 1999. It is stated that in the original agreement of 15.11.1993 which ended in June 1998 and the extended period was to end in June, 1999, there were several defects, one of which was that the agreement had dealt with distribution of power as well as the establishment of a captive power plant. It was clearly stated that these two issues were totally independent and they should not have been contained in the same agreement. It was also directed that when the NPCL would establish its own power generating station, the power produced by it would be purchased by the State Electricity Board and thereafter supply of it to the NPCL should be on the basis of the pooled costs.

71. It is also the submission of Shri Shanti Bhushan, learned Senior Counsel that

the State Government is required to prepare and notify a transfer scheme by which all properties, interests, rights and liabilities of the State Electricity Board would vest in the State Government. It is a further submission of learned Senior Counsel that the right to distribute the retail supply of power was granted to the petitioner-Company not by the agreement dated 15.11.1993, but by the license dated 30.8.1993. Thus, the termination of the agreement dated 15.11.1993 had not affected on the statutory right of the petitioner-Company for distributing and retail supply of power. While arguing on Section 19 of the Supply Act of 1948, Shri Shanti Bhushan, learned Senior Counsel, also referred to Clause 11 of the distribution license of the petitioner Company as also Section 3(2)(f) of the Act of 1910 and paragraph-9 of the Schedule of the 1910 Act. On the basis of the aforesaid statutory provisions, learned Senior Counsel contends that since the UPPCL was a bulk licensee and the petitioner-Company was a distribution licensee, therefore, it had a clear right to make a requisition on the UPPCL requiring it to give supply of energy, as was required by the petitioner-Company. It also makes clear that the parties had to enter into an agreement to determine the rate at which such supply will be made by the bulk licensee to the petitioner-Company for supplying electricity in its area. The area of operation is defined in its license granted u/s 3 of the Act of 1910. The right of a distribution licensee to get power from UPSEB/UPPCL flows from Section 18, which is Chapter-IV of the Supply Act of 1948. Sections 46, 47 and 48 of the Supply Act of 1948 are parts of Chapter-V which only deal with the rate at which electricity is to be supplied to distribution licensees. Thus, the object of the agreement dated 15.11.1993 was merely to determine the rate at which the supplies would be made by the UPSEB/UPPCL to the petitioner-Company for the period of the duration of the agreement. Thus, Section 50 of the Supply Act of 1948 would also not be relevant for deciding the issue on hand.

72. Regarding setting up a power generating plant, it is the submission of petitioner-Company that on account of various acts of non-cooperation by the respondents, the petitioner-Company was not able to set up a generating station. Shri Shanti Bhushan, learned Senior Counsel, has in particular referred to Section 12(c), Section 13, Section 2(71), last proviso to Section 14 of the Electricity Act of 2003 in support of the argument that the UPPCL cannot continue to hold PPAs and has to assign them to different distribution licensees of the State.

73. Shri Shanti Bhushan, learned Senior Counsel, in reply to reference to the transfer scheme dated 23.12.2010 by the State Government u/s 131(4) of the Electricity Act of 2003 submitted that it only provided that in terms of transfer scheme vesting the transmission undertaking in the transferee, the U.P. Power Transmission Corporation Ltd. (UPPTCL), the transferee would get the right to enforce all transmission agreements as if the transferee had been a party thereto instead of transferor, namely, the UPPCL. According to him, Clause-4(4) of the transfer scheme dated 23.12.2010 contains the provisions for transfer of transmission undertaking. The transfer scheme u/s 23 of the U.P. Act of 1999

was promulgated on 14.1.2000. Under Clause-5(3) and Clause-5(4) of the transfer scheme, the UPPCL got the right to all contracts, agreements and other instruments of whatever nature relating to respective undertakings transferred to it which the UPSEB was a party as if the UPPCL was a party thereto instead of the UPSEB.

74. Arguing on the point of binding nature of the statutory electricity policy, Shri Shanti Bhushan, learned Senior Counsel, has relied upon the judgment of Hon'ble the Apex Court in the case of PTC India Ltd. Vs. Central Electricity Regulatory Commission thr. Secy., . He has also placed reliance on the judgment in the case of N.D.M.C. and Others Vs. Tanvi Trading and Credit Pvt. Ltd. and Others, .

On the other hand, learned Senior Counsel appearing for the U.P. Power Corporation submitted that the petitioner-Company does not have independent statutory right for allocation of PPAs u/s 18(b) of the Supply Act of 1948 read with Section 13(3)(c) of the U.P. Act of 1999. It is further submitted that u/s 13(4) of the U.P. Act of 1999, the UPPCL, respondent No. 2 has to discharge its duties under the Supply Act of 1948 as may be specified u/s 15 of the U.P. Act of 1999. It is also a submission that under the license of the petitioner-Company, the UPPCL has not shown undue preference to any person, nor has it discriminated under Clause 5.1.4 thereof. Learned Senior Counsel referred to the provisions of the Electricity (Supply) Act 1926 which was enforced in United Kingdom. Following that enactment, the Supply Act of 1948 was passed and enforced with effect from 10.9.1948 for the development of electricity in India on regional basis.

75. Section 5 of the Supply Act of 1948 empowered the State Government to constitute the State Electricity Board. Section 18 of the Supply Act of 1948 lays down the general duties of the Board, including coordination with the power generating companies for supply of electricity, and other related activities.

According to learned Senior Counsel, before the provisions of Section 18(b) of the Supply Act of 1948 can be attributed to apply, the following requirement should be fulfilled:

- (a) The person claiming supply of electricity should be a licensee.
- (b) He should require said supply.
- (c) Board should be competent to supply such electricity.

76. According to learned Senior Counsel, Section 2(6) of the Supply Act 1948 defines the word "licensee" to mean a person licensed under Part-II of the Indian Electricity Act, 1910 to supply energy, or a person who had obtained sanction u/s 48 to engage in the business of supplying the energy. A reference is also made to Section 3(1) of the Indian Electricity Act 1910, which provides that the State Government may grant a license to supply energy to any specified area. Thus, the petitioner was granted licence on 30.8.1993 and with its area of operation,

vide paragraph-4 of the license, corresponding to the present Greater Noida area. It is clarified in the submission that though area of supply has been mentioned in the licence, yet the period for which the license has to be made, is not mentioned therein. The competence of the UPSEB under the Supply Act of 1948 to give supplies has to be determined in terms of Section 19 of the Supply Act of 1948. This provision lays down that the UPSEB may supply electricity to any licensee requiring such supply in any area in which a scheme sanctioned under Chapter-V, is enforced.

77. Thus, the area of supply of the petitioner-Company clearly mentioned that it was subject to the terms and conditions of the agreement. According to learned Senior Counsel, Shri Shanti Bhushan, learned Senior Counsel appearing for petitioner-Company, has not referred to this provision in his arguments.

78. Learned Senior Counsel for UPPCL also submitted that u/s 19(1) of the Supply Act 1948, the area of supply becomes important because the UPSEB could not force a licensee to supply in a non-notified area. The licence granted to the UPPCL u/s 15 of the U.P. Act of 1999 was for carrying on the business of bulk supply, distribution, and retail supply of energy within the area of supply. The area of supply was defined in the licence to mean the geographical area referred to in Schedule-1 of the licence within which any activity authorized of the licensee is allowed. The area of supply in the licence provides "the entire State of U.P.", subject however, to the rights granted to the Kanpur Electricity Company Ltd. and the petitioner-Company, namely, the NPCL. The rights granted to the petitioner-Company was only in terms of the agreement dated 15.11.1993, which was for 4 1/2 years. The said agreement was terminated on 22.8.2008 which was never challenged. The licence was granted to the petitioner-Company on 30.8.1993 when the arrangement u/s 47 evidenced by the agreement, was executed. Thus, the petitioner-Company was fully aware that merely having a licence was not enough. In fact, the rights granted were in terms of the agreement, which has ceased, and thus, the petitioner-Company has no independent right as claimed. If the petitioner-Company claims that the right has been granted under the licence, then it only provides for the area and not for the period of supply, which is the subject-matter of Section 47.

79. Chapter-V of the Supply Act of 1948 contains Section 28 to Section 58. Section 35 of the Supply Act of 1948 obliges the UPSEB to supply electricity to a licensee owning generating station. Section 47 of the Supply Act of 1948 confers discretion on the UPSEB to make such arrangements as may be mutually agreed with any licensee in regard to purchase or sale of electricity and the price thereof. Section 48 of the Act requires the licensee to carry out any such arrangements.

80. Thus, the area of supply of the petitioner-Company was subject to the arrangement, meaning thereby, only till the period of subsistence of the agreement. Thus, in view of the provisions of Section 47 read with Section 18 and Section 19 of the Supply Act of 1948, it was competent for the Board to

enter into a mutually agreed arrangement for the supply of electricity to the petitioner-Company, as has been done in the present case. Consequently, it was competent for the Board to have supplied energy pursuant to the agreement dated 15.11.1993.

The salient features of the agreement dated 15.11.1993 are:

(i) Paragraph 7B lays down that the Board has agreed to supply electricity to the petitioner on the terms and conditions contained therein.

(ii) Paragraph 7.1 of the agreement provides that subject to the provisions contained and during the continuance of the agreement, the supplier (i.e. the Board) shall supply electrical energy to the petitioner regularly. However, power cut/rostering like Noida area will be made applicable to the Company. It further provides that after construction of 220KV, Noida sub-station, the supplier will supply the maximum power 45 MVA till the Company starts generation.

(iii) Paragraph 7(d) provides that if the Company did not start its own generation within four and a half years and if the Board is ready to supply electricity then the Board shall charge the Company at double the rates.

(iv) The agreement has to be read along with the License granted to the petitioner. Para 4/I/55 of the licence provides that the licensee may lay down electric supply lines for conveyance and transmission of energy from a generating station "situation or to be situated" outside the area of supply to the boundary of the area of supply. This again is indicative of the obligation of the petitioner to set up its generating station. The agreement was valid for a maximum period of 4 1/2 years.

(v) The agreement envisaged the petitioner to set up its own generating station. Section 50 of the Electricity Supply Act provides for the circumstances in which it would not be permissible to supply electricity to a licensee who owns a generating station, and nothing in Section 47 shall empower the Board to supply electricity to a licensee who is not otherwise entitled.

(v-a) Section 50 of the Supply Act provides that nothing in Section 47 shall empower the Board to supply electricity directly to any licensee to whom it is not otherwise entitled so to supply electricity.

(v-b) It is submitted that in order that the Board was entitled to supply electricity there had to be an agreement for sale & purchase with a licensee u/s 47 of the Act. An arrangement was made, but was termination.

(vi) Paragraph 11 of the agreement provides that it would remain in force for two years and thereafter on year to year basis not exceeding four and a half years. It also provided that after the expiry of the period of 4 years, the agreement shall automatically cease unless the Board itself extends the period.

(vii) Paragraph 12 empower the Board to terminate the agreement in the circumstances mentioned therein.

81. The Writ Petition No. 1048 (MB) of 2000 filed by the petitioner-Company, impugning the validity of the action of the competent authority, fixing the tariff under the agreement, was decided on 10.11.2005. The Court while referring to various provisions of the agreement dated 15.11.1993 has observed that:

(i) the agreement is an arrangement referable to Section 47 and 48 of the Act and, therefore, while interpreting and understanding the meaning and import of the terms of the agreement, their intention, scope and binding nature has to be kept in mind.

(ii) placing reliance upon Sections 47 and 48 of the Act of 1948, it is being pressed that the agreement in question being still in force, the Board was free to make alternative arrangements with the licensee and it having been mutually agreed between the parties as to in what manner the final determination of price would be made, it is not open for the petitioner to take somersault and insist for adopting a principle which obviously stand excluded in the agreement.

(iii) This arrangement of power supply was thus an arrangement which was made with the consent of the parties for boosting the power generation in the State of U.P. The principle of election and that a contracting party cannot approbate and reprobate has been noticed.

(iv) This Hon''ble Court recorded the statement of the petitioner that it would set up a generating station within 3/4 years.

82. As no steps were taken by the petitioner-Company to even initiate setting up a generating station, the competent authority, vide the impugned order dated 22.10.2008 issued the notice for discontinuance of supply to the petitioner-Company as the agreement had expired by the efflux of time. Even the directions given by the UPERC to set up a generating plant, was also not followed. The Commission, vide its order dated 15.12.2005 directed the petitioner-Company to inform the Commission about its plan to set up a generating plant in compliance to the observations of the High Court, disposing of the Writ Petition No. 1048 (MB) of 2000. The Commission, in its order dated 20.9.2007, noticed the fact that the petitioner-Company had not set up a generating plant in compliance of the observations of the High Court. This fact was also acknowledged by the Commission in order dated 15.12.2005. However, no steps were taken by the petitioner-Company to set up generating station. The agreement entered into between the parties dated 15.11.1993 was to be valid for 4 1/2 years, subject to extension at the discretion of the UPSEB, and the petitioner-Company was obliged to set up its generating station within 4 1/2 years. u/s 18(b) read with Section 19 of the Supply Act of 1948, the Board was competent to supply electricity to the petitioner-Company in view of the arrangement, namely, the agreement dated 15.11.1993 made u/s 47 of the Act. The arrangement made u/s 47 of the Supply Act of 1948 included setting up of a generating station by the petitioner-Company within the specified period, say, within 4 1/2 years, after the agreement. Learned Senior Counsel brought to our notice the averments made in

the rejoinder-affidavit dated January 2009 filed by the petitioner-Company as under:

(i) The petitioner is not relying on the said agreement for the purposes of continuing 45 MVA of power. The petitioner is seeking enforcement of its legal right as provided under the various provisions of Electricity Act, 2003 read with National Electricity Policy and Tariff Policy for assignment/allocation of the existing power purchase agreements.

(ii) In paragraph 12, it has been stated by the petitioner that setting up of the generating plants will not have any bearing on the legal entitlement of the petitioner to get the PPA assigned. In paragraph 15 (a to c) it has been stated that the petitioner is not seeking enforcement of any agreement between the respondent No. 2 and the generating station and is only seeking enforcement of the legal provisions which makes it entitled to the assignment/allocation of PPAs.

83. It is also a submission of learned Senior Counsel that u/s 18(b) of the Electricity Supply Act of 1948, after the termination of the agreement on 22.8.2008, it is no longer competent for the UPPCL successor of the UPSEB to supply any electricity to the petitioner-Company. With the termination of the arrangement, by way of the agreement, which is also not disputed, the area of supply u/s 19 ceased to exist. Thus, it was no longer competent or practicable for the UPSEB or its successor, the UPPCL to supply energy to the petitioner-Company, nor could the petitioner-Company claim as a matter of right that it required supply of electricity and that the UPSEB/UPPCL was mandated to continue the supplies. Besides, the prayer made to quash the order dated 22.8.2008 has been given up and is no longer in challenge. It is also a submission that since the agreement dated 15.11.1993 has expired by the efflux of time, and there is no decision to extend the period of the agreement, the petitioner-Company was intimated that the UPPCL would discontinue supply of 45 MVA power with effect from 30.11.2008, and, thus, the petitioner-Company was requested to make alternative arrangements for supply of electricity consumers of the licensed area. Thus, the petitioner-Company is not entitled to any supply of electricity from the respondent No. 2 and the said order is also not in challenge. u/s 18(1)(b) of the Supply Act of 1948, there is an obligation upon the UPPCL to supply electricity, if it is required by the petitioner-Company. However, the word "require" would mean "legally required" and the word "require" implies more than a wish, impulse or desire. There is an element of "must have" in the case of "require". Require must have some relationship to actual need. It is more than "convenient" and less than "indispensable". It also means "requisite or necessary". The mandate of Section 18(1)(b) of Supply Act of 1948, obligating upon the Board to supply electricity to a licensee, who requires it, would not apply in the event of licensee, by his own conduct disabling himself for the supply of electricity. If the petitioner-Company had set up its generating station under the terms of the agreement, it would not have required the supply of electricity.

84. It is also a submission of learned Senior Counsel for the respondent UPPCL that the word "practicable" used in Section 18(1)(b) is not a premium for defiant non-compliance. Practicable means legally possible or capable of being accomplished; or is feasible. "Practicable" cannot be construed as "equitable" or "fair" or "reasonable". Practicable intends a stricter requirement than reasonably practicable. Section 19 of the Electricity Supply Act of 1948 provides that the Board may, subject to the provisions of the Act, supply electricity to a licensee requiring such supply in an area in which a scheme under Chapter-V is enforced. Proviso (iii) of Section 19(1)(b) of the Supply Act of 1948 lays down that the Board shall supply electricity for any purpose to any person, if the licensee is unable or unwilling to supply electricity. Therefore, the Board could not force a licensee to supply the energy in an area not notified by it. By not setting up a generating plant, the petitioner-Company has disabled itself from supplying electricity by its own conduct, and thus, now it is the obligation of the UPPCL, the successor of the UPSEB, to ensure supply of electricity to consumers of the Greater Noida. The petitioner-Company cannot be allowed to take advantage of its own wrong. The principle underlying the maxim "*actus curiae neminem gravabit*" would apply in this case. This maxim is a rule of construction. If the action of the petitioner-Company appears to be wanton and vexatious, it was held that it is contrary to the policy of law to permit a man to take advantage of his own wrong, and this maxim is founded upon the principles of justice and good sense. It also affords a safe and certain guide for the administration of law.

85. It is also a submission that the petitioner-Company cannot be allowed to approbate and reprobate. Having taken advantage of the agreement, it cannot be allowed to urge that it was not obliged to set up the power generating station. It is also a submission that the agreement has to be read as a whole and in construing a contract, it would be legitimate to take into account the surrounding circumstances. The UPPCL, in the conduct of the licensed business, has not shown undue preference to any person. Learned Senior Counsel for respondents has referred to paragraph-8 of the licence granted to the UPPCL as under:

In conduct of the Licence Business, the Licensee shall not show undue preference to any person. Provided that the Licensee shall not be deemed to be in breach of its obligations under this Licence if any classification is made between the consumers in accordance with the provisions of the Act or any preference results from compliance with any directions of the State Government u/s 22A and 22B of the Indian Electricity Act, 1910 and Section 12 of the Act or in the implementation of any order passed by the Commission.

86. In Section 22A of the Electricity Supply Act of 1948, powers have been conferred upon the State Government to give directions to a licensee in regard to the supply of energy to certain class of consumers, whereas Section 22B confers power on the State to control distribution and consumption of energy. It is also a submission that in view of the non-setting up of a generating station by the petitioner-Company, and the consequent lack of competence of the UPSEB/UPPCL

to supply electricity to the petitioner-Company, if it had been treated differently, it cannot be said that any undue preference has been given to any one. On the contrary, if, despite persistent defaults and wanton defiance by the petitioner-Company, the respondent continued to supply electricity to the petitioner-Company, it would have been a case of giving undue preference to it. Thus, the petitioner-Company cannot legitimately invoke Clause-8 of the licence issued to the UPPCL. It is also a submission on behalf of the respondents that vide paragraph 8.1 of the licence granted to the UPPCL, there is a prohibition of undue preference to any one. "Person" has been defined to include any individual, firm or Company or association or body of individuals, whether incorporated or not, to mean the end user and not the intermediaries. The undue preference, which is prohibited, is to apply in the case of "licence business". "Licence business" has also been defined to mean the business of distribution and supply of energy in the area of distribution. Thus, it would apply to a consumer, or an end user, and not to a licensee. Paragraph 8.1 of the licence granted to the UPPCL also protects any preference resulting from compliance with any direction under Sections 22A or 22B of the Act of 1910, which authorizes the State to give directions for supply to a class of consumers. The distribution, therefore, referred to is related to consumers and not to a distribution licensee like the petitioner-Company. The petitioner-Company is not a consumer, but a licensee. It is also informed that on 19.4.2010, the Grid Corporation informed the respondent Corporation about the over-drawing to the extent of 1000 MVA. This was occasioned because of draught and urgent requirement of electricity. The Corporation was required to take immediate steps. Thus, in view of the complaint of over-drawing, and also power being required in agricultural sector, where threshing of wheat crop was going on, the time bound process, roistering was ordered from 10.00 in the night to 06.00 in the morning for all industrial units. The petitioner-Company, however, insisted on the uninterrupted supply from the respondent Corporation to the extent of 45 MVA.

87. Further, in terms of paragraph 5.1.4 of the licence granted to the UPPCL on 4.10.2000, the Corporation is under obligation to supply electricity to other licensees. Under paragraph 5.1.1 of the licence, it is the right of the Corporation to purchase electricity in terms of PPAs and to sell it to any other person. Paragraph 5.1.2 provides that the Corporation is entitled to purchase electricity from a person whose electricity generating unit was existing on date of licence. It is directly connected to and interfaced with the licensees' distribution system with the approval of UPERC. The licensee would be required to obtain approval of the Commission for the price payable for such purchase. Thus, under the licence, the UPPCL alone is competent to enter into the PPAs with generating companies. This is a statutory recognition by the UPERC u/s 15 of the U.P. Act of 1999. Paragraph 5.1.4 of the licence being relevant is reproduced as under:

The Licensee shall purchase the energy required by the Licensee for Distribution and Retail Supply or for Bulk Supply to other Licensees in an economical manner and under a transparent power purchase or procurement process and in

accordance with the regulations, guidelines, directions made by the Commission from time to time.

Paragraph-8 of the licence deals with Distribution Retail Supply and Bulk Supply. Paragraph-8 also confers sole right on the UPPCL to purchase electricity. It also makes it clear that a classification can be made between consumers. Paragraph 5.1.4 would not apply in the case of petitioner-Company for the reason that paragraph 3.1 of the licence permits the respondent No. 2, the UPPCL to conduct the licensed business in the area specified in Schedule-1. The entire State of U.P. is the area of supply, but in respect of Kanpur Electricity Supply Agency and the petitioner-Company, it would be subject to the rights granted to them. The right granted to petitioner-Company was in terms of the agreement which stands terminated and which is not in challenge also. The right granted to the petitioner-Company was in terms of the agreement which stands terminated and which is not in challenge also. Paragraph 8.1 of the licence granted to the UPPCL also protects any preference resulting from compliance with any direction u/s 22A or 22B of the Act of 2010, which authorizes the State Government to give directions for supply to a class of consumers. The discrimination, therefore, referred to is only with respect to consumers and not to a distribution licensee, like the petitioner-Company.

88. Regarding the State Transmission Utility, it has been submitted that vide Section 2(67) of the Electricity Act of 2003 it has been defined as the Board or the Government Company, specified as such, by the State Government under sub-section (1) of Section 39. Proviso to Section 39(1) prohibits the State Transmission Utility from engaging in the business of trading in electricity. In this context, learned Senior Counsel has made a reference to paragraph 5.3.4 of the National Electricity Policy to submit that the UPPCL is a State Transmission Utility and, as such, it cannot engage in the business of trading in electricity. In exercise of powers conferred under and by Section 39 of the Electricity Act of 2003, the U.P. Power Transmission Corporation Limited has been notified as the State Transmission Utility of U.P., therefore, the argument that the UPPCL is a Transmission Utility is not sustainable. On the contrary, the UPPCL is conducting the Licensed Business in terms of the licence granted to it on 4.10.2000. It is also the contention of learned Senior Counsel for respondents that assuming for the sake of arguments that paragraph 5.1.4 of the licence would apply in the case of petitioner-Company, in that case, the supply of power has to be made by the UPPCL to the petitioner-Company under a transparent power purchase or procurement process as well as in accordance with the regulations, guidelines and directions made by the Commission from time to time. Nonetheless, paragraph 5.1.4 envisages a power purchase process, which would include an agreement between the parties and not that the petitioner-Company is entitled to the supplies as a matter of right.

89. The petitioner-Company has also relied on paragraph 5.3.4 of the National Electricity Policy, which requires the PPAs to be suitably assigned to distribution

companies, subject to mutual agreement, and an assignment can be made by agreement of parties and that the petitioner-Company is not entitled to be assigned PPAs as a matter of right. The privity of contract is between the UPPCL and NTPC, but NTPC is not a party to the petition. Assignment of contract has to be tripartite. NTPC has entered into an agreement with the UPSEB/UPPCL to subserve a public purpose and not for assigning PPAs, therefore, no mandamus would lie to command the UPPCL to enter into a particular agreement, especially, as there is no legal right accruing to the petitioner-Company.

90. Under paragraph 20 of the licence of the UPPCL, it is its obligation to take all reasonable steps to ensure that all consumers connected to the licensees' distribution system receive supply. This indicates that the UPPCL has to receive supplies before it can distribute and, therefore, the PPAs cannot be assigned to the petitioner-Company. Paragraph 3.1 of the licence of the UPPCL reads as:

The Commission, in exercise of the powers conferred on it by Section 15 of the Act, hereby grants to the Uttar Pradesh Power Corporation Limited (UPPCL-licensee) for conducting the Licensed Business in the area specified in Schedule-I, during the period specified in paragraph 3.3, and subject to the terms and conditions contained in the licence.

Schedule-1 of the licence is quoted below:

UPPCL area of Distribution, Retail Supply and Bulk Supply-

The entire State of Uttar Pradesh, subject however to the rights granted to the Kanpur Electricity Supply Limited and Noida Power Company Limited.

91. Learned Senior Counsel submitted that under the licence granted to the UPPCL, the areas of Kanpur Electricity Supply Company and that of the petitioner-Company, were excluded. The area of operation in Greater Noida was excluded subject to rights granted to petitioner-Company. Rights were granted to the petitioner-Company by the UPSEB in terms of the agreement dated 15.11.1993. The said agreement has been terminated on 22.8.2008. The termination of agreement is not in challenge in the writ petition. Thus, the area of operation of the Corporation extends to the Greater Noida area as there are no rights subsisting in petitioner-Company.

92. The provisions of Section 13 of the Act, 1993 are identical to the provisions as contained in Section 131 of the Electricity Act of 2003. u/s 23 of the Act, 1993 and Section 131 of the Electricity Act of 2003, the State by a scheme can vest the described properties, with the agreement of the of the UPSEB/UPPCL. In Section 13(3)(c), it was provided that the Power Corporation shall be the legal successor of the U.P. State Electricity Board in relation to all power purchase and transmission agreements entered into by the Board with generating and transmission companies, including those owned and controlled by the Central Government. Section 13(4) of that Act provided that upon the grant of a licence to the UPPCL, it shall have such powers and discharge such duties and perform

such functions of the Board as provided under the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or the Rules made thereunder and/or as may be specified by the commission in the licence. u/s 131(1) of the Act, 1993, "any" property belonging to the UPSEB, from the effective date alone, can be subject of vesting depending on the agreement. "Effective date" under the 2003 Act is the date on which the transfer scheme under it, is notified. u/s 131(2) properties which vest in the State under sub-section (1) shall be re-vested by the State Government in a Government Company in accordance with transfer scheme. Section 131(3) of the Act, 2003 gives a discretion to the State Government, after consulting the UPPCL or others.

93. The licence for carrying out the business of bulk supply, distribution and retail supply of electricity was granted to respondent No. 2, UPPCL, by the U.P. State Regulatory Commission u/s 15 of the U.P. Electricity Reforms Act, 1999 in the year 2000 for the State of U.P. except retail supply and distribution in the area supplied by Kanpur Electricity Supply Company Ltd. and the petitioner Noida Power Company Ltd. Clause 8 of general conditions vide Part II of the licence for distribution of electricity, there is a clear prohibition that in conduct of the licensed business, the licensee shall not show undue preference to any person.

94. As per the judgment in the case of Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, , the word "business" is more comprehensive than the word "trade" since it will include manufacture, which the word trade may not ordinarily include.

95. Learned Senior Counsel also argued and relied upon various provisions of the National Electricity Policy and Plan. He argued that the statutory policies u/s 3 of the Electricity Act of 2003 are binding on all authorities. It is submitted that even under paragraph 5.3.4 of the National Electricity Policy, assignment of PPAs has to be done suitably and by mutual agreement. It is a further submission of learned Senior Counsel that the agreement obliged the UPPCL to supply 45 MVA to the petitioner-Company during the subsistence of the agreement. The petitioner-Company, in fact, is supplying 110 MVA electricity to its consumers by purchasing 65 MVA power through the open access system.

96. It is a further submission of learned Senior Counsel that there is no restriction on the grant of licence for bulk supply. The petitioner-Company relied on paragraph 5.3.4 of the National Electricity Policy which mentions that the Act prohibits the State Transmission Utility/Transmission Licensee from engaging in trading in electricity. It is submitted that the UPPCL is neither a State Transmission Utility nor Transmission Licensee. Section 2(71) of the Central Act 2003 defines trading to mean purchase of electricity for resale thereof. Section 39 of the Electricity Act of provides that the State Government may notify the Board or a Government Company as the State Transmission Utility. Section 39(2) thereof lays down the functions of the State Transmission Utility. The duties of a transmission licence are mentioned in Section 40 of the Act. State of U.P. has issued a notification on 18.7.2007 constituting the U.P. Transmission Corporation

as the State Transmission Utility. Learned Senior Counsel argued that the petitioner-Company's claims that it had legally enforceable right to demand share of electricity by placing reliance on the provision of Section 17 of the Indian Trust Act, 1882 which provides that if there are more beneficiaries than one, the trustee has to be impartial to all the beneficiaries. Section 17 of the Trust Act, 1882 further lays down that where the trustee has a discretionary power, nothing in the section shall be deemed to authorize the Court to control the exercise of power reasonably and in good faith. Section 3 of the Indian Trust Act 1882 lays down that a trust is an obligation annexed to the ownership of the property and arising out of confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another or of another and the owner.

97. It is argued that in terms of 6th proviso to Section 14 of the Electricity Act of 2003, a licence has been granted to Paschimanchal Vidyut Vitran Nigam Ltd. by the UPERC on 11.12.2009. The petitioner-Company objected to the grant of the aforesaid licence and filed an appeal against the grant of said licence. The appeal was allowed on 6.4.2011.

98. It is a further submission of learned Senior Counsel that the petitioner-Company has not abided by the terms of the agreement and the directions of the High Court, still it is claiming to advocate the cause of consumers of the area. However, it is evident that the only cause which the petitioner-Company is advocating is to further defraud the UPPCL and the State. The submission of the petitioner-Company that despite several orders of the UPERC, the PPAs have not been devolved on it and that such devolution with trading Company namely the UPPCL is violative of Section 131(4) of the Electricity Act of 2003 as well as 9th Proviso to Section 14 of the U.P. Electricity Reforms Act, 1999 would thus deserve to be rejected. It is submitted that u/s 86 it is not the function of the UPERC to direct the State Government to allocate PPAs, nor has it any such power to issue any direction u/s 86(1) to the State Government. Under sub-section (2) of Section 86 of the Act, the State Commission has advisory role in respect of matters other than allocation of PPAs.

99. At the end, learned Senior Counsel for respondents argued that the petitioner-Company is relying on deliberations of a meeting held on 6.6.1999 in which the Principal Secretary (Energy) was of the opinion that after expiry of the agreement dated 15.11.1993 a new agreement may be considered to be executed. The deliberations of said Committee are not the decision of the State Government nor are legally enforceable.

100. It is also a submission on behalf of the respondents that u/s 13(1) of the U.P. Act of 1999, the UPPCL was to be established for the purpose of procurement. As regards the meaning of the word "procurement" it, inter alia, means to "purchase, come into possession of". Thus, the word procure consists of much wider import than the word "purchase". It has been clarified that the UPPCL continued as a provisional licensee u/s 13(3)(a) of the Act of 1999 till the

licence was granted to it. A transfer scheme framed u/s 23 of the U.P. Act of 1999 has to give effect to the provisions of Section 13(1) and 13(3)(c) of the Act. Consequently, the properties which can be made subject of the transfer scheme u/s 23 have to exclude the PPAs. It is also a contention on behalf of the UPPCL that when the Central Act, namely, the Electricity Act of 2003 was enacted and came into force with effect from 10.6.2003, in almost eight States, including the State of U.P., the State Electricity Reforms Act, 1999 had already been enacted. It is also an argument that Section 131 of the Electricity Act of 2003 would not apply in the case of State of U.P. The Electricity Act of 2003 has been specifically made prospective [vide Section 1(3)] in operation and was enforced on 10.6.2003. The U.P. Act of 1999 (which was enforced on 14.1.2000) and the Electricity Act of 2003, the Central Statute, operated in different areas. On 10.6.2003, the date of operation of the Electricity Act of 2003, the property (PPAs) had already vested in the UPPCL.

101. It is also a submission that the PPAs, which were held by the UPSEB, vested absolutely in the UPPCL and there is no provision under the U.P. Act of 1999 or elsewhere for divesting the UPPCL of such PPAs. Such vesting of PPAs in the UPPCL has resulted from operation of law with effect from 14.1.2000 when the U.P. Act of 1999 was enforced by a notification issued u/s 1(3) of the Act. The transfer scheme, which was notified on 14.1.2000, could not and did not deal with the PPAs at all, since the same vested directly in the UPPCL by operation of law. The second transfer scheme was also notified on 12.8.2003, which is known as "the Power Sector Reforms" (Transfer of Distribution Undertakings) Scheme, 2003.

102. In terms of the said Transfer Scheme it was provided that the business of distribution and supply of electricity which was being done by the UPPCL would be transferred to four Government Companies which were incorporated under the Indian Companies Act.

103. In consideration of the transfer of distribution business, assets, liabilities, proceedings and personnel as specified in Schedules A to D, the four Discoms namely, Madhyanchal Vidyut Vitran Nigam, Paschimanchal Vidyut Vitran Nigam Ltd., Dakshinanchal Vidyut Vitran Nigam Ltd. and Purvanchal Vidyut Vitran Nigam Ltd. issued and allotted their equity shares to the UPPCL by Clause 3(3) of the Transfer Scheme, 2003.

104. Moreover, the PPAs which had vested in the UPPCL by virtue of Section 13(3) (c) of the U.P. Act of 1999 were not transferred to the four distribution companies since there was no provision for their being vested from the UPPCL and the said agreements continued to remain with the UPPCL.

105. The petitioner-Company was not a "distribution Company" within the meaning of "Clause 2(f) of the U.P. Power Sector Reforms (Transfer of Distribution Undertakings) Scheme, 2003.

106. The petitioner-Company was aware of the Transfer Scheme of 2003 but it

never represented to the State Government against the same nor laid any claim from 12.8.2003 onwards to any part of the "Undertaking" of the UPPCL.

107. The petitioner-Company has not challenged the U.P. Power Reforms (Transfer of Distribution Undertakings) Scheme, 2003.

108. The guidelines made u/s 3 of the Electricity Act of 2003 is like a five year plan and is meant for guidance of the UPERC u/s 79(4) for the purposes of advising the State Government u/s 86(2). Thus there are three stages namely (i) Guidelines, (ii) Advise to the State Government & (iii) Action of the State Government. In the circumstances, stage-I is not enforceable unless State Government acts thereon.

109. There are repetitions of the arguments in the documents filed one after another till the contest of this matter finally terminated, still we have noticed the essentials thereof during the course of examination of the records and the consideration of rival oral submissions.

110. There is no dispute that the petitioner-Company is a public limited Company with 27% equity shares held by the Greater Noida Authority. Thus, to the extent of equity shares held by the Authority, it also receives the profits if earned by the petitioner-Company. It is also not in dispute that the Chairman of the Greater Noida Authority has all times been the ex-officio Chairman of the petitioner-Company. There is also no dispute that the petitioner-Company was constituted by way of an special arrangement as an experiment of public-private partnership in the power sector for distribution and supply of electricity to consumers of the Greater Noida area, and even during the course of decision making on policy matters relating to the affairs of the petitioner-Company, participation of the Greater Noida Authority has been made necessary. Thus, it appears that the petitioner-Company unlike a private venture has not been constituted with the sole motive of earning profit.

111. The petitioner-Company was granted the licence to distribute and supply electricity to the Greater Noida area by the Government of U.P. u/s 3(1) of the Act of 1910 on 30.8.1993. Pursuant thereto, the petitioner-Company entered into an agreement on 15.11.1993 with the UPSEB for carrying out distribution of electricity after receiving supply of power upto 45 MVA to the Greater Noida notified area for a period of 4 1/2 years till the petitioner Company set up its own power generating station. In terms of the agreement, the instrument of covenant was to become operative w.e.f. the 1st day of December 1993. The terms of agreement were to be read and construed in all respect in conformity with the provisions of the Act of 1910, and the Supply Act of 1948, and/or any subsequent amendments carried therein and the rules and regulations made thereunder from time to time. In case of failure to commence own generation of power within the time stipulated, the agreement also provided for charging the double rate as:

d- If the Company does not start its own generation within 4 1/2 years (Four

Years and Six Months i.e. the maximum period of agreement) and if the Board, is ready to supply Electricity then the Board shall charge the Company at double the rates so enforced and applicable at that time.

Paragraph-11 of the terms of the agreement being relevant reads as given below:

This agreement shall subject hereinbefore provided be and remain in force for two years from the date of commencement of supply (hereinafter called the initial period of supply) and thereafter from year to year basis not exceeding for a total period of 4 1/2 years from the date of commencement of supply. After the expiry of this period of 4 1/2 years the agreement shall automatically cease unless the Board itself extends the period. No notice for cessation of the agreement will be given by the Supplier and if under any provision of this agreement or elsewhere there exists any provisions for notice it shall stand waived on the terms and conditions herein contained.

In case of any dispute between the parties over the terms of agreement, paragraph-25 thereof provided for arbitration reference as under:

If any question or dispute or difference arises between the parties to this agreement as to the interpretation or effect of any provision or clause herein contained or the construction thereof or as to any other matter in any way connected with or arising out of this agreement or the operation thereof or the rights, duties or liabilities of either party in connection therewith; such questions, dispute or difference shall be referred to the Arbitration of the Chairman, U.P. State Electricity Board or the person nominated by him and the award/decision of the said Arbitrator shall be final and binding upon the parties. In case of any neglect or refusal by the nominee to proceed with the Arbitration, the Chairman, UPSEB, may nominate another person in his place to proceed with the dispute as Sole Arbitrator.

Provided that if the question, dispute or difference relates to or concerns any dues chargeable to the consumer in terms of this agreement, no reference to the Arbitration shall at the instance of the consumer be made till the consumer has deposited with the Supplier the amount of dues in dispute, in cash.

112. Initially, the rate of cost per unit for supply of power to the petitioner-Company as agreed to between the parties was fixed tentatively at Rs. 1.66. However, it was required to be studied and revised by an independent authority, to be nominated by the State Government, after six months of petitioner's operations in terms of the licence. But the petitioner-Company had been asked to supply electricity to its consumers on the same rates which are being charged from other consumers of the UPSEB from time to time within its area of licence. Paragraph-23 of the agreement stipulated as:

During the validity period of this agreement Noida Power Company shall supply Electricity to its consumers on the same rates which are applicable to the consumers of the Board from time to time.

113. During the subsistence of the agreement, the Parliament enacted the Regulatory Commissions Act of 1998, which came into force on 25.4.1998 and, thus, the U.P. Electricity Regulatory Commission (UPERC) was established and constituted, inter alia, with powers and functions of determination of tariff charges for the purchase of electricity by the UPSEB.

114. Before the expiry of the extended term of the agreement, a tripartite meeting was held on 6.5.1999 by the Chief Minister of U.P. along with Chief Secretary, the Principal Secretary (Energy) and other senior officers of the Energy Department, and senior officers of the UPSEB, and the petitioner, the NPCL, wherein the issue/dispute of determination of purchase price for the bulk supply of power by the UPSEB to the petitioner-Company was discussed particularly for the reason that the term of the agreement between the parties was to expire shortly in the month of June, 1999. It was suggested in the said meeting that the power to be generated in the proposed captive power plant of the petitioner-Company shall be purchased by the Board and the petitioner-Company, the NPCL, would be supplied power at the pooled cost. It was also suggested by the Principal Secretary (Energy) that since the extended period of the agreement was expiring in the month of June, 1999, it would be proper that the UPSEB should consider entering into a fresh agreement with the petitioner-Company. A view was also expressed from the Government side that since it is the first experiment of giving power distribution to the private sector, in order to make the experiment a success, it is necessary to make efforts at all levels. It is also not in dispute that during the term of agreement dated 15.11.1993 for 4 1/2 years which expired in June 1998, generating station was not established by the petitioner-Company, as envisaged in the agreement. Thereafter, the U.P. Electricity Reforms Act of 1999 (the U.P. Act of 1999) came into force on 14.1.2000 and the UPSEB was unbundled into different Corporations. The UPPCL, respondent No. 2, which succeeded the UPSEB u/s 13(1) of the U.P. Act of 1999 vide its letter dated 6.3.2000 wrote to the petitioner-Company regarding the acquirement of agreement/MOU pursuant to the directions given by the UPERC in the meeting held on 2.3.2000, as follows:

Kindly refer to the meeting held in U.P. Electy. Regulatory Commission on 2.3.2000 wherein it was directed that the Agreement/M.O.U. for the purchase of power by M/s. N.P.C.L. from U.P. Power Corpn. Ltd., may be submitted to the Commission by 8.3.2000.

I am accordingly to invite your attention to this office letter No. 172-HC/NPCL dt. 2.3.2000 wherein the rates on the basis of Award of Mr. M.I. Beg (Independent Authority) were forwarded to you in detail.

It is requested that your acceptance of the same may kindly be communicated through fax so that the same may be filed before the U.P. Electy. Regulatory Commission.

115. The petitioner-Company vide its letter dated 7.3.2000 sent its reply to the

letter of the UPPCL, respondent No. 2, informing its disagreement with the power purchase rates fixed on the basis of award given by the independent authority which was communicated to the petitioner-Company vide the above letter No. 172-HC/NPCL dated 2.3.2000. The relevant part of the letter dated 7.3.2000 is reproduced as:

This refers to your letter No. 186-HC/GN dated 6.3.2000 received by fax. Your kind attention is drawn to our letter No. P-15/111 dated 3.3.2000, wherein we have communicated our response to your letter No. 172-HC/GEN/NPCL dated 2.3.2000, conveying our disagreement with the rates of power purchase proposed by you and the reasons thereof.

In regard to the new Agreement to be executed between U.P. Power Corporation Limited and the Company, and finalisation of the terms and conditions thereof, as per decisions taken at the meeting of 6.5.99 presided over by the Hon'ble Chief Minister, you will kindly recall that the draft Agreement has been forwarded by the Company vide its letter No. D/SC/6741 dated 28.5.99. The matter has been subsequently followed up with your office. During the meeting held at your office on 25.2.2000, it was communicated to us that your comments/observations on the same would be forwarded to us by 6.3.2000. Your response in the matter is awaited.

116. In the meantime, the Chairman, Greater Noida Authority, who happens to be the ex-officio Chairman of the petitioner-Company also wrote a letter to the Principal Secretary (Energy) about the need of a new agreement. Despite all the aforesaid exercise, it appears that the efforts to execute a new agreement regarding determination of rate of power purchase failed. As the UPPCL, respondent No. 2, insisted upon the petitioner-Company to accept the recommendation of the committee appointed by the State Government to determine the rate of power purchase price, it filed writ petition No. 1048 (MB) of 2000 before this Court, vide an interim order dated 31.3.2000, the Court directed the UPERC to determine/fix the power purchase price in accordance with the provisions of the Regulatory Commissions Act, 1998. It was also directed that in the meantime, the payments by the petitioner-Company to the UPPCL, respondent No. 2, were to be made at the prevailing rate i.e. Rs. 1.66 per unit. Finally the UPERC after a detailed hearing fixed the tariff rates for different years at different rates. The determination of rates by the UPERC was placed before the Court in the pending writ petition. Thus, the Court after due consideration and hearing the parties vide its judgment dated 10.11.2005 approved the rates as recommended by the UPERC. The said judgment has been challenged by respondent No. 2 before Hon'ble the Supreme Court in an SLP which is said to be pending. However, during the pendency of the aforesaid writ petition No. 1048 (MB) of 2000 before this Court, respondent No. 2 vide its letter dated 20.4.2001 informed that the agreement dated 15.11.1993 was being extended till the final disposal of writ petition on the same terms and conditions as contained in that agreement. It is also pertinent to notice that during the pendency of the writ

petition, the Electricity Act of 2003 came into force whereby the entire regime of electricity generation, transmission and distribution in the country has been changed.

117. u/s 131 of the Electricity Act of 2003, a provision being pari-materia to Section 23 of the U.P. Act of 1999, the existing Electricity Boards in all the States were to be unbundled by the State Governments and their assets and liabilities were required to be transferred under the transfer scheme to be framed under that proviso thereof to separate companies to be formed for the purpose of carrying out 3 different functions as aforesaid. During 4 1/2 years period of the agreement dated 15.11.1993 the erstwhile UPSEB and thereafter the UPPCL, respondent No. 2, continued to supply electricity up to 45 MVA. It is only vide letter No. 479/SA (Com) dated 22.8.2008, that respondent No. 2 issued the notice to discontinue with the arrangement of supply power. That is how the instant writ petition was filed, amongst other reliefs, also to challenge the said letter. The letter dated 22.8.2008 on reproduction would read as:

Kindly refer to the agreement dt. 15.11.1993 under which M/s. Noida Power Company Limited is receiving electrical energy from UPSEB/UPPCL Paschimanchal Vidyut Vitran Nigam Ltd. at 132 kv Substation Surajpur. Please note that even after 14.5 years of the agreement, you have still not been able to start your own generation. Please also appreciate that U.P. Power Corporation Ltd. is facing shortage of power for its own consumers.

Clause 11 of the above agreement provides as follows:

The agreement shall subject herein before provided be and remain in force for two year from the date of commencement of supply (hereinafter called the initial period of supply) and thereafter from year to year basis not exceeding for a total period of 4.5 year from the date of commencement of supply. After expiry of this period of 4.5 year the agreement shall automatically cease unless the Board itself extends the period. No notice for cessation of the agreement will be given by the supplier and if under any provision of this agreement or elsewhere there exists any provision for notice it shall stand waived on the terms and conditions herein contained.

A perusal of clause 11 of the agreement would show that the term of the agreement was 4.5 years, after which the agreement was to automatically cease unless the Board itself were to extend the period. The Board, by its resolution dated 17.2.2001 had resolved to extend the term of the agreement till such time that writ petition No. 1048 (MB) of 2000 filed by M/s. Noida Power Co. Ltd. remained pending in the Hon"ble High Court. You are aware that the aforesaid writ petition has been decided by the Hon"ble High Court on 10.11.2005.

Since the agreement dated 15.11.1993 has expired by efflux of time and since there is no decision of the U.P. Power Corp. Ltd. to extend the period of the agreement, we hereby intimate that we shall be discontinuing supply of 45 MVA power w.e.f. 30.11.2008. You are therefore requested to kindly make alternative

arrangements for supply of electricity to the consumers of your licensed area.

118. But it appears from the written submissions on behalf of the UPPCL (vide paragraph A-14) that the challenge to the aforesaid letter/order dated 22.8.2008 has been given up as:

It may be pointed out that though in relief (iii), a prayer has been made to quash the order dated 22.8.2008 (Annexure 22 to the writ petition), the said prayer has been given up and is no longer in challenge. It may be mentioned here that in the said order it has been stated that since the agreement dated 15.11.1993 has expired by efflux of time and there is no decision to extend the period of agreement, the petitioner was intimated that the Corporation would discontinue supply of 45 MVA power with effect from 30.11.2008 and the petitioner was requested to make alternative arrangements for supply of electricity to the consumers of their licensed area.

119. However, in the averments made in the writ petition or in the written submissions of learned Senior Counsel Shri Shanti Bhushan appearing for the petitioner, we do not find anything specific to that effect to hold that the challenge to the aforesaid letter has been given up. The only noticeable clarification on the nature and premises of the relief(s) is vide paragraph 15(a-c) and (d) of the rejoinder-affidavit filed on 27.1.2009 on behalf of the petitioner-Company through one Ashok Kumar Arora, the Resident Officer of the Company. It contains the clarification as:

(a-c). The Petitioner is not seeking enforcement of any agreement between the Respondent No. 2 and the generating stations and is only seeking enforcement of the legal provisions which makes it entitled to the assignment/allocation of the said Power Purchase Agreements.

(d). As mentioned above and also as mentioned in the Writ Petition, the Petitioner is not seeking enforcement of the agreement dated 15.11.1993 and as stated above is seeking to enforce its legal entitlement as provided under the law.

120. Thus, it appears that the petitioner has given up the prayer seeking enforcement of the agreement dated 15.11.1993 as well as the agreements between the UPPCL, respondent No. 2, and generating stations. Now, the prayer of the petitioner is, thus, limited to the enforcement of legal provisions which make it entitled to seek the assignment/allocation of the PPAs as held by the UPPCL.

121. In the premises set out hereinabove, the entire gamut of arguments of learned counsel for parties can be considered only within the precincts of this prayer and other reliefs specifically connected therewith, as sought and contained in the prayer-part of the petition.

122. Learned Senior Counsel Shri Shanti Bhushan pleaded for the assignment of PPAs held by the UPPCL, respondent No. 2, with generating stations in favour of the petitioner essentially on the basis of the provisions of the Electricity Act of

2003 read with the National Electricity Policy and the Tariff Policy as notified by the Government of India.

123. We may notice that the right of the petitioner to distribute and supply electricity to consumers of Greater Noida Area arose only from the agreement dated 15.11.1993 and on the authority of licence granted in its favour on 30.8.1993. The agreement has already expired and the efforts to enter into a new agreement between the parties have also failed.

124. Thus, in the absence of a fresh agreement in line with the terms of the earlier one dated 15.11.1993 between the petitioner and the respondent Corporation, which was entered into between the parties in consonance with and under the provisions of the Act of 1910 and the Supply Act of 1948 and the rules and regulations framed thereunder (including the amendments carried out from time to time), merely on the basis of licence granted to the petitioner-Company under the Act of 1910 on 30.8.1993, it would not become entitled to seek the supply of 45 MVA electricity or the assignment of PPAs in accordance with its load profile from the UPPCL, respondent No. 2. The petitioner-Company was granted licence to supply energy to an specified area u/s 3(1) of the Act of 1910 being its area of operation, as provided in paragraph-4 of the licence. The period of validity of the licence is not specified therein. Moreover, in order to start the distribution work in terms of the licence dated 30.8.1993, there should be a request/demand as stipulated in paragraph 8(B) of the agreement dated 15.11.1993, which reads as:

(B) WHEREAS the Company has requested the Supplier to supply him electrical energy in bulk at 132/33 kv Surajpur Substation for distribution of electrical energy in Greater Noida area as per Government Notification No. 5480-P-3/93-23-86-P/92 dated August 30, 1993 (Annexure-1) and the Supplier has agreed to afford such supply to the Company on the terms and conditions hereinafter contained.

125. Besides, the UPSEB could move the State Government for revocation of licence in case there was a breach of the conditions of the agreement as provided in paragraph 10 thereof.

126. It is also noticeable that on the basis of the outcome of the tripartite meeting dated 6.5.1999 headed by the then Chief Minister, U.P., the petitioner Company asserts that the Government of U.P. wanted to continue supplying power to the petitioner Company by executing a new agreement and thus advised the UPSEB accordingly.

127. We also find that the distribution of electricity in the area of Greater Noida has been provided to the petitioner Company under an exclusive licence issued to it. Thus, no other person, neither the State Government nor the UPPCL, can supply electricity in the area of Greater Noida till such time that the licence granted to the petitioner Company remains valid. However, the UPERC can revoke the licence or make alternative arrangements for supply of power/

electricity in that area in case of breach of conditions of licence which ordinarily in the absence of agreement to seek supply of power from the bulk supplier or the individual PPA between the petitioner and power generating station will not become operational and effective. Therefore, unless there is a fresh agreement between the petitioner Company and the UPPCL, the UPPCL being the successor of the erstwhile UPSEB, which used to supply electricity to the petitioner Company under the Agreement of 15.11.1993, cannot supply any electricity to the petitioner Company. The agreement dated 15.11.1993, which was extended from time to time with the same terms and conditions and finally in terms of undertaking dated 17.2.2000 of the respondent No. 2 that till the disposal of the Writ Petition No. 1048 (MB) of 2000 it shall continue, has admittedly been terminated under the impugned order dated 22.8.2008 while providing three months' time to the petitioner Company till 30.11.2008 to make alternative arrangements. There is no prayer for enforcement of the terms of the said agreement or for the extension of its period, which was extended beyond 1998 by the respondents for the reasons mentioned hereinabove. Thus, the agreement, being the basis of relationship between the UPSEB, and now its successor the UPPCL, and the petitioner Company is now nonexistent.

128. Moreover, it is the own case of the petitioner Company that in terms of Clause 5.3.4 of the National Electricity Policy framed u/s 3 of the Electricity Act of 2003, there is a requirement of mutual agreement because such agreement would be required for applying uniform distribution of power by the UPPCL, respondent No. 2. Thus, the requirement of mutual agreement, whether it is the case of supply of electricity by the UPPCL in terms of the earlier agreement dated 15.11.1993, or for providing power from the PPAs held by it, is mandatory and indispensable. It is also noteworthy that the competence of the erstwhile UPSEB to supply power under the provisions of the Supply Act of 1948 was governed by the provisions of Sections 18 and 19 thereof. It could not have been asked to supply the electricity without its consent. Sections 18 and 19 of the Supply Act of 1948 read as:

[18. General duties of the Board.--Subject to the provisions of this Act, the Board shall be charged with the following general duties, namely:

(a) to arrange, in co-ordination with the Generating Company or Generating Companies, if any, operating in the State, for the supply of electricity that may be required within the State and for the transmission and distribution of the same in the most efficient and economical manner with particular reference to those areas which are not for the time being supplied or adequately supplied with electricity;

(b) to supply electricity as soon as practicable to a licensee or other person requiring such supply if the Board is competent under this Act so to do;

(c) to exercise such control in relation to the generation, distribution and utilization of electricity within the State as is provided for by or under this Act;

(d) to collect data on the demand for, and the use of, electricity and to formulate perspective plans in co-ordination with the Generating Company or Generating Companies, if any, operating in the State, for the generation, transmission and supply of electricity with the State;

(e) to prepare and carry out schemes for transmission, distribution and generally for promoting the use of electricity within the State; and

(f) to operation the generating stations under its control in co-ordination with the Generating Company or Generating Companies, if any, operating in the state and with the Government or any other Board or agency having control over a power system.]

19. Powers of the Board to supply electricity.--(1) The Board may, subject to the provisions of this Act, supply electricity to any licensee or person requiring such supply in any area in which a scheme sanctioned under Chapter V is in force:

Provided that the Board shall not--

(a) supply electricity for any purpose directly to any licensee for use in any part of the area of supply of a bulk-licensee without the consent of the bulk-licensee, unless the licensee to be supplied has an absolute right of veto on any right of the bulk-licensee to supply electricity for such purpose in the said part of such area, or unless the bulk-licensee is unable or unwilling to supply electricity for such purpose in the said part of such area on reasonable terms and conditions and within a reasonable time, or

(b) supply electricity for any purpose to any person, not being a licensee for use in any part of the area of supply of a licensee without the consent of the licensee, unless -

(i) the actual effective capacity of the licensee's generating station computed in accordance with paragraph IX of the First Schedule at the time when such supply was required was less than twice the maximum demand asked for by any such person; or

(ii) the maximum demand of the licensee, being a distributing licensee and taking a supply of energy in bulk is, at the time of the request, less than twice the maximum demand asked for by any such person; or

(iii) the licensee is unable or unwilling to supply electricity for such purpose in the said part of such area on reasonable terms and conditions and within a reasonable time.

(2) After the Board has declared its intention to supply electricity for any purpose in any area for which purpose and in which area it is under this section competent to supply electricity, no licensee shall, the provisions of his licence notwithstanding, at any time be entitled without the consent of the Board to supply electricity of that purpose in that area.

(3) For the purposes of sub-section (1) "absolute right of veto" means an unqualified right vested in a licensee by virtue of any law, licence or other instrument whereby a bulk-licensee is prevented from supplying electricity in any specified area without the consent of the licensee in whom the right of veto vests.

(4) If any question arises under sub-section (1) as to the reasonableness of the terms or conditions or time therein mentioned, it shall be determined [by arbitration] as provided in Section 76.

129. The licence granted to the UPPCL u/s 15 of the U.P. Act of 1999 was for carrying on the business of bulk supply, distribution and retail supply of energy within the area of supply. The area of supply is defined in the licence to mean the geographical area referred to in Schedule-1 thereof, within which, any activity relating to the authority of licence is allowed. The area of supply of the UPPCL in the licence provides "the entire State of U.P.", subject, however, to the rights granted to the Kanpur Electricity Company Ltd. and the petitioner-Company, namely the NPCL. The rights granted to the petitioner-Company to receive supply from the UPSEB and to distribute in the licensed area flowed from the agreement dated 15.11.1993 which has finally ended and that is also not in challenge. Moreover, the licence granted to the petitioner-Company on 30.8.1993 was only by way of an alternative arrangement u/s 47 of the Supply Act of 1948. Merely having a licence is not enough unless there is an agreement between the parties and the subsisting rights granted to receive power from the UPPCL, respondent No. 2. Thus the rights to distribute and supply power to consumers of the Greater Noida area were provided in terms of the agreement of 15.11.1993 and the licence dated 30.8.1993 only specifies the area of supply. As the agreement has now ceased to operate, the petitioner-Company has no right independent of the agreement to claim PPAs held by the UPPCL to receive supply of the electricity for distribution to consumers of its licensed area. The petitioner-Company now claims its rights under the licence, then the licence only provides for the area and not the period of supply with claim over the PPAs now held by the UPPCL, which can be the subject-matter of Section 47 of the Supply Act of 1948. In terms of Section 35 of the Supply Act of 1948, there was an obligation upon the erstwhile UPSEB to supply electricity to a licensee owning generating station. Section 47 of the Supply Act of 1948 confers discretion on the UPSEB to make arrangements as may be mutually agreed with any licensee in regard to purchase or sale of electricity and the price thereof. Section 48 of the Act requires the licensee to carry out any such arrangements. For ready reference, the provisions of Sections 35, 47 and 48 of the Supply Act, 1948 are given below:

35. Supply by the Board to licensees owning generating stations.--The Board may at any time declare to a licensee owning a generating station, other than a controlled station, situate within an area for which a scheme is in force that it is ready to make a supply of electricity available to the licensee for the purposes of his undertaking, and thereupon, but without prejudice to the provisions of Section 47, the provisions of the Second Schedule shall apply in respect of the

relations between the Board and the said licensee.

47. Power to Board to make alternative arrangements with licensees.--Notwithstanding anything contained in Sections 34 and 37 and sub-section (2) of Section 46 but subject to any regulations made in this behalf, the Board may make such arrangements as may be mutually agreed with any licensee whose area of supply is situate within an area for which a scheme is in force, in regard to the purchase or sale of electricity and the price thereof, or the purchase, operation or control of any generating station or main transmission line:

Provided that in making any such arrangement the Board shall not show undue preference to any licensee.

48. Power to licensee to carry out arrangements under this Act.--Where under any provision of this Act the Board is authorised or required to enter into arrangements with any licensee for any purpose, then notwithstanding anything contained in any law or in any licence, memorandum of association or other instrument regulating the constitution or powers of the licensee, it shall be lawful for the licensee to enter into any carry out any such arrangements.

130. Thus, the area of supply of the petitioner-Company was subject to the arrangements, meaning thereby only till, and during the period of subsistence of agreement. As such, it was only in view of the provisions of Section 47 read with Sections 18 and 19 of the Supply Act of 1948 that the UPSEB was competent to enter into a mutually agreed arrangement for the supply of electricity to the petitioner-Company, as has been done in the present case.

131. As noticed hereinabove, during the subsistence of period of the agreement, the State statute namely the U.P. Act of 1999 and the Central statute i.e. the Electricity Act of 2003 came into force. There is no controversy over the fact that the petitioner-Company has confined the relief(s) only to the extent of seeking direction for the enforcement of legal provisions which, according to it, entitle it to seek assignment/allocation of the PPAs. Thus, the petitioner-Company has impliedly given up the ground to seek continuous supply of 45 MVA for distribution/supply of power to consumers of its licensed area, namely the Greater Noida, which was earlier based only on the terms of the agreement dated 15.11.1993 between the parties and that was also extended from time to time beyond the 4 1/2 years period, and now, stands terminated finally in terms of the impugned letter/order dated 22.8.2008. There is no prayer to seek direction to go for a fresh mutual agreement on the basis of the orders of the UPERC, the National Electricity Policy, minutes of the tripartite meeting among the parties, and the correspondence addressed on that issue. The licence has been granted to the petitioner-Company only under the provisions of Section 3(1) of the Act of 1910 and though the period of validity of licence has not been prescribed yet only on the basis of licence, the petitioner-Company cannot seek assignment/allocation of PPAs in its favour nor would the UPPCL be competent to do so, being the successor of the UPSEB which itself was incapacitated to do so

in the absence of such arrangements under the provisions of the Supply Act of 1948 as discussed hereinabove. As regards the PPAs held by the UPPCL, the main argument of the petitioner-Company is that the UPPCL, respondent No. 2, is the successor of the erstwhile UPSEB which had entered into agreements with the generating companies. It is also a submission that issue of setting up of generating stations has been wrongly made a part of the agreement dated 15.11.1993. The UPPCL, respondent No. 2, now holds the PPAs under the provisions of the Electricity Act of 2003 and also the statutory policies namely the National Electricity Policy and the Tariff Policy as notified by the Central Government in exercise of powers u/s 3 of the Electricity Act of 2003. The PPAs thus held by the UPPCL, respondent No. 2, are required to be suitably assigned/allocated amongst distribution companies in the State after the reform process has started. Such act of denial of assignment/allocation on the part of the UPPCL, respondent No. 2, is arbitrary and illegal. The petitioner-Company has also alleged mala fide against the respondents while submitting that they want to harm the petitioner-Company and curtail its legal rights under the Electricity Act of 2003 although it has invested Rs. 275 Crores in extending distribution network in the area of supply. The petitioner-Company has also alleged discrimination against the UPPCL, respondent No. 2, which has not suitably and equitably assigned the PPAs to all distribution companies and failed to fulfill its obligation under the Electricity Act of 2003. It is also an act of discrimination between the people of Greater Noida and the people of rest of the State. It is, thus, violative of Article 14 of the Constitution. The petitioner-Company has also relied upon the orders passed by the UPERC advising the respondents to suitably assign/allocate the PPAs amongst all distribution companies in the State so as to promote a fair competition amongst such discoms. It is also the assertion of the petitioner-Company that the power has been allocated under the PPAs for the benefit of entire population in the State, and the agreement dated 15.11.1993 was made only in order to fix the rate at which the petitioner-licensee was required to make payment for the supply of the electricity to the Company by the UPSEB. The position of the UPSEB was like a trustee in respect of PPAs and all types of consumers of the electricity were in a position of beneficiary. All generating stations which have been set up by the UPSEB were only from the funds received from all consumers of the State. The petitioner-Company has also claimed that even without setting up of generating stations it has right to get the assignment of PPAs in terms various provisions of the Electricity Act of 2003 read with the National Electricity Policy and the Tariff Policy.

132. The UPPCL, respondent No. 2, constituted u/s 13(1) of the U.P. Act of 1999 is the legal successor of the UPSEB pursuant to coming into force of that Act, vide the provisions of Section 23(1) and (2) of the U.P. Act of 1999, a transfer scheme was framed and the profits, interests, rights and liabilities of the UPSEB have been re-vested and devolved in the UPPCL, respondent No. 2.

133. For the purpose of procurement, transmission and supply of electricity u/s 13 of the U.P. Act of 1999, the UPPCL got complete rights in relation to all power

purchase and transmission agreements entered into by the UPSEB with various generating and transmission companies in terms of Section 13(3)(c) of the U.P. Act of 1999. Section 13 of the U.P. Act of 1999, being relevant, is reproduced as:

13. Formation and functions of the Uttar Pradesh Power Corporation Limited.--(1) For the purpose of procurement, transmission and supply of electricity, a Company by the name of the Uttar Pradesh Power Corporation Limited shall be formed and registered under the Companies Act, 1956 as soon as may be after the commencement of this Act by the State Government.

(2) The Power Corporation shall undertake planning and co-ordination in regard to transmission and shall determine the electricity requirements in the State in consultation with the generating companies, the State Government, contiguous States, the Commission, the Regional Electricity Board, the Central Electricity Regulatory Commission and the Central Electricity Authority.

(3) That Power Corporation shall, -

(a) be provisional licensee for transmission and supply of electricity within the state until the grant of licence by the commission;

(b) be responsible for transmission system operations;

(c) be the legal successor of the Board in relation to all power purchase and transmission agreements entered into by the Board with generating and transmission companies including those owned or controlled by the Central Government; and

(d) undertake such other functions as may be required under the licence.

(4) Upon the grant of licence to it u/s 15, the Power Corporation shall have such powers and discharge such duties and perform such functions of the Board under the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or the rules made thereunder as may be specified by the commission in the licence.

(5) The Commission may, in consultation with the Power Corporation grant licence also to a Company subsidiary to the Power Corporation.

134. Thus, the PPAs vested in the UPPCL, respondent No. 2, by virtue of Section 13(3)(c) of the U.P. Act of 1999. The argument on behalf of the petitioner is that u/s 23(1)(2) of the U.P. Act of 1999, the transfer scheme was framed on 14.1.2000. Thus, the assets of the UPSEB including the PPAs were vested in the State Government and thereafter re-vested in the UPPCL, respondent No. 2 thereunder. Further, according to learned senior counsel, Section 23(4) contemplates a further transfer scheme to vest these assets in distribution companies which also include the petitioner Company. Relevant provisions of Section 23 of the U.P. Act of 1999 is also reproduced hereunder:

23. Transfer of the Board's properties, powers, functions, duties and personnel.--

(1) On and from the date of specified in a transfer scheme, prepared and notified

by the State Government to give effect to the objects of this Act, hereinafter referred to as the appointed date in this Act, all properties, and all interests, rights and liabilities of the Board therein shall vest in the State Government.

(2) The properties, interest, rights and liabilities vested in the State Government under sub-section (1), shall be re-vested by the State Government in the Power Corporation and in a generating Company in accordance with the transfer scheme so notified along with such other property, interest, rights and liabilities of the State Government as may be specified in such scheme, on such terms and conditions as may be determined by the State Government.

(3) In addition to the rights and powers of the Power Corporation as specified in Chapter IV of this Act, such of the rights and powers exercisable by the Board under the Electricity (Supply) Act, 1948 as the State Government may, by notification, specify shall be exercisable by the Power Corporation or the generating Company, as the case may be, for the purposes of performing the functions and discharging the duties under the said Act of 1948.

(4) The State Government may, after consultation with the generating Company or the Power Corporation, hereinafter referred to in this section as transferor, may, require transferor to draw up a transfer scheme to vest in a person hereinafter referred to in this section as transferee, any of the functions including distribution function, property, interest, right or liability which may have been vested in the transferor under this section and notify the same as statutory transfer scheme under this Act. The transfer scheme to be notified under this sub-section shall have the same effect as the transfer scheme under sub-section (2).....

135. Thus, u/s 13(4) of the U.P. Act of 1999 with the grant of licence to the UPPCL, it has been conferred such powers and can discharge such duties and perform such functions as used to be performed earlier by the UPSEB under the Act of 1910 and the Supply Act of 1948 and also the rules framed thereunder and the orders to be passed by the UPERC.

136. However, it appears that the UPPCL continued as a provisional licensee u/s 13(3)(a) of the U.P. Act of 1999 till the licence was granted to it by the UPERC although the PPAs vested in it with the operation of Section 13 thereof, vide paragraph 5.1.1 of the licence granted to the UPPCL, u/s 15 of the U.P. Act of 1999, it became entitled to purchase electricity. Thus, the agreement by way of the PPAs and the licence, both were required to supply power. We may also notice that in order to enable the UPPCL to procure electricity, a legislative provision has been made in Section 13(3)(c) whereunder it would be the legal successor of the UPSEB in relation to all PPAs. If the provisions of Section 13(3)(c) are read with Section 13(1) of the U.P. Act of 1999, then the position would become clear. Section 23 of the U.P. Act of 1999 empowers the State Government to frame transfer scheme to give effect to the objects of the Act. One of the objects of the U.P. Act of 1999 is to enable the UPPCL to procure

electricity and become successor of the UPSEB as per the mandate of Section 13 of the U.P. Act of 1999. Thus, the transfer scheme has only to give effect to and facilitate the application of the provisions of Section 13(1) and 13(3)(c) of the U.P. Act of 1999. Consequently, other properties can be made subject of the transfer of the scheme u/s 23 in order to facilitate the use of PPAs, which is excluded from such properties which are covered by the transfer scheme because the PPAs as held by the UPSEB immediately vested in the UPPCL with the operation of provisions of Section 13(1) and 13(3)(c) of the U.P. Act of 1999, and if we hold that it vested in the State Government and re-vested in the UPPCL under the scheme, then it would disable the UPPCL from purchasing electricity, wholly or partially, though legislatively empowered and obligated to purchase electricity to the complete exclusion of the State or any other State agency or authority. Moreover, the scheme u/s 23 would be in the nature of a subordinate legislation and cannot over-ride the provisions of the Act. Section 23(2) provides that the properties vested in the Government shall be re-vested by the State in the UPPCL in accordance with the transfer scheme. Since the PPAs have already been vested in the UPPCL u/s 13(3)(c), it was not to be vested in the State Government and re-vested in the UPPCL. In the circumstances, a transfer scheme cannot be applicable to the PPAs. Besides, in the scheme, namely, the U.P. Electricity Reforms Transfer Scheme, 2000, prepared u/s 23(1) and (2) by the State Government on 14.1.2000, vide para 2(b) thereof, the property of the UPSEB includes inter alia the agreement. Paragraph 3 of the scheme provides that all properties of the UPSEB shall stand transferred to and vest in the State Government. As the UPPCL becomes the legal successor of the UPSEB in respect of the PPAs under a legislative provision, therefore, the PPAs cease to remain in the property of the Board which were to be vested in the State Government under the scheme. The PPAs ceased to be the property of the Board, the moment the U.P. Act of 1999 came into force. The scheme where under the property of UPSEB was to vest in the State Government was drawn after the enforcement of the Act. The Board was no longer the owner of the PPAs in view of operation of Section 13(3)(c) of the U.P. Act of 1999. Thus, the property referred to in paragraph 2(b) of the scheme would exclude the PPAs. Moreover, vide the provisions of Section 23(3) of the U.P. Act of 1999, there is a clause like "in addition to the rights and powers of the Power Corporation as specified in Chapter IV of the Act". Thus, other rights could be exercisable by the Corporation as may be prescribed by the State Government. Chapter IV of the Act only consists of Section 13. Consequently Section 23(3) recognizes that the PPAs are the properties of the UPPCL and that in addition thereto other rights could be vested in it. Section 23(4) provides that the State Government requires the UPPCL to prepare a scheme to re-vest the property vested in the UPPCL under this Section. Section 23(3), having recognized that the UPPCL is the owner of the PPAs, the State Government could not direct the UPPCL to devolve the PPAs in another person as they do not vest in the UPPCL u/s 23, but u/s 13(1) read with Section 13(3)(c). The Electricity Act of 2003 was enacted and came into force with effect from 10.6.2003. Before that, in almost eight States, including the

State of U.P., the State Electricity Reforms Act, 1999 had already been enacted. The provisions of Section 23 of the U.P. Act of 1999 and Section 131 of the Electricity Act of 2003 are pari-materia but Section 131 of the Electricity Act of 2003 would apply in the State of U.P. only when the UPSEB had existed on the date of coming into force of the Electricity Act of 2003 and the property of the Board had not vested in any other authority. As the property had already vested in the UPPCL u/s 13 and 23 of the U.P. Act of 1999, there is no question of application of the provisions of Section 131(4). Besides, the Parliamentary Enactment, 2003 was made with full knowledge about the existence of similar provisions in the U.P. Act of 1999. That apart, the Electricity Act of 2003 has been made specifically prospective and was enforced on 10.6.2003 whereas the U.P. Act of 1999 came into force on 14.1.2000. In fact, the PPAs had already vested in the UPPCL by operation of law on 14.1.2000 when the U.P. Act of 1999 came into force. Section 131(4) would apply in respect of properties vested in the State u/s 131. The PPAs did not vest in the State on 10.6.2003 and thus did not vest in it u/s 131 of the Electricity Act of 2003. Since the PPAs did not remain to be vested in the State on 10.6.2003, the provisions of Section 131 of the Electricity Act of 2003 would not apply to it. Moreover, the provisions of Section 23 admittedly being pari-materia with the provisions of Section 131 of the U.P. Act of 1999 and not being inconsistent with any of provisions of the Electricity Act of 2003 would continue to govern the field and remain in force in the State of U.P. In addition to that, the Electricity Act of 2003 would not undo or supersede actions taken under the U.P. Act of 1999. The PPAs have absolutely vested in the UPPCL and there is no provision under the Act of 1999 or elsewhere for divesting the UPPCL of such PPAs because it has resulted from operation of law with effect from 14.1.2000 when the U.P. Act of 1999 was enforced by a notification issued u/s 1(3) of the Act.

137. "Vest" has been defined by Black's Law Dictionary (i) to confer ownership (of property) upon a person; (ii) to invest a person with full title to property; and, (iii) to give a person immediate fixed right of present or future enjoyment.

138. Moreover, in the case of Centre for Public Interest Litigation Vs. Union of India (UOI) and Another, , it has been held by the Hon'ble Apex Court that divestment can be done in the same manner in which vesting is done.

139. The transfer scheme made under the U.P. Act of 1999 did not affect the position for the reason that the PPAs which vested in the UPPCL by the operation of law u/s 13 of that Act, could not have vested in the State u/s 23(1) of the U.P. Act of 1999. Section 131 of the Electricity Act of 2003 would not apply in the case of assets including PPAs, which had already vested either u/s 13(3)(c) of the U.P. Act of 1999, or under the transfer scheme u/s 23 of the said Act, much before coming into force the Electricity Act of 2003. The second transfer scheme which was notified on 12.8.2003 was only in respect of business of distribution and supply of electricity which was being done by the UPPCL and the same would be transferred to 4 Government companies which were incorporated under the

Indian Companies Act namely Madhyanchal Vidyut Vitran Nigam (Lucknow Discom), Paschimanchal Vidyut Vitran Nigam Ltd. (Meerut Discom), Dakshinanchal Vidyut Vitran Nigam Ltd. (Agra Discom) and Purvanchal Vidyut Vitran Nigam Ltd. (Varanasi Discom) and the said companies were given the personnel, debtors, creditors and the entire distribution business, specified in Schedules A to D of the Scheme [Clause 3(2) of the Transfer Scheme, 2003].

140. In consideration of the transfer of distribution business, assets, liabilities, proceedings and personnel as specified in Schedules A to D, the four Discoms namely, Madhyanchal Vidyut Vitran Nigam, Paschimanchal Vidyut Vitran Nigam Ltd., Dakshinanchal Vidyut Vitran Nigam Ltd. and Purvanchal Vidyut Vitran Nigam Ltd. issued and allotted their equity shares to the UPPCL by Clause 3(3) of the Transfer Scheme, 2003.

141. Moreover, the PPAs which had vested in the UPPCL by virtue of Section 13(3) (c) of the U.P. Act of 1999 were not transferred to the four distribution companies since there was no provision for their being vested from the UPPCL and the said agreements continued to remain with the UPPCL.

142. Petitioner-Company was not a distribution Company within the meaning of "Clause 2(f)" of the U.P. Power Sector Reforms (Transfer of Distribution Undertakings) Scheme, 2003, because no part of undertaking of the UPPCL was transferred to it nor any equity share of the petitioner Company has been transferred to the UPPCL as has been the case in respect of the shares of the 4 distribution companies as aforesaid. Besides, the petitioner Company did not challenge the transfer scheme of 2003 as aforesaid. In addition to that, the guidelines/policies framed u/s 3 of the Electricity Act of 2003 are like a five year plan and are meant for the guidance of the UPERC u/s 79(4) for the purpose of advising the State Government.

143. In support of this view, we may also refer to the case of Narendra Kumar Maheshwari Vs. Union of India (UOI) and Others, , wherein the Hon'ble Apex Court has held that policy is not the law. Similarly, in the case of Maharao Sahib Shri Bhim Singhji Ors. Vs. Union of India (UOI) and Others, , Hon'ble the Apex Court has held that the guidelines are nothing, but in the nature of executive instructions and cannot obviously control the plain meaning of the Section.

144. On the other hand, the judgment referred to on behalf of the petitioner Company as rendered in the case of [PTC India Ltd. Vs. Central Electricity Regulatory Commission thr. Secy., , Para 19] only relates to the aims, objects, and tenets of the Tariff Policy in regard to the powers and functions of the Regulatory Commission.

145. As regards the argument that the petitioner, the NPCL, was granted a distribution licence for Greater Noida area on 30.8.1993 even without entering into an agreement with the UPSEB, and therefore, it has acquired an enforceable statutory right u/s 18(b) of the Supply Act of 1948 for assignment/allocation of the PPAs in its favour, in view of discussion on the legal position hereinabove that

the PPAs have vested in the UPPCL by the operation of substantive provisions of law u/s 13 of the U.P. Act of 1999 and not u/s 23 of this Act or Section 131 of the Electricity Act of 2003 and further that there is no surviving agreement between the parties, we are not inclined to accept it. Moreover, it is not the stand of the respondents that the petitioner Company is not entitled to supply the electricity to consumers in its licensed area. The only dispute that now survives is regarding the right of petitioner to get supply of electricity as per its load profile from the allocation of the PPAs held by the UPPCL without establishing its own generating station, being one of the terms and conditions of agreement dated 15.11.1993. The petitioner may, thus, supply electricity in terms of the licence by making its own arrangement by entering into the PPAs directly with generating stations as it is said to have already entered into such agreements with M/s. NCS Sugars-Andhra Pradesh, M/s. Adan-Gurgaon and M/s. Global Energy-New Delhi. It is also said that some more PPAs with one M/s. Kribhco Shyam Ltd. are in pipeline. Besides, the petitioner Company cannot espouse the cause of consumers of the Greater Noida area by claiming share in the PPAs as held by the UPPCL for them as per the load profile for its right to supply electricity in the absence of the agreement is limited to the terms of the licence which can not mandate the UPPCL to supply power to the petitioner Company for distribution. Rather, it specifies only the area of supply. Moreover, the petitioner Company is not entitled to seek supply on the basis of the PPAs held by the UPPCL after committing the breach of the condition of agreement dated 15.11.1993 by not establishing its generating stations.

146. As we have already held hereinabove that the provisions of Section 131 of the Electricity Act of 2003 would not apply in the matter of PPAs which devolved on the UPPCL with the operation of the U.P. Act of 1999 three years before the Electricity Act of 2003 came into force, it would not be open for the petitioner to claim any legal right for assignment of the said PPAs in its favour. Moreover, with the grant of licence under the Act of 1910, the petitioner does get the right to become "parens patriae" to represent and espouse the cause of Greater Noida area. Besides, there have been complaints of irregular supply of electricity to consumers of its licensed area by consumers as well as the officials of the Greater Noida area. We may also observe that according to the assessment of the UPPCL, respondent No. 2, the petitioner is supplying 78% of power to the industries and commercial consumers, 5 to 7% to the public and private institutions, 15% to the domestic sector and hardly 0.4% MVAs to the agriculture sector. On the contrary, the State of U.P. is primarily an agricultural State. A large part of the electricity generated, say about 17%, is supplied to the agricultural sector at a heavily subsidized rate of about 1.10 per unit. Even the realization of that amount becomes very difficult as the electricity is not provided on the basis of metered consumption but only on the basis of connected load and verification of BHP of the meters of tube-wells. Besides, in the northern region there are in total nine States including the State of Uttar Pradesh. As per 2001 census, the total population of these States was 307,208,883 out of which the

population of Uttar Pradesh itself is 166,052,859 which constitutes 54.05% of the total population of the northern region. However, the share of allocation of power as has been given to the State of U.P. is only 32.36%. Similarly, though the population of Delhi is 4.49% but the power allocation is higher at 16.08%. The power allocation is made by the Ministry of Power, Government of India, while taking into account the installed capacity and the available capacity. The past record of the installed capacity of the Central Power Generating Stations and the maximum available capacity would only show that even if the case as setup by the petitioner Company is accepted, the petitioner Noida Power Company Limited is not entitled to get 110 MVA of energy as demanded by it on the basis of population ratio and the requirement of load profile. Therefore, the argument on behalf of the petitioner with reference to Gadgil's formula for providing electricity in accordance with the population and required load profile does not find favour with us.

147. So far as the claim of the petitioner Company regarding the reduction in loss of power in the licensed area of the petitioner Company is concerned, we find considerable force in the submission on behalf of the UPPCL, respondent No. 2, that the petitioner Company should be compared with the Noida Electricity Urban Distribution Circle having similar consumer base. Figures show that the Noida circle of the UPPCL which is having consumer base of more than 5 times (1.70 lacs) than the NPCL has a current loss level at 8.83% only. Another factor to be highlighted is that this loss level includes all consumers including the rural consumers. Thus, a more pragmatic comparison will be between Urban Distribution Division of Noida with the petitioner, the NPCL, with similar consumer base, wherein the current figure corresponds to line loss level of 5.4% (Electricity Urban Distribution Division III), 7.43% (Electricity Urban Distribution Division II) and 8.32% (Electricity Urban Distribution Division I).

148. That apart, the petitioner Company has failed to set up its own generating station despite the orders of the UPERC and also the undertaking given before this Court during the course of hearing of Writ Petition No. 1048 (MB) of 2000 towards the enforcement of the terms of agreement dated 15.11.1993. In case the petitioner Company had to face any difficulty due to non-cooperation on the part of respondents in setting up of the power generating plant as alleged hereinabove, it was always open for the Company to approach this Court for seeking appropriate relief. If the petitioner Company could be in continuous litigation since 2000 on one count or the other like: determination of tariff, interim direction for supply of power, and allocation of the PPAs etc., it could as well have instituted the proceedings against the respondents if they had created any difficulty in setting up its power plants. Thus, the case of petitioner claiming to have enforceable rights under the provisions of the Electricity Act of 2003 and the National Electricity Policy and the Tariff Policy framed thereunder cannot be appreciated also for that reason.

149. Coming to the apprehension of the petitioner Company that in case of

discontinuance of power supply by the UPPCL, consumers of the Greater Noida area would be left to live in darkness, it has always been the stand of the UPPCL that in case of stoppage of the supply to the petitioner Company, consumers of the Greater Noida area would never be left stranded to suffer a power blackout.

150. We may also notice that proviso (iii) of Section 19(1)(b) of the Supply Act of 1948 provides that the Board shall not supply electricity for any purpose to any person not being a licensee without the consent of licensee unless the licensee is unable or unwilling to supply electricity on reasonable terms and conditions and within a reasonable time. Therefore, the Board could not force a licensee to supply the energy in an area not notified by it but can takeover the supply if the licensee fails to supply on reasonable terms and conditions and within a reasonable time. Besides, by not setting up a generating plant, the petitioner Company has disabled itself from supplying electricity by its own conduct, and thus, now it is the obligation of the UPPCL, the successor of the UPSEB, to ensure supply of electricity to consumers of the Greater Noida. The petitioner-Company cannot be allowed to take advantage of its own wrong. The principle underlying the maxim "*actus curiae neminem gravabit*" would apply in this case. This maxim is a rule of construction. If the action of the petitioner-Company appears to be wanton and vexatious, it would be contrary to the policy of law to permit the Company to take advantage of its own wrong. This maxim is founded upon the principles of justice and good sense. It also affords a safe and certain guide for the administration of law.

151. Besides, u/s 35 of the Supply Act of 1948 and the 2nd Schedule annexed thereto, the UPSEB and now its successor being the UPPCL would be under obligation to supply the electricity only to the licensee which has setup its generating stations and the petitioner Company having failed to do so is not within its legal right to seek the PPAs held by the UPPCL according to its load profile required for supply of the electricity to consumers of the Greater Noida area.

152. Under the licence granted to the UPPCL, the area of Kanpur Electricity Supply Company and the petitioner-Company, was excluded. The area of operation in Greater Noida was excluded subject to rights granted to petitioner-Company. Rights were granted to the petitioner-Company by the UPSEB in terms of the agreement dated 15.11.1993. The said agreement has been terminated on 22.8.2008. The termination of agreement is not in challenge in the writ petition. Thus, the area of operation of the Corporation extends to the Greater Noida area as there is no right subsisting in favour of the petitioner-Company.

153. The concern of the petitioner that there is discrimination against consumers of the Greater Noida area also does not appear to hold ground because only on the basis of licence he does not have the authority of law to rake up and espouse their cause which they being the end users may, themselves, take up. The argument built up on the basis of Section 17 of the Indian Trust Act would also not be tenable, for, the UPSEB being an instrumentality of the State was

primarily engaged in the electrification of the State. If some PPAs had been entered into between it and some generating stations, the same did not create any relationship in the nature of a trust between the UPSEB and consumers or the petitioner in terms of the provisions of Section 6 of the Indian Trust Act. There is no relationship of trustee and beneficiaries. The concept of trustee as conceived of by the petitioner is neither recognized under the Indian Trust Act 1882 nor under any other law. Moreover, the petitioner not being "parens patriae" cannot purport to act on behalf of the beneficiaries even assuming that the UPSEB was a trustee and consumers of electricity of the State were the beneficiaries.

154. Section 17 of the Indian Trust Act, 1882 has no application in the circumstances of the present case. The duty of the UPSEB was not that of a trustee as alleged by the petitioner but it was only in respect of the nature of work, it was engaged in, namely work of electrification of the entire State.

155. Section 17 of the Trust Act, 1882 further lays down that where the trustee has a discretionary power, nothing in the section shall be deemed to authorize the Court to control the exercise of power reasonably and in good faith. Section 3 of the Indian Trust Act 1882 lays down that a trust is an obligation annexed to the ownership of the property and arising out of confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another or of another and the owner.

156. Regarding the argument that the power generating stations set up by the UPSEB were from the revenue generated by way of receipts from the consumers, we do not find any force for the reason that the UPSEB was generating revenue not only from its consumers, but a major part of the revenue came from subventions in the form of loans, subsidies and grants given by the State Government to it. Section 59 of the Supply Act of 1948 does not require and indicate that the generating stations have been funded only through the revenue received from the consumers.

157. Insofar as the rights of the people of the Greater Noida area to seek equitable supply of power is concerned, apparently there is no violation of their rights for the reason that the petitioner Company is the exclusive licensee for that area and as per the conditions of the licence, as well as agreement dated 15.11.1993, the petitioner Company has been asked to supply electricity at the pooled cost and for that reason only, there was a deliberation in the tripartite meeting held in May 1999 that the powers available from the generating stations to be set up by the petitioner Company, shall be purchased by the UPSEB and in lieu thereof it shall be provided the electricity at the pooled cost so that there is equitable supply of electricity to consumers of the Greater Noida area. Moreover, there was a privity of contract between the UPSEB and the power generating stations and the petitioner Company could not have been assigned the PPAs on that count also. There is neither any legal right nor equitable right in favour of the petitioner to draw electricity from the UPPCL without there being an

agreement between the parties. There is no duty cast upon the UPPCL to supply power to the petitioner Company, or to any entity, even if the entity has a distribution licence. The petitioner Company has a licence to supply electricity to the consumers of Greater Noida area, but correspondingly there is no duty upon the UPSEB, and now the UPPCL, to provide the benefits of the PPAs apart from what had been agreed to and imposed upon by the agreement dated 15.11.1993 in respect of supply electricity to the petitioner Company. Section 18 of the Supply Act of 1948 did not cast any statutory duty on the UPSEB to supply energy mainly because a person had a licence under the Act of 1910. A licence only enables the licensee to supply electricity but it does not create a right u/s 18 of the Supply Act of 1948 to acquire electricity from the UPSEB or the UPPCL. The UPSEB had been constituted only for the electrification in the State and the petitioner Company acquired the right to seek supply of electricity only on the basis of agreement dated 15.11.1993 and on that count, the Company cannot claim to have any right to be the successor of the UPSEB.

158. Besides, the PPAs, which are not capable of valuation, were never sold or transferred by the UPSEB or its successor, the UPPCL, to the petitioner Company. That apart, the UPPCL has not shown any undue preference in favour of other distribution companies for the reason that they are the Government companies and also its subsidiaries, whereas the petitioner Company has violated the terms of agreement and breached the undertaking given to the High Court for setting up the generating plant, apart from disobeying the orders of the UPERC.

159. Chapter V of the Supply Act of 1948 contains Sections 28 to 58. u/s 35 of the Supply Act of 1948, there is an obligation upon the UPSEB to supply electricity to a licensee owning generating station. As the petitioner Company does not own any generating station, it could not have been supplied the electricity. Thus, there is no discrimination whatsoever. Besides, if the preference has been prohibited in terms of Clause 8 of the licence issued to the UPPCL, it is to apply in the case of end user, namely, consumers. There is no discrimination in the case of consumers of the Greater Noida area, for, they are to be supplied the electricity by the petitioner Company at the rate not higher than the pooled cost of supply. u/s 39 of the Electricity Act of 2003, the U.P. Power Transmission Corporation Ltd. has been notified on 18.7.2007 by the State Government as the State Transmission Utility. Therefore, the argument that the UPPCL is a Transmission Utility is not sustainable. On the contrary, the UPPCL is conducting the licence business in terms of the licence granted to it.

160. Coming to the question of determination of load profile of power required for distribution to consumers of the Greater Noida area, it is the own stand of the petitioner Company that instead of calculating the exact entitlement of the petitioner Company, after laying down the principles and guidelines, the Court may direct the UPERC to make actual calculation of its entitlement. Thus, the UPERC being the expert body can determine the exact entitlement of consumers of the Greater Noida area for supply of electricity, if so (sic) in appropriate

application being limited by them as the end users, or on their behalf, on the basis of authorization.

161. Thus, in view of the aforesaid discussion, the prayer of the petitioner Company claiming to have the enforceable legal rights for the assignment of the PPAs held by the UPPCL, respondent No. 2, in its favour is declined and rejected.

162. Though there have been threadbare arguments by learned senior counsel for both sides on various other issues as well, which have been discussed hereinabove, but now the relief being limited essentially to seeking the assignment/allocation of the PPAs in favour of the petitioner Company, earlier held by the UPSEB, and now, its successor the UPPCL, that we have already rejected, we think it unnecessary to dwell upon them elaborately.

163. However, the one important aspect of the case that weighs in favour of the petitioner Company is that it is a public limited Company with 27% shares held by the Greater Noida Authority, a public body, with its Chairman being the ex-officio Chairman of the Company. Even though it may not be a distribution Company within the meaning of Clause 2(f) of the Power Sector Reforms (Transfer of Distribution Undertakings) Scheme, 2003, because no part of Undertaking of the UPPCL was transferred to it, nor is any equity share of the petitioner Company being held by the UPPCL, yet in view of the facts that the petitioner Company has spent about Rs. 275 Crores on transmission network; that it claims to have given profit to the tune of Rs. 200 Crores to the UPPCL and reduced the transmission loss; that it holds a valid distribution licence with no time limit prescribed therein; that the UPPCL, respondent No. 2, is said to have, under the Power Sector Reforms (Transfer of Distribution Undertakings) Scheme, 2003, transferred the business of transmission and supply of electricity to its subsidiaries, and also that the UPPCL is alleged to have granted franchisees to private companies (which is not denied on affidavit) and agreed to supply power at much lower rate than the pooled cost, we think it appropriate, particularly in the wake of incorporation of the petitioner Company as a public-private partnership venture, to direct the respondents to provide electricity supply to the extent of percentage of shares held by the Greater Noida Authority, at the pooled costs, provided that the parties shall enter into a mutual agreement on the terms and conditions to be set out by the UPERC. It would also be open for the parties to enter into arrangement in the same agreement by incorporating such terms and conditions which may facilitate the transfer of 23% or more of equity shares of the petitioner Company, in addition to 27% shares held by the Greater Noida Authority, in favour of the UPPCL so that in this arrangement of public-private partnership, the public bodies/authorities acquire 50% or more of equity shares of the Company with the Chairman of the Greater Noida Authority as its ex-officio Chairman in order to serve the public interest harmoniously and more effectively through the petitioner Company itself. The entire exercise shall be completed within a time frame of three months, during which period, the operation of the notice/letter dated 22.8.2008 shall remain in abeyance.

164. In case of agreement being arrived at between the parties to transfer 23% or more of equity shares of the petitioner Company in favour of the UPPCL, respondent No. 2, and that consequently, 50% or more of such shares are held by the public authorities, the supply of electricity to the petitioner Company at the pooled cost shall increase correspondingly and proportionately.

165. However, if the parties fail to arrive at the agreement, on the terms and conditions to be set out by the UPERC, the order as contained in the letter dated 22.8.2008 shall revive and become operative, and consequently, it would be open for the respondent-State or the UPERC, as the case may be, to revoke the licence of the petitioner Company and take over the supply of electricity to the Greater Noida area through its subsidiary supplying electricity in the western part of the State, subject to settling the issue of payment of the amount spent on establishing transmission network by the petitioner Company. In view of all the aforesaid discussion, while rejecting the prayer for assignment/allocation of the PPAs in favour of the petitioner Company, we dispose of the writ petition in terms of the directions given and liberty granted as hereinabove.