(2019) 03 KAR CK 0006

In the Karnataka High Court

Case No : Writ Appeal No. 23158, 23162, 23449, 23457, 22838, 22841, 22842, 23069, 23070, 23078, 23119, 23080, 23118, 23085, 23086, 23116, 23108, 23109, 23242, 23696, 23700, 23851, 23990, 23995, 24248, 24259, 25090, 26480, 28622, 53531, 39329 Of 2018

Renew Power Limited APPELLANT

Vs

Bangalore Electricity RESPONDENT

Date of Decision : 13-03-2019

Acts Referred:

Open Access Regulations, 2004 — Section 42(2), 42, 61, 61(b), 62, 64, 79(1), 86(1)(e), 181
General Clauses Act, 1897 — Section 14, 21
Electricity Act, 2003 — Section 178, 79((1), 79(1)(j), 111
Code Of Civil Procedure, 1908 — Order 47 Rule 1, Section 151
Open Access Regulations 2004 — Rule 11
Constitution Of India, 1950 — Article 5, 14, 12(6), 226, 227

Citation : (2019) 03 KAR CK 0006

Hon'ble Judges : S. Sujatha, J

Bench : Single Bench

Advocate : Aditya Sondhi, Kusum Ranganath, Shahbaaz Hussain, S.S.Naganand, S.Sriranga, M.C.Nagashree, Murugesh V. Charati, H.V.Devaraju, B.N.Prakash

Final Decision : Allowed

Judgement

1. These petitions involving similar and akin issues, have been considered together and are taken up for final disposal at this stage with the consent of the learned counsel appearing for the parties.

2. Facts of the case:

The petitioners have challenged the order dated 14.5.2018 (impugned order) passed by the Karnataka Electricity Regulatory Commission (KERC), Bengaluru under the provisions of the Electricity Act, 2003 ['Act' for short] and the KERC (Terms and Conditions for Open Access) Regulations, 2004, which deals with open access charges including wheeling and banking charges, transmission losses and cross subsidy surcharge of Renewable Energy [RE] projects commissioned between 01.04.2013 and 31.3.2018. The open access charges for RE projects commissioned between 01.04.2013 and 31.3.2018 were governed by two separate orders of the KERC. The order dated 4.7.2014 dealt with wind based as well as Mini hydel power plants and the order dated 18.8.2014 dealt with solar power plants. The wind/Mini hydel power plants under order dated 4.7.2014 were required to pay 5% wheeling charges of the injected energy. The banking charges were specified at 2% of the injected energy. The solar power generators as per the order dated 18.8.2014 were exempt from paying wheeling and banking charges and gross subsidy surcharge for a period of 10 years from the date of commissioning provided that their power plants were commissioned between 1.4.2013 and 31.3.2018. It appears that the petitioners have complied with the conditions in the orders dated 4.7.2014 and 18.8.2014 and commissioned their respective projects prior to 31.3.2018. However, KERC by the order impugned herein continued the exemption on the wheeling and banking charges to the solar projects commissioned on or earlier to 31.3.2017 and all the RE Projects [other than the captive generators] availing of the benefit of the Renewable Energy Certificate [REC], which have not yet completed ten years from the date of commercial operation as on 31.03.2018 are made liable to pay 25% of the normal transmission charges and/or wheeling charges and banking charges of two percent in kind. In case of wind/Mini hydel power projects commissioned during the period between 10.10.2013 and 3.9.2017, 25% of the normal transmission charges and/or wheeling charges have been levied. The line losses were to be exempted in kind. The banking charges were retained at 2% for projects commissioned between 10.10.2013 and 3.9.2017. The other applicable charges are liable to be levied in respect of wind projects as well. Being aggrieved by the order impugned, these petitions are filed.

3. Submissions on behalf of M/s. Renew Power Limited & others:-

The impugned order suffers from jurisdictional error being contrary to sections 42(2), 61 and 62 of the Act, Rule 11 of the Open Access Regulations 2004 ['OA Regulations' for short] as well as the judgment of the Hon'ble Apex Court in PTC India limited Vs Central Electricity Regulatory Commission(2010)4 SCC 603. It was contended that the respondent KERC has no jurisdiction to interfere with the settled contract under the provisions of the Act, Regulations 2004 and in terms of the contract entered into between the parties. The KERC has not traced the power to re-determine the tariff to any provision under the Act. Settled contract cannot be unsettled except by way of fresh regulation in exercise of the legislative function of the state commission.

The statutory contracts have to be read with the Act and the regulations governing the statutory contract. Any amendments to statutory contract have to be in conformity with the parent statute and the specific regulations that govern the statutory contract in question. A generic order made applicable to multiple projects may only be revised by resorting to a regulation under section 181 of the Act and not under the quasi judicial functions of the KERC.

It was submitted that the amendment can only be carried out at the instance of one of the parties to the contract which is admittedly not the case herein. Neither the KERC nor the public notice and the discussion paper issued prior to the impugned order do trace the power of the commission to the amendment clause of the contract and the same is an after thought.

The KERC cannot revisit the open access charges determined in a settled contract by belatedly resorting to amendment clause in the contract. KERC has reaffirmed the exemption granted in its order dated 18.8.2014 repeatedly in the orders dated 30.7.2015 and 12.4.2017 which were applicable to various control periods from 1.4.2013 to 31.3.2018. Achieving the desired objective and the solar as well as wind power generation in the State of Karnataka has been increased cannot be treated as a ground for change in the circumstances to revisit the exemptions granted to solar and wind generators in the orders dated 10.10.2013, 4.7.2014, 18.8.2014, 30.7.2015 and 12.4.2017.

The OA regulations framed in the present case under Sections 42 and 62 of the Act are in exercise of delegated legislative powers under Sections 42, 61, 62 and 181 of the Act. The KERC cannot re-open the tariff determination made under the order dated 18.8.2014 without there being corresponding change in the regulations through legislative amendments or by way of introduction of a fresh regulation under Section 181 of the Act. It was argued that the tariff order in question traces its source to section 86(1)(e) of the Act which mandates promotion of cogeneration and generation of power from renewable sources of energy and therefore, the order granting exemption from payment of OA charges was essential for the development of renewable energy generation and therefore is not a concession that can be withdrawn unilaterally.

The exemption granted is not in the nature of state largesse. The exemption granted by the order dated 10.10.2013 has been extended for a specific period of ten years by the order dated 18.08.2014, after taking into account a) the debt repayment period of ten years. b) High cost of solar power generation and c) the requirement for transparency and clarity in revenue for the next ten years. The KERC after applying its mind to the issues and passing OA regulations read with sections 61, 62, 64 and 86(1)(e) of the Act cannot now revisit the issues by citing subsequent changes in circumstances such change in circumstances can only be applied to projects which are set up after 31.03.2018 and not for projects commissioned prior to 31.03.2018 which were commissioned based on the assurance/promise made by the State Government in as much as the exemption granted relating to tariff and banking charges in terms of the orders as well as the order of the KERC dated 18.08.2014.

As regards the alternative remedy of appeal available under the Act, it was contended that the KERC has no jurisdiction to interfere with the settled contracts under the provisions of the Act which are statutory contracts. OA Regulations and/or the terms of the contracts entered into between the parties, the settled contract between the parties which are wheeling and banking agreement in this case, do not permit either a re-determination, revision or review of the generic OA charges determined in accordance with applicable tariff orders and the OA Regulations, 2004. The order impugned passed without jurisdiction is amenable to writ jurisdiction. Reliance was placed on the judgment of the Hon'ble Apex Court in PTC India Private Limited supra, to substantiate their arguments.

4. Submission on behalf of M/s Embassy Energy Private Limited:-

The Respondent No.1 convened a Global Investors Meet (Invest Karnataka 2016) and issued public policy document on 05.02.2016. This global investors meet was exclusive and focus was on the energy development through alternative source, which contains the foreword of the then Hon'ble Minister of the Energy providing the aim of achieving the maximum solar/wind/mini hydel energy. Under foreword of Additional Chief Secretary, Government of Karnataka inviting additional active investment on solar energy providing with the key high lights revising the minimum target as 2000MW in solar power, planning to achieve 6000 MW by 2021 with no limits or caps for projects under REC mechanism. Industry friendly policy regulation therein assured no cross subsidy surcharge for third party, no transmission and wheeling charges, 100% banking for open access projects. Applications were made by the petitioner for submitting proposals for solar power plants of 100 MW. Government by order dated 28.03.2016 permitted the setting up of the solar power plant.

Petitioner submitted performance of security with Government of Karnataka on 16.09.2017. Tentative evacuation scheme and regular evacuation scheme were made on 24.10.2016 and 28.03.2017 respectively. Wheeling and banking agreement was entered into by the petitioner with KPTCL on 19.12.2017 commissioning of 40MW out of 100MW of solar power plant started on 23.01.2018. Commission certificate for the balance 60MW was given on 28.02.2018.

Referring to these events and the list of dates, it was argued that the KERC had granted ten years tariff holiday on banking, wheeling and cross subsidy surcharge for all solar plant commissioned between 01.04.2013 and 31.03.2018. The State Government has issued a public policy document of energy Invest Karnataka 2016, GIM, declaring and re-iterating the availability of these benefits to those invest in solar power plant industry in Karnataka. It is based on the promises and assurances of the KERC and the Government of Karnataka, the petitioner initiated the process of filing the applications for setting up of solar plants and after carrying out series of steps, carried out commissioning of the plants on 23.01.2018, thus coming within the time period mandated by the KERC and the Government of Karnataka. The discussion paper initiated by the KERC on 10.01.2018 on wheeling and banking charges re-iterates its earlier order dated

04.07.2014 granting the benefit for the period of ten years for such projects commissioned on or before 31.03.2018. The reasons stated for revisiting the earlier decisions that the solar power project capacity has increased to 1698 MW as on the November 2017 and by the end of the financial year 2019, it anticipated commissioning of 6000 MW would call for revisiting the concession granted post 31.03.2017 is without jurisdiction, arbitrary and discriminatory.

Nextly, it was argued that, a] State action withdrawing the promise midway without there being a supervening public interest necessitating such withdrawal calls for interference in the judicial review by this court. b] Agreement or contract in question is not a private contract between the private parties but a statutory contract. Arbitrary classification made by the impugned order continuing the benefit for the solar plants commissioned between 01.04.2013 and 31.03.2017 and withdrawing the benefits for such plants commissioned post 01.04.2017 is unreasonable, arbitrary and hit by Article 14 of Constitution of India.

The reasons assigned by the KERC that the petitioners are making super profit and therefore, the concession requires to be withdrawn is legally unsustainable. On the contrary, the records show a down word decline of an unimaginable 98% down fall as regards the solar power projects are concerned.

Regarding alternative remedy it was argued that the order impugned being violative of Article 14 of the Constitution and is passed without jurisdiction is amenable to the writ jurisdiction under Articles 226 and 227 of the Constitution of India.

5. Submissions on behalf of M/s. Matrix Wind Energy Private Limited:

It was argued that the commission lacks jurisdiction to amend / modify the wheeling and banking charges once determined in respect of renewable energy projects. The transmission and wheeling charges are amenable to section 61(b) of the Act and the said power is exercised by the commission as a regulator and not as an adjudicator, exercising the statutory power wheeling and banking charges were fixed/determined payable by renewable power plant established up to a particular period of ten years. Commission cannot suo-moto exercise the powers to revise / amend the wheeling and banking charges fixed in terms of the statutory contract on the assurance/ promise made to provide an exemption to the petitioner, no such suo-moto power is vested with the commission.

Reference was made to Doctrine of promissory estoppel, legitimate expectation and the discussion paper in as much as revising the order dated 18.08.2014 to contend that the order impugned is arbitrary and capricious and passed without jurisdiction.

It was argued that surprisingly, a sub categorization was made to discriminate between the RE Generators commissioned before 31.03.2017 and post 31.03.2017. Order 47 Rule 1 of CPC was also referred to submit that no review of the order dated 18.08.2014 is permissible.

As regards alternative remedy, it was argued that there being breach of fundamental rights and the promise/assurance made, order impugned lacks jurisdiction, as such there is no bar to exercise the writ jurisdiction under Articles 226 and 227 of the Constitution.

Inherent powers of the commission are saved to make orders which are necessary to secure the ends of justice and to prevent the abuse of the process of the commissions. Reference was made to the judgment of the Hon'ble Apex Court in the case of Gujarat Urja Vikas Nigam Limited Vs. Solar Semi Conductor Power company (India Private Limited) and another (2017) 16 SCC 498.

6. Submissions on behalf of M/s. Narayanpur power Company Private Limited:

It was argued that existence of the judicial member is sine quo non for the Tribunal passing quasi judicial orders. Placing reliance on the judgment of the Hon'ble Apex Court in the case of State of Gujarat and others Vs. Utility Users Welfare Association and others (2018)6 SCC 21, it was submitted that if the Tribunals are to be given judicial power, they must possess judicial independency and capacity associated with the courts, Members of judiciary should be the presiding officer/member of such Tribunal. Further, referring to the clarificatory orders of the Hon'ble Apex Court dated 10.09.2018, it was submitted that the clarificatory order has to be understood in the light of the series of judgments of the Hon'ble Apex Court. The clarificatory order reads as under:

"Application[s] for impleadment /intervention is/are dismissed

We are of the view that there is no ambiguity in the Judgment and till such time a reconstitution of the Tribunal does not take place arising from a retirement of a Member from the legal field, the existing Tribunal will decide all the cases.

The application/s for clarification/direction is/are disposed of.

In view of the above, the misc. petition is disposed of."

The said clarificatory order applies to the transfer case MA No.2217/2018 in TC (C No.137/2015) and not to the entire batch of cases. In any event, the ratio laid down by the Hon'ble Apex Court in the State of Gujarat supra, is not disturbed or in other words, the clarificatory order of the Hon'ble Apex Court would not be of any avail to the respondents. The contract would not confer the jurisdiction on the commission or delegate to issue a revising / modification order in respect of the wheeling and banking charges fixed with retrospective effect. No such power is vested with the commission.

7. The submissions made on behalf of M/s. Awada Sustainable Energy Private Limited:

Order impugned has been passed by the commission against the principles of natural justice without issuing any individual notice, the general and blanket order has been passed in violation of the principles of natural justice. Order impugned seeks to undo the settled contract between the parties. The concessional charges/exemption extended in the order dated 18.08.2014, issued cannot be withdrawn or modified much against the principles of legitimate expectation and promissory estoppel. The order impugned is in utter defiance and disregard to the doctrine of promissory estoppel. To promote solar power generation providing a level playing field for such generation vis-à-vis the solar power being sold by ESCOM of the State to such private parties, it was envisaged to achieve the same by affording the exemption/concession from payment of wheeling and banking charges etc., However, in utter disregard, the impugned order has been passed which is violative of Article 14 of the Constitution of India. In view of the order impugned being illegal, without jurisdiction, violative of the principles of natural justice and also hit by Article 14 of the Constitution of India, invoking the extraordinary writ jurisdiction of this Court is not unjustifiable and writ petitions requires to be adjudicated on merits, not withstanding the alternative remedy of appeal available under the Act.

The other petitioners have adopted the arguments as aforesaid.

8. Submissions on behalf of the Commission - KERC and Electricity Supply Companies [ESCOMS].

Primarily, it was argued that the writ petitions are not maintainable in view of the alternative remedy of the appeal available under the Act. Placing reliance on the judgment of the Hon'ble Apex Court in Civil Appeal No.879/2019 disposed of on 21.01.2019 in the matter of Reliance Infrastructure Limited Vs. State of Maharashtra Civil Appeal No.879/2019 (D.D. Jan 21, 2019), it was argued that in exercise of power of judicial review under Article 226 of the Constitution arising out of orders passed by the specialized Tribunal like Electricity Regulatory Commission, the Hon'ble court would have to be circumspect in examining the merits of the decision particularly relating to fixation of tariff and ought not to interfere unless the matter is manifestly unreasonable, arbitrary and based on extraneous consideration. The petitioners have not pleaded/demonstrated such infirmity in the order of the commission and therefore, the petitions are liable to be dismissed in limine.

It was argued that the wheeling and banking agreement itself provides the alteration/modification of the terms of the contract under Article 12.6. Article 5 of the Wheeling and Banking agreement clearly states that the petitioners are liable to pay the charges as determined by the commission in its orders passed from time to time. Standard format of the wheeling and banking agreement being accepted by the petitioner and respondents, the petitioners are therefore precluded from contending that the contracts could not have been modified. The provisions of the Act, Regulation, 2004 and Wheeling and Banking agreements empowers the commission to determine and revise the wheeling charges, banking charges and cross subsidy charges. Hence, passing a regulation under Section 181 of the Act is not necessary as the Commission is empowered under the parent Act and the regulation to determine the tariff and the period, the principles of legitimate expectation and promissory estoppel are not applicable in the present context when parties are governed by the contract. It is always open to the regulator to take into consideration the changed circumstances which necessitates change in the regulatory frame work. Concessions that were granted earlier were required at that time however the commission has noted that in view of the change in the circumstances warranting the imposition of wheeling charges of 25% and banking charges passed the orders impugned.

Reference was made to section 21 of the General Clauses Act, 1897 to argue that the power to issue an order includes the power to alter, amend, vary or rescind the order. The orders dated 04.07.2014 and 18.07.2014 as well as the order impugned have been issued in furtherance of such powers. The impugned order is prospective in nature and has not taken away the concession / promotional measures granted in the orders dated 04.07.2014 and 18.08.2014 respectively. The commission has granted promotional measure and concessional charges in orders dated 04.07.2014 and 18.08.2014 in view of the short fall in energy in the State and the country. However, now in view of the changed circumstances, energy generation is surplus in the State. Therefore, the commission came to the opinion that change in the demand and supply position and the significant reduction in cost of generation has necessitated reconsideration of whether concession for wheeling and banking ought to be given. After thorough analysis, the commission has come to the conclusion that the concessions granted earlier are now no longer required to be granted. RE Generators are making super profits availing the concession granted in the orders dated 04.07.2014 and 18.08.2014, which additional cost is ultimately being borne by the consumers of the State.

Drawing the attention of the Court to the clarificatory order passed on 10.09.2018 in the case of State of Gujarat supra, argued that the Hon'ble Apex Court has observed that till such time a reconstitution of the Tribunal does not takes place arising from a retirement of a member from the legal field, the existing Tribunal will decide all the cases, the said decision is applicable to the commission as the question before the Hon'ble Apex court was whether requirement of non-judicial member was legal. Hence, the orders passed by the commission are in accordance with law and have been passed in exercise of the jurisdiction vested in it. The order impugned cannot be construed as being passed in exercise of the power of review.

It was argued that in terms of the order dated 30.07.2015 and the order dated 12.04.2017 passed by the Commission, the capital cost was considered at Rs.440 lakhs for MW for the purpose of determination of tariff per mega watts solar PV power plants. The commission in its order dated 23.03.2016 has determined the bench mark capital cost norms for solar photo volaptic projects for 2016-17 at Rs.530.02 lakhs per MW as against the Rs.605.85 lakhs per MW determined for 2015-16, considering these bench mark norms, the commission in its discussion paper dated 09.02.2017 had proposed to adopt Rs.463.76 lakhs per MW, a capital cost for 2017-18. The capital cost has reduced from year to year.

9. Submissions on behalf the State:

The order impugned being appealable, the writ petition is not maintainable. The Government of Karnataka has allotted the projects to the petitioners vide Government order dated 28.03.2016 and 08.09.2017. The government orders make it clear that the petitioners are governed by the solar policy 2014 to 2021. Clause 13 of Solar Policy makes it clear that the wheeling, banking and cross subsidy charges shall be applicable as determined by the KERC from time to time. Brochures furnished by the petitioners Karnataka 2016 Global Investors Meet 3 to 5, 2016 is not a solar policy, the said booklet/brochures have been issued by the Department of the Industries and Commerce which contains the information regarding solar policy. Solar policy 2014-21 issued on 22.05.2014 is still in operation. By the impugned order dated 14.05.2018 commission has withdrawn the exemption on wheeling and banking charges based on the public interest and is not arbitrary. The doctrine of promissory estoppel is not attracted in the sphere of legislative power since the fixing of tariff of wheeling and banking charges is a consequence of the legislative measure.

10. It is apt to refer to relevant provisions of the Act:-

Section 2(76): 'Wheeling' means the operation whereby the distribution system and associated facilitates of a transmission licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62.

Section 61

"Tariff regulations - The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of the tariff, and in doing so, shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good

performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi-year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;]

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity

(Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

"Section 62. (Determination of tariff): --

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for - (a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the

purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, exception respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

"64. Procedure for tariff order: ---

(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order."

"Section 86. (Functions of State Commission): ---

(1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and

(k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any of the following matters, namely :-.

(i) promotion of competition, efficiency and economy in activities of the electricity industry;

(ii) promotion of investment in electricity industry;

(iii) reorganization and restructuring of electricity industry in the State;

(iv) matters concerning generation, transmission , distribution and trading of electricity or any other matter referred to the State Commission by that Government.

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3."

181. Powers of State Commissions to make regulations: ---

(1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carryout the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely: -

xxxxxx

(3) All regulations made by the State Commission under this Act shall be subject to the condition of previous publication.

11. Regulation No.11 of KERC (TQC for open Access) Regulations, 2004.

"11. Saving of inherent power of the Commission:

(1) Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission.

(2) Nothing in these Regulations shall bar the Commission from adopting a procedure which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.

(3) Nothing in these Regulations shall, expressly or impliedly, bar the Commission from dealing with any matter or exercising any power under the Act for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit.

(4) In the exercise of its powers under the Act and in the discharge of its functions, the Commission shall as circumstances may permit, be guided by the principles of natural justice".

12. Order dated 18.08.2014 (Solar) :

On analyzing the discussion paper, suggestions/ comments of Stakeholders on the discussion paper, promotion of solar power, High Cost of solar power projects, competitive rates of solar power, Commission KERC has arrived at a decision and the relevant portion of the order reads thus:

"In exercise of the powers conferred under clause 11 of the KERC [Terms and Conditions of open access] Regulations, 2004 as amended from time to time and all other powers enabling in this behalf, the Commission hereby orders as follows:

1. All solar power generators in the State achieving commercial operation date [CoD] between 1st April 2013 and 31st March 2018 and selling power to consumers within the State on open access or wheeling shall be exempted form payment of wheeling and banking charges and cross subsidy surcharge for a period of ten years from the date of commissioning. This is also applicable for captive solar power plants for self-consumption within the State.

2. Captive solar power plants opting for Renewable Energy Certificates shall pay the normal wheeling, banking and other charges as specified in the Commission's Order dated 9th October 2013."

13. Order dated 04.07.2014 (Wind and Mini- hydel):

(1) The Wheeling charges shall be 5% of the injected energy for wind, mini-hydel, Bagasse based co-generation plants and Biomass based projects;

(2) The banking charges shall be 2% of the injected energy and shall be applicable for wind and mini-hydel projects only;

14. Brochure of the Global Investors Meet:

The Brochure of the Global Investors Meet February 3-5/2016 held at Bengaluru Palace, Bengaluru provides the key highlights for the Karnataka Solar Policy 2014-2021 which is quoted under:

? "Government of Karnataka [GoK] on 22nd May 2014 revised its existing State Solar Power Policy with minimum target of 2,000 MW.

? MNRE has revised this target to 6,000 MW to achieve national target of 175 GW.

? Planning to achieve 6,000 MW [in phased manner] by 2021

? Grid connected projects - 3,600 MW

? Projects under REC mechanism, captive/group captive, IPPs - No limit

? Projects under bundled power

? Projects selected by competitive bidding [capacity > 3MW]

? Grid connected rooftop projects - 2,400 MW by 2020."

Regarding renewable energy, solar power, it is assured that industry friendly policies and regulations.

- No cross subsidy surcharge

- No transmission and wheeling charges

- 100% banking for open access projects. Shelf of projects regarding renewable energy is stated as under:

"Solar Power: [as per Solar Policy 2014-21]

? Ultra Mega Solar Parks having capacity of 500 MW or above are planned as per MNRE guidelines

? Solar projects can be installed under IPP model. There are no wheeling and banking charges & cross subsidy for the projects commissioned before 2018

? Government of Karnataka encourages solar parks with area not less than 100 acres through a viable model in backwards districts of Karnataka

? Karnataka offers the best policy and tariff in net metering in the country; promotional measures will be taken for increasing awareness about the advantages of net metering within residential, community, institutional, industrial, and commercial establishments

? A new policy for promoting gross metering for commercial and industrial establishments will be published to tap solar power potential.

Wind power:

? Investors are encouraged to set up wind power plants as per the prevailing policies of Karnataka.

? Re-powering of old wind mills having capacity less than 500 KW will be taken up in the State in a pro-active manner for enhancing the existing capacity. In this regard, discussions with investors will be made to frame a new policy document for enhancing wind power potential in the State."

Similar for Mini-hydel project also.

15. Amendment Clause in PPA:

Clause 12.6 of the Wheeling and Banking agreement reads thus:

"12.6 Amendments:

This Agreement shall not be amended, changed, altered, or modified except by a written instrument duly executed by the authorized representatives of both the Parties and approved by the Commission. However, the Commission shall be entitled to modify/alter the conditions of this contract [agreement] at the instance of either of the parties, or Suomotu, after giving an opportunity of hearing to all the parties."

16. Clause 5.1 of PPA:

"The Company shall pay all the charges to the Corporation/GESCOM/BESCOM for using their network as per the applicable KERC Regulations/Orders issued from time to time............"

17. Discussion paper - Relevant portion:

In the discussion paper on wheeling and banking

charges for renewable power projects, relevant para 11 reads thus:

"11. Considering that the Orders dated 04.07.2014 and 08.07.2014 relating to wheeling and banking charges are valid upto 31.03.2018, there is a need to take a decision on the wheeling and banking charges that would be applicable for both solar and non-solar power projects under non-REC route from 01.04.2018, onwards. Therefore, the Commission is issuing this Discussion Paper with the proposal for revising the wheeling and banking charges, as discussed in the subsequent paragraphs."

18. Order Dated 14.05.2018:

Wheeling and Banking Charges for Renewable Power Projects has been revised in terms of the order of the KERC dated 14.05.2018 [impugned order]. The relevant paragraphs of the said order is quoted herein for ready reference:

"[1] Subject to the terms stated in Paragraph-2 below of this Order, all Renewable Energy Projects [other than the Captive Generators availing of the benefit of the Renewable Energy Certificate (REC)], which have not yet completed 10 [ten] years from the date of commercial operation, as on 31.03.2018, shall be:

[a] liable to pay 25% [twenty five percent] of the normal Transmission Charges and/or Wheeling Charges, payable in cash, as determined by the Commission in its Tariff Orders, issued from time-to-time, transmitting/wheeling electricity using the network of the Transmission Licensee/Distribution Licensee, as the case may be; and,

[b] xxxxx

[c] xxxxx

[2] [a] The Solar Power Projects commissioned on or earlier to 31.03.2017 shall be continued with the existing concessional Charges.

[b] For the Wind Power Projects commissioned during the period between 10.10.2013 and 03.09.2017, 25% [twenty-five percent] of the normal Transmission Charges and/or Wheeling Charges, in cash, alone shall be levied, exempting the levy of the line loss, in kind;"

(c) The Solar Power Projects commissioned on or earlier to 31.03.2017 shall be continued with the existing concessional charges:

For the Wind Power Projects commissioned during the period between 10.10.2013 and 03.09.2017, 25% (twenty five percent) of the normal Transmission Charges and/or Wheeling charges, in cash, alone shall be levied, exempting the levy of the line loss, in kind.

19. In the background as aforesaid, the points that arise for consideration before this Court are:

1. Whether the writ petitions are maintainable circumventing the alternative remedy of appeal provided under Section 111 of the Act?

2. Whether the KERC is estopped from withdrawing the exemption granted on the wheeling and banking charges before the completion of term period by virtue of doctrine of promissory estoppel?

3. Whether the order impugned suffers from discrimination and thus hit by Article 14 of the Constitution of India?

4. Whether existence of judicial member is sine qua non for the Tribunal to pass the orders?

5. Whether in the absence of the Regulation framed under Section 181 of the Act, the KERC is empowered to interfere or revise the wheeling and banking charges with the existing contractual relationship between the regulated entities?

Re: Point No.1

20. In Karnataka Power Transmission Corporation Ltd. Vs. R.K. Powergen Pvt. Ltd. ILR 2005 KAR 5468 the Hon'ble Apex Court at paras 14 and 15 has observed thus:

"14. The next question which requires consideration is assuming that this Court can entertain the Writ Petition notwithstanding there being an alternate and efficacious remedy by way of an appeal before the Tribunal, the Courts are empowered or for that matter have enough machinery to deal with a situation like this. The Apex Court in the case of W.B. Electricity Regulatory Commission v. Cesc Ltd., (Supra) has observed as follows:

"The Commission constituted under Section 17 of the 1998 Act is an expert body and the determination of tariff which has to be made by the Commission involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management, It would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that the various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first appellate stage also. The Central Electricity Regulatory Commission which has a judicial member as also a number of other members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealings with this type of factual and technical matters. Therefore, it is recommended that the appellate power against an order of the State Commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body."

It is brought to my notice that a Appellate Tribunal as contemplated under Section 111 of the Act has already been formed and is functioning. A notification to that effect is also produced. It is also brought to my notice that all three members of the Appellate Tribunal have already been appointed and assumed the office on 13.5.2005. In the circumstances the question of entertaining this petition when there is an alternate and efficacious remedy for redressal of the petitioner's grievance is available there is no reason as to why this Court should exercise its powers under Articles 226 and 227 of the Constitution and deal with the technical matter. In my considered view the grievance of the petitioner should be decided by the Appellate Tribunal consisting of experts.

15. Another reason as to why this Writ Petition cannot be entertained is because, as stated in the body of the Writ Petition itself, since there is no appellate Tribunal as yet formed, the present Writ Petition is filed. But however during this interregnum, the Appellate Tribunal has already come into effect and is functioning."

The said judgment was rendered in the context of the company filing the writ petition aggrieved by the termination of the power purchase agreement wherein the content of the writ petition disclosed that no appellate Tribunal was constituted, however during the pendency of the writ petition, the appellate Tribunal having been formed and started functioning this court relegated the generator company to the appellate jurisdiction.

21. In Whirlpool Corporation vs. Registrar of Trade Marks Mumbai and others Civil Appeal No.5201/1998 (D.D.26.10.98), the Hon'ble Apex Court at paras.15 and 20 has held thus:

"15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

20. Much water has since flown beneath the bridge, but there has been no

corrosive effect on these decisions which though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a Writ Petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the Writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

22. Thus, it is clear that the self imposed restrictions of alternative remedy as a bar for entertaining writ petition is not applicable where the orders or proceedings are without jurisdiction or where there has been a violation of the principle of natural justice or the vires of the Act is challenged or for enforcement of fundamental rights. Moreover, it is the discretion of the court to entertain or not. Considering the issue of wider magnitude involved coming within the exception clause of entertaining the writ petitions despite the availability of the alternative remedy, this Court finds it appropriate to entertain the writ petition and to adjudicate the matter on merits.

Re: Point No.2

23. The order dated 18.08.2014 of the KERC Broachers of the Invest Karnataka 2016 as well as the subsequent orders dated 30.07.2015 and 12.04.2017 of the KERC indicates the promise/assurance made by the KERC and the Government of Karnataka inviting the entrepreneurs/investors across the globe specifying the exemption/concession on the wheeling and banking charges with reference to solar projects/wind projects/mini hydel projects.

Much reliance is placed by the KERC on the agreement clause at 12.6 which deals with the amendment. The agreements/ contract in question is not a mere private contract between private parties. The State through its instrumentality viz., the KERC has entered into a contract in exercise of its statutory powers under the Act which partakes the power of statutory contract. The contract with promises/assurances stands on a different footing from the statutory contract without such assurances/promises. The statutory agreement incorporates the earlier orders granting exemption and concession for a period of ten years from the commissioning date through all those projects commissioned before 31.3.2018. The statutory contract is ameanable to doctrine of promissory estoppel. The Hon'ble Apex Court in the case of Pawan Alloys & Casting Private Limited Vs. U.P. State Electricity Board and others((1997)7 SCC page 251) held that even though the companies/appellants have succeeded in convincing the Court that the earlier notifications contained a clear promise and representation by the Board to the prospective new industrialists that once they established their industries in the region within the territorial limits of the operation of the Board, they would be assured 10% rebate on the total bills regarding consumption of electricity by their industries for a period of three years from the initial supply of electric power to their concerns, the appellants will not be enable to enforce the equity by way of promissory estoppel against the expiry of three years as available to the appellants concerned. It is also held that even if such withdrawal of development rebate prior to three years is not based on any overriding public interest, if it is shown that by such premature withdrawal the appellant promises would be restored to status quo ante and would be placed in the same position in which they were prior to the grant of such rebate by earlier notifications the appellants would not be entitled to succeed. The relevant passages of Pawan Alloys is extracted hereunder:

" 31. In the light of this settled legal position we, therefore, hold that even though the appellants have succeeded in convincing us that the earlier three notifications dated 29th October 1982, 13th July 1984 and 28th January 1986, did contain a clear promise and representation by the Board to the prospective new industrialists that once they established their industries in the region within the territorial limits of the operation of the Board, they would be assured 10% rebate on the total bills regarding consumption of electricity by their industries for a period of three years from the initial supply of electric power to their concerns, the appellants will not be able to enforce the equity by way of promissory estoppel against the Board if it is shown by the Board that public interest required it to withdraw this rebate even prior to the expiry of three years as available to the appellants concerned. It has also to be held that even if such withdrawal of development rebate prior to three years is not based on any overriding public interest, if it is shown that by such premature withdrawal the appellant-promisees would be restored to status quo ante and would be placed in the same position in which they were prior to the grant of such rebate by earlier notifications the appellants would not be entitled to succeed. We, therefore, now proceed to examine these twin aspects of the controversy.

35. Under these circumstances when no public interest was sought to be pressed in service by the Board for withdrawal of this incentive rebate, as seen earlier, the equity which had arisen in favour of the appellants remained untouched and undisturbed by any overwhelming and superior equity in favour of the Board entitling it to withdraw this development rebate in a premature manner leaving these promisees high and dry before the requisite period of three years earlier guaranteed to them by way of development rebate had got exhausted. This takes us to the consideration of the second aspect of the matter.

43. In the view of the High Court despite the equity by way of promissory estoppel being available to the appellants against the Board, as the appellants themselves had agreed by entering into written agreements and contracts with the Board when they took electric connections for their industries, that the Board had power to change the rate schedules from time to time and to revise them, the appellants were barred from challenging the impugned notification. Now it must be kept in view that as per the incentives offered to the new industries the Board had promised these new industrialists that for three years from the date on which they took electric supply for the first time for their industries they would be given 10% rebate on the total bill of electricity consumption charges for their industries. It is not in dispute that before electric supply could be made

available to these new industries who would be new consumers to be enrolled by the Board these consumers had to enter into standard agreements. Such agreements had to be signed and entered into by all the prospective consumers whether they were covered by any incentive scheme or not. It is also an admitted position that all the appellants while taking electric connections for the first time for their new industries established by them in the region relying upon the incentives offered by the Board, entered into such written agreements in standard forms. The relevant clauses of these agreements on which strong reliance was placed by the High Court of non-suiting the appellants, deserve to be extracted in extenso at this stage :

"7. (a). The consumer shall pay for the supply of electric energy at the rates enforced by the supplier from time to time as may be applicable to the consumer.

(b) The Rate Schedule applicable to the consumer at the time of execution of this agreement is annexed hereto as Annexure-2.

(c) The Rate Schedule above mentioned, may, at the discretion of the supplier, be revised by the supplier from time to time and in the case of revision, the Rate Schedule so revised shall be applicable to the consumer."

According to the High Court once the consumers agreed to the authority of the Board to revise earlier rate schedule which was existing at the time of the agreement and as item 8 was a part and parcel of the said rate schedule implicit in Clause 7(c) was the agreement by the appellant-consumers that the Board will be able to tinker with or even wholly withdraw the development rebate earlier made available as per the said item 8 of the rate schedule.

51. It is difficult to appreciate how the High Court could persuade itself to hold in the light of Clause 7(c) that the appellants while signing such agreements for taking electricity supply for the first time for their new industries as if by sidewind agreed of give up their right to claim development rebate by handing over on a platter an absolute right to the Board to totally withdraw such development rebate at any time it liked before the three years' period, for which incentive was meant to be guaranteed, would have expired. On the express language of Clause 7(a), (b) and (c) such a conclusion is impossible to be arrived at.

54. It would be totally absurd and incongruous to suggest on behalf of the Board that on the one hand it guaranteed to the new industrial units for a period of three years from the date of commencement of supply 10% development rebate of the total amount of the bill and on the other hand moment such supply started pursuant to the written agreement the very incentive could be withdrawn by it from its inception as new industrial unit had to sign a written agreement containing Clause 7 (a), (b) and (c). If that submission on behalf of the Board which appealed to the High Court is accepted a most incongruous, unreasonable and absurd result would follow. It can then be said that the Board on the one hand had given incentive to new industries by guaranteeing development rebate

of 10% on the total bill of consumption of electricity for a period of three years from the date of commencement of supply but from the very inception of that period the Board on the other hand as per the very agreement with the promisee was enabled to immediately withdraw the very same development rebate in exercise of its contractual powers as per clause 7(c) of that very agreement. If that happens the Board would be giving on the one hand incentive to new industries by way of development rebate of 10% and by another hand would immediately and almost simultaneously be withdrawing the said incentive by pinning down the consumer to the terms of the agreement as found at clause 7(a), (b) and (c). This would result in a total exercise in futility. The incentive development rebate scheme would in such an eventuality be still-born. It is also easy to visualize that a new industrial unit which spends large amounts for establishing its infrastructure and gets lured in the light of the representation held out by the Board and establishes its plant and machinery in the new unit, would not simultaneously and voluntarily agree by signing such an agreement with the Board to give up the very same benefit of incentive by permitting the latter to withdraw it at any time it likes. That would be doing violence to common sense and business approach of an ordinarily prudent businessman. No businessman in his senses would ever voluntarily to such an absurd, incongruous and inconsistent predicament.

62. As a result of the aforesaid discussion on these points the conclusion becomes inevitable that the appellants are entitled to succeed. It must be held that the impugned notification of 31st July 1986 will have no adverse effect on the right of the appellant-new industries to get the development rebate of 10% for the unexpired period of three years from the respective dates of commencement of electricity supply at their units from the Board with effect from 1st August 1986 onwards till the entire three years period for each of them got exhausted. This result logically follows for the appellants who have admittedly entered into supply agreements with the Board as new industries prior to 1st August 1986. However those appellants who entered into such agreement after 1st August 1986 cannot get benefit of development rebate any longer after 1st August 1986. This conclusion of ours pertains to the question which is no longer res integra. It is already so held by this Court in S.L.P. (C) No. 11906 of 1994 and others decided by a Bench of this Court consisting of A.M. Ahmadi, CJ. (as His Lordship then was) and S.P. Bharucha, J., in the case of Hotz Hotel Pvt. Ltd. Etc. Etc./Vaidya Ply Board & Anr. v. U.P.S.E.B. & Anr. Etc. Etc. on 3rd October 1994. We find that the appellant in Civil Appeal No. 1713 of 1991 executed agreement with the Board for the first time on 5th May 1987. Similarly appellant in Civil Appeal No. 3534 of 1991 executed agreement with the Board for the first time after 1.8.1986. These appellants, therefore, will not be entitled to get out of the sweep of the impugned notification. These appeals will, therefore, have to be dismissed."

24. In the present set of facts, it is not in dispute that as per the exemption offered to the RE plants the KERC had promised the petitioners that for 10 years

from the date on which they commissioned the solar projects, they would be exempted from wheeling and banking charges. Concession of tariff was granted with respect to wind/Mini hydel projects.

25. The statutory contract has been signed and entered with the State through its instrumentality, the KERC. It would not be justifiable on behalf of the Commission that on guarantying the exemption/concession of wheeling and banking charges to the new RE projects who have commissioned the said projects on or before 31.3.18 and on the other hand, to withdraw the said exemption based on the agreement clause. A new solar/wind/mini hydel project unit which spends huge amounts for establishing its infrastructure in view of the promise/assurance made by the Commission and after certain period to withdraw the said exemption subcategorizing the projects who invested and commissioned before 31.3.2017 and after 31.3.2017 would be incongruous and hit by Article 14 of the Constitution and the principles of promissory estoppel. In this context, the objections filed by the KERC do not establish any supervening public interest that prevailed to withdraw the exemption even prior to the 10 years period as available to petitioners concerned. Neither in the impugned order nor in the statement of objections filed by the KERC no satisfactory reasons of public interest warranting such withdrawal is cited. In the absence of supervening public interest established by the KERC, withdrawing of the exemption/ concession in a premature manner giving the assurances/promises a go-by before the requisite period of 10 years guaranteed by the orders dated 14.07.2014 and 18.8.2014 of the KERC as well as the global investment brochure issued by the Energy Department, Government of Karnataka to attract the investors cannot be left in lurch in the mid stream. It is also not possible for the promisee now to restore back to the original status after acting up on the promises/assurances made. Once the new solar/wind/mini hydel plants have been invited by projecting exemption/concession on wheeling and banking charges in the State of Karnataka and being assured with 10 years guarantee on such exemption/concession and acting on the same and the promisee established their projects and spend lot of amount for constructing the infrastructure and the related employment expenses, it would be difficult for them to restore the status quo ante and walk out mid stream relating to the unexpired period out of the ten years guaranteed. Thus the twin tests propounded by the Hon'ble Apex Court in Pawan Alloys, supra is not satisfied by the KERC to disown the Doctrine of promissory estoppel.

26. The arguments advanced by the learned AGA, that the Global Investors Meet brochures is not a state policy and any promise or assurance made in such investors meet would not be binding on the State, requires to be negated. All such assurances/promises were made in the brochures in invest Karnataka 2016 GIM declaring and reiterating the availability of the benefits of wheeling, banking and cross subsidy surcharge for all RE plants commissioned between 1.4.2013 and 31.3.2018. Even in the solar policy of the Government 2014 to2021, the tariff shall be applicable as fixed by the KERC.

27. The contention of the respondent-state as well as the KERC that the principles of promissory estoppel enunciated in the case of Motilal Padmat Sugar Mills Vs. State of U.P. reported in (1979)2 SCC 409 has been diluted in Jit Ram and others Vs. State of Haryana - AIR 1988 SC 1285 is unsustainable. The principles laid down in Motilal Padmat Sugar Mills still holds the field as held by the Hon'ble Apex Court in Nestle India Limited.

In the case of State of Punjab V/s. Nestle India Ltd., [2004] 6 SCC 465 the Hon'ble Apex Court has held thus:

"34. The discordant note struck by Jit Ram case [[1981] 1 SCC 11 : [1980] 3 SCR 689] was firmly disapproved by a bench of three Judges in Union of India & Ors. v. Godfrey Philips India Ltd. (1985) 4 SCC 369. It was affirmed that: [SCC p.387, para 12]

"12. There can therefore be no doubt that the doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel".

46. In any event judicial discipline requires us to follow the decision of the larger Bench. The facts in the present case are similar to those of prevailing in Godfrey Philips (supra). There too, as we have noted earlier, the statutory provisions require exemption to be granted by notification. Nevertheless, the Court having found that the essential pre-requisites for the operation of promissory estoppel had been established, directed the issuance of the exemption notification.

47. The appellants have been unable to establish any overriding public interest which would make it inequitable to enforce the estoppel against the State Government. The representation was made by the highest authorities including the Finance Minister in his Budget Speech after considering the financial implications of the grant of the exemption to milk. It was found that the overall benefit to the state's economy and the public would be greater if the exemption were allowed. The respondents have passed on the benefit of that exemption by providing various facilities and concessions for the upliftment of the milk producers. This has not been denied. It would, in the circumstances, be inequitable to allow the State Government now to resile from its decision to exempt milk and demand the purchase tax with retrospective effect from 1-4-1996 so that the respondents cannot in any event re-adjust the expenditure already made. The High Court was also right when it held that the operation of the estoppel would come to an end with the 1997 decision of the Cabinet."

It is thus held that the speech made by the Finance Minister after considering financial implications of the grant of the exemption to milk is binding on the State and it would be inequitable to allow the State Government to resile from its decision applying the principles of promissory estoppel.

28. The orders dated 30.7.2015 and 12.4.2017 of the KERC confirms, reiterates the benefits of exemption allowed in wheeling, banking and cross subsidy surcharge and confirms the continuity of the same in terms of clause 'd' of the order dated 30.7.2015 and 12.4.2017 which reads thus:

Order dated 30.7.2015:

" (d) Applicability of wheeling and banking charges and cross subsidy surcharge:

The Wheeling, Banking and Cross Subsidy surcharge shall be applicable as per Commission's Order dated 18th August 2014."

Order dated 12.4.2017:

" (d) Applicability of wheeling and banking charges and cross subsidy surcharge:

A stakeholder has sought clarification as to, whether the exemption allowed in Wheeling, Banking and Cross Subsidy surcharge would continue with the new tariff order.

The Commission hereby clarifies that the tariff Order is to determine the applicable tariff for Solar PV plants coming in the State during FY 18 and the Wheeling, Banking and Cross Subsidy surcharge shall remain applicable as per Commission's Order dated 18th August 2014."

29. In such circumstances, the change of circumstances pleaded by the KERC to contend that the doctrine of promissory estoppel is not applicable to the petitioners inasmuch as the installation capacity of solar power which was 41 MW as on 18.8.2014 has increased to 1698 MW as on November 2017 and it is anticipated to touch 6000 MW by the end of financial year 2019 would not be countenanced as the increase in the capacity has happened with the consent of the Government of Karnataka, KERC and the ESCOMS and they having permitted such an increase in the capacity, having achieved their objective of increasing RE power, the benefits granted to the power projects cannot be withdrawn against the interest of the petitioners more particularly in view of the clarification issued by the orders dated 30.07.2015 and 12.04.2017. Such withdrawal of exemption would be against the public interest also, inasmuch as, if such exemptions are withdrawn, not only it would affect the financial viability of the petitioners but also would make the petitioners suffer monetary loss of huge amount thereby affecting the economy as such as the loans which could run into thousands of crores of rupees given to the various power generators could not be recovered and the very financial equilibrium of economy would be in peril. The action of the banks refraining from altering the existing guidelines for commissioned projects pursuant to the impugned order if considered, indeed public interest would suffer owing to the incapacity of the power projects repaying the loans borrowed by the banks. These power plants have a long gestation period spanning across 25 years. The concessions are only for 10 years. A cooling period or tariff holiday cannot be withdrawn and trap the investors after securing the investments.

In the aforesaid circumstances, placing reliance on clauses 5 and 12.6 of the PPA, the statutory contract cannot be revised by the KERC much against the promises/assurances made. The doctrine of promissory estoppel is squarely applicable in the present fact situation.

Re: Point No.3

30. The RE generators obviously constitute a homogeneous single class. The orders dated 14.07.2014 and 18.8.2014 recognized all the wind/mini hydel/solar power generation commissions from 1.4.2013 to 31.3.2018 as one single class without any sub-classification. The sub-classification now sought to be made upto 31.3.2017 and withdrawing the classification after 1.4.2017 is nothing but an artificial classification without any basis and is perverse. No doubt the learned Senior counsel appearing for the KERC made an endeavour to argue that the capital cost of the projects has drastically come down and the petitioners are making super profits, the same cannot be a ground for sub-classification.

31. In order to examine the sub-classification whether is hit by Article 14 of the Constitution, it is apt to refer to the relevant passage in the case of Dharam Dutt and Others V/s. Union of India and Others reported in [2004] 1 SCC 712, the same is quoted hereunder:

"56. Article 14 of the Constitution prohibits class legislation and not reasonable classification for the purpose of legislation. The requirements of the validity of legislation by reference to Article 14 of the Constitution are: that the subject matter of legislation should be a well-defined class founded on an intelligible differentia which distinguishes that subject-matter from the others left out, and such differentia must have a rational relation with the object sought to be achieved by the legislation. The laying down of intelligible differentia does not, however, mean that the legislative classification should be scientifically perfect or logically complete."

32. It is thus clear that two factors have to be fulfilled to uphold the validity of sub-classification by reference to Article 14 of the Constitution viz., the subject matter classification should be founded on an intelligible differentia which distinguishes that subject matter from the others left out and secondly, such differentia must have a rational nexus with the object sought to be achieved. That a RE power plant has a long gestation period across about 25 years. Before concessional period, the proposal was in order of 3 MW and after the withdrawal it is around 30 MW, but during the concessional period it attracted an investment of 2000 MW. It is thus self evident that the investments had come into the State only because of the exemption or tariff holiday. Inviting the investors with incentive of exemption on wheeling and banking charges and then turning round making sub categorization between the projects commissioned between 1.4.2013 to 31.3.2017 and the projects commissioned between 1.4.2017 to 31.3.2018 is not a reasonable classification. The same fails to withstand the test of intelligible differentia. There is no rational nexus to the objective to be achieved in sub-

classifying a homogenous class. As could be seen from the details furnished by the petitioners, to commission the project between 1.4.2017 to 31.3.2018, the process had begun during 2015-16 and finally the commissioning certificates were issued between 1.4.2017 and 31.3.2018. If a uniform scheme had been applied for all the projects commissioned between 1.4.2013 and 31.3.2018 that would have been different aspect but discriminating the RE plants commissioned between 1.4.2017 to 31.3.2018 would be discriminatory and cannot be approved.

33. Several judgments referred to, by the learned Senior counsel for the ESCOMS to contend that a cut off date prescribed by the Commission, will not invalidate the order impugned, would relate to the service matters. Fixing a cut off date in the service matters stands on a different footing with respect to the investment made by the entrepreneurs based on the promise/assurance given by the State.

34. This issue is no more res integra in view of the dictum enunciated by the Hon'ble Apex Court in the case of Utility Users Welfare Association and others, supra, and the clarificatory order thereto. Moreover, it is not in dispute that the Tribunal is now functioning with the judicial members.

Re: Point No.5

35. In the case of the Gujarat Urja Vikas Nigam Limited V/s. Tarini Infrastructure Limited and others [2016] 8 SCC 743, the Hon'ble Apex Court conceding the contention of the appellant Tharini Infrastructure Limited, that under Clause 5[2] of the PPA wherein the appellant therein, was required to pay tariff as determined by the State Commission which would liable to escalation at 3% per annum and accordingly sought for the novation of the PPA to the extent of modification of tariff observed thus:

18. All the above would suggest that in view of Section 86(1)(b) the Court must lean in favour of flexibility and not read inviolability in terms of the PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review of the tariff. The facts of the present case, as elaborately noted at the threshold of the present opinion, would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections

14 and 21 of the General Clauses Act, 1897. In this context, the views of this Court on the purport and effect of Sections 14 and 21 of the General Clauses Act may be re-noticed by extracting paras 47, 48 and 49 of the decision of this Court in D.K. Trivedi & Sons Vs. State of Gujarat.

As discussed in the preceding paragraphs there is no request made by either of the parties to the revision of the tariff on wheeling and banking charges but it is the suo motu action unilaterally initiated by the KERC to withdraw the exemption of tariff granted on wheeling and banking charges.

36. In PTC India Limited, supra, the Hon'ble Apex Court has held thus:

58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j).

66. While deciding the nature of an Order (decision) vis-a-vis a Regulation under the Act, one needs to apply the test of general application. On the making of the impugned Regulations 2006, even the existing Power Purchase Agreements ("PPA") had to be modified and aligned with the said Regulations. In other words, the impugned Regulation makes an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the impugned 2006 Regulations have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across-the-board could have been done only by making Regulations under Section 178 and not by passing an Order under Section 79(1)(j) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word "order" in Section 111 of the 2003 Act cannot include the impugned 2006 Regulations made under Section 178 of the 2003 Act.

92. (i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions)".

37. The Hon'ble Apex Court in Gujarath Urja Vikas Nigam Limited, supra has held that under regulations 80 to 82, the inherent powers of the State Commission which is akin to Section 151 of CPC, the power of the State Commission to regulate the conduct of the Commission i.e. to regulate its own procedure, the power cannot travel so as to alter the terms and conditions of the agreement entered into between the parties to grant substantive relief to the company by extending the control period of tariff order. In terms of Regulation 80, the inherent powers of the State Commission are saved to make such orders as may

be necessary:- (i) to secure the ends of justice; and (ii) to prevent abuse of process of the Commission. The inherent powers under Section 151 CPC are procedural in nature and cannot affect the substantive right of the parties. Hence inherent powers preserved under regulation 80 cannot affect a substantive right of the parties. This dictum with all force applies to the proceedings at hand.

It is the contention of the Commission and the State that the Commission has been conferred with the power to determine the tariff from time to time and it cannot be said that the Commission is functus officio once it has determined the price. The phrase 'time to time' emphasized would only mean that the KERC can determine wheeling and banking charges prospectively. Sections 62 and 64 conferred the power on the Commission to determine the tariff and once settled contracts have been entered into, based on the tariff orders, sans any request made by the either of the parties to the PPA, the KERC has not been conferred with the power to determine tariff from time to time.

38. Thus, the power of KERC to revisit the tariff at the request of the regulated entities though is traceable to Section 21 of the General Clauses Act, 1897 in terms of the judgment of the Hon'ble Apex Court in the case of Shree Sidhabali Steel Vs. State of Uttar Pradesh (2011)3 SCC 193 as well as Tarini Infrastructure Limited and Others, supra, considering the wider impact of withdrawing the exemption/concession by the KERC suo moto as observed by the Hon'ble Apex Court in PTC India Limited, supra and Gujarat Urja Vikas Nigam Limited, supra, inasmuch as exercising the inherent powers in terms of Regulation No.11 of OA Regulations, Regulation under Section 181 would have been appropriate which has a general application to the entire trading activity.

Writ Petition Nos.23086/2018, 23116/2018, 23990 to 23993/2018, 23995/2018, 25090/2018, 26480/2018 and 28622/2018 pertain to the wind project.

Writ Petition Nos.53531/2018 and 23994/2018 pertain to Mini-hydel project.

All other writ petitions relate to the solar projects.

Conclusion:

For the aforegoing reasons, all the writ petitions are allowed.

The impugned order dated 14.05.2018 issued by the KERC, Bengaluru is quashed.

No order as to costs.

