THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE

AND

THE HON'BLE SRI JUSTICE T.VINOD KUMAR

+ Writ Appeal Nos.2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168 of 2004; and Writ Petition No.8964 of 2004 and Writ Appeal Nos.58, 59, 60, 61, 62, 63, 64, 257, 268, 269, 807, 892, 893, 894, 895, 897, 898, 899, 900, 901, 902, 903, 904, 905, 910, 911, 912, 1297, 1298, 1299, 1300, 1301, 1305, 1600, 1601, 1607 and 2300 of 2005

% Date: 16.08.2023

M/s. SRJ Poly Films Private Limited and others.

... Appellants

v.

$ Transmission Corporation of A.P., Ltd.,
Vidyut Soudha, Khairatabad, Hyderabad,
Rep.by its Chairman & Managing Director,
And others.

... Respondents

! Counsel for the appellant in W.A.No.2161 of 2004:
Mr. K.Gopal Choudary, learned Senior Counsel

! Counsel for participating industries:
Mr. Prashanth VRN, learned counsel representing
M/s.Indus Law Firm

! Counsel for T.S.TRANSCO: Mr. R.Vinod Reddy, learned Standing Counsel

! Counsel for A.P.TRANSCO: Mr. Venkat Challa, learned Standing Counsel

! Counsel for A.P.Gas Power Corporation Limited:
Mr. M.Karthik Pavan Kumar

< GIST:

➢ HEAD NOTE**:**

? CASES REFERRED:

1. (2004) 10 SCC 511
2. (1863) 143 ER 414
3. (1969) 2 SCC 262
4. (1989) 2 All ER 648
5. (1996) 3 SCC 364
6. (1996) 5 SCC 460
7. (2005) 5 SCC 337
8. (2022) 11 SCC 1
9. 2023 SCC OnLine SC 366
10. (1969) 1 SCC 200
11. (2002) 5 SCC 203

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Writ Appeal Nos.2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168 of 2004; and Writ Petition No.8964 of 2004 and Writ Appeal Nos.58, 59, 60, 61, 62, 63, 64, 257, 268, 269, 807, 892, 893, 894, 895, 897, 898, 899, 900, 901, 902, 903, 904, 905, 910, 911, 912, 1297, 1298, 1299, 1300, 1301, 1305, 1600, 1601, 1607 and 2300 of 2005;

COMMON JUDGMENT

(Per the Hon'ble the Chief Justice Alok Aradhe)

These intra-court appeals filed by the participating industries and the Transmission Corporation of Andhra Pradesh Limited (hereinafter referred to as 'A.P.Transco') emanate from common orders dated 06.12.2004 and 20.12.2004 passed by the learned Single Judge by which writ petitions preferred by the participating industries have been partly allowed.

2. On admitted facts, common issues of law arise for consideration in this batch of appeals and in the writ petition i.e., W.P.No.8964 of 2004 and therefore, we have heard the same analogously and this batch of cases is decided by this common judgment. For the facility of

reference, facts from W.A.No.58 of 2005 are being referred to.

(i) Facts:

3. The appellant is a Private Limited Company engaged in the manufacture of co-extruded polyethylene film. The industrial activity of the appellant requires continuous and uninterrupted supply of electrical power. The appellant industry suffered due to severe power cuts imposed by the erstwhile Andhra Pradesh Electricity Board, which in turn crippled the functioning of the appellant industry.

4. In the year 1988, A.P.Transco, T.S.Transo and six other companies of public and private sector entered into a Memorandum of Understanding dated 17.10.1988 (hereinafter referred to as 'MoU-I') for formation of a new company namely, Andhra Pradesh Gas Power Corporation Limited (hereinafter referred to as 'APGPCL'). The said company was formed with an object to set up a natural gas based power generation station of 100 MW capacity in the erstwhile State of Andhra Pradesh.

5. Various medium and large scale industries located in the State of Andhra Pradesh volunteered to join the venture of setting up of generation station and invest in the equity capital of APGPCL which are referred to as 'participating industries' who are also appellants before us.

6. Clause 3 of MoU-I, dated 17.10.1988 provides for sharing of the energy generated from aforesaid generating plant by the participating industries and A.P.Transco in proportion to their paid-up share capital for the generating plant under MoU-I. A.P.Transco has the right to sell share of energy and power to its consumers which may include members of APGPCL.

7. Thereafter, another Memorandum of Understanding, dated 19.04.1997 (hereinafter referred to as 'MoU-II) was executed between APGPCL, A.P.Transco/TS Transco and shareholders of APGPCL i.e., participating industries for setting up additional capacity of 172 MW fuel based power generation station at Vijjeswaram, West Godavari District.

8. Clause 2.1 of the MoU-II provides for sharing of the energy generated from 172 MW generating station by the participating industries and A.P.Transco, in proportion to the number of shares held by them. Clause 2.6 of MoU-II provides that when a participating industry, for any reason, is unable to utilise its full share of energy from APGPCL, participating industry shall give advance notice of fifteen days before billing month to APGPCL and there upon APGPCL shall reallocate the surrendered energy to the participating industry on prorata basis, among those of the rest of the participants who require additional power. When such advance notice is not received by APGPCL within the stipulated period of fifteen days, the unutilised power shall be fully allocated to A.P.Transco.

9. The Andhra Pradesh Electricity Reforms Act, 1998 (hereinafter referred to as 'the Reforms Act') was brought into force with effect from 01.02.1999. Section 14(4) of the Reforms Act requires a licence for transmission and supply of electricity. A provisional licence was granted to APGPCL for a period of twelve months from 01.02.1999. The Andhra

Pradesh Electricity Regulatory Commission (hereinafter referred to as 'APERC') by an order dated 07.07.2000 *inter alia* held that licence is required by APGPCL for generation of power and conditional exemption from licence under Section 16 of the Reforms Act, was granted. The order passed by the APERC was upheld by a Bench of this Court by an order dated 08.06.2001 in C.M.A.No.1971 of 2000 and other connected matters.

10. Against the aforesaid order passed by a Bench of this Court, a Special Leave Petition was preferred.

11. The Hon'ble Supreme Court in **Andhra Pradesh Gas Power Corporation Limited v. Andhra Pradesh State Regulatory Commission**[1] dealt with the issue whether APGPCL is required to obtain a licence under the law for utilisation/sale or supply of power generated by it to the participating industries, their sister concerns or the industries to whom shares of APGPCL have been transferred by the participating industries. The said issue was answered in paragraph 48 which is extracted below:

[1] (2004) 10 SCC 511

> **48.** As a result of the discussions held above and the findings as recorded by us, the position that emerges is that participating industries and the industries to whom participating industries have transferred their shares, consumption of electricity by them within the limits of the value of their share capital in A.P. GPCL would only amount to captive consumption and for such utilisation or consumption of self-generated electricity no licence would be required under any provision of law. So far as the sister concern or concerns which have been defined as those under the same group as participating industries are concerned, it would require to have a licence if the electricity is made available or provided to them for consumption as, in our view, it shall fall within the ambit of distribution, sale or supply of the electricity and not captive consumption of power. It would be permissible without licence only in case of exemption, if granted in that behalf, by the competent authority. Hereinafter we shall discuss that aspect of the matter.

11.1. Thus, the Hon'ble Supreme Court has held that no licence is required under the Reforms Act for utilisation of energy generated by APGPCL which is utilised by participating industries. However, it was held that licence would be necessary for supply of energy to the sister concerns which are distinct and separate entities.

12. On coming into force of Electricity Act, 2003 with effect from 06.10.2004, provisions relating to licence under the Reforms Act ceased to have any effect.

13. The erstwhile A.P.Transco issued revised bills demanding tariff in respect of surplus energy consumed by the participating industries. The aforesaid demand notices were challenged by the participating industries in batch of writ petitions.

(ii) Orders of learned Single Judge:

The learned Single Judge by common order dated 06.12.2004 *inter alia* held as follows:-

(i) A.P.Transco has exclusive discretion to make use of surplus energy and allot the unutilised power to the participating industries.

(ii) The participating industries have a preferential right for allocation of surplus power under MoU-I.

(iii) The price for such surplus energy has to be settled between A.P.Transco and APGPCL based on fuel cost plus O&M charges plus depreciation but not exceeding the rate of energy as per HT category-I of A.P.Transco.

(iv) The action of A.P.Transco in levying charges or tariff in respect of surplus energy allotted to the participating industries is valid.

(v) In the absence of any price fixation agreement contemplated in the MoU-I and in view of Clause 17(a) therein, it cannot be said that the price can be levied at the choice of the A.P.Transco, and

(vi) It is not the case of APGPCL that the rates have been fixed in consultation with the A.P.Transco.

14. The learned Single Judge, therefore, partly allowed the writ petitions and held that the claim of A.P.Transco in respect of surplus charge was valid, and however the same has to be necessarily at the rates or prices to be determined by A.P.Transco and APGPCL after notice to the parties. It was directed that till such decision is arrived at, the A.P.Transco shall not give effect to the demands and any demand, if made, shall be subject to determination of price between the A.P.Transco and APGPCL. In the aforesaid background, these intra-court appeals have been

filed by participating industries as well as by the A.P.Transco.

15. Heard Mr. K.Gopal Choudary, learned Senior Counsel appearing for appellant/participating industry in Writ Appeal No.2161 of 2004; Mr. Prashanth VRN, learned counsel representing M/s.Indus Law Firm, learned counsel for participating industries; Mr. R.Vinod Reddy, learned standing counsel for T.S.Transco, Mr. Venkat Challa, learned standing counsel for A.P.Transco and Mr. M.Karthik Pavan Kumar, learned counsel for Andhra Pradesh Gas Power Corporation Limited.

(iii) Submissions on behalf of participating industries:

16. Mr. Gopal Choudary, learned Senior Counsel for appellant/participating industry in Writ Appeal No.2161 of 2004 and Mr. Prashanth VRN, representing M/s.Indus Law Firm, learned counsel for the participating industries, submit that the learned Single Judge erred in considering clause 17(a) of MoU-I only which is not applicable to the facts of the case, as surplus power from generating station

under MoU-I is not an issue. While inviting the attention of this Court to clause 2.6 of MoU-II, it is contended that the participating industries have to be reallocated the surrendered energy on prorata basis and thereafter if any surplus power is left, then only the same has to be transferred to the A.P.Transco. It is urged that the issue with regard to the requirement of licence has been settled by the Judgment of the Hon'ble Supreme Court in **Andhra Pradesh Gas Power Corporation Limited** (supra). It is argued that the power has to be allocated only in accordance with MoUs and no notice was given to the participating industries before issuing the revised demands.

16.1. It is contended that the property in goods i.e., 'electricity' belongs to APGPCL and the A.P.Transco, in respect of surplus energy is in temporary possession of the electricity as bailiff, till it is transferred to the participating industry. It is, therefore, contended that a bailiff cannot set up a title in respect of the goods, namely 'electricity' and therefore, has no authority in law to issue the revised bills as if it is the owner of the goods. It is also clarified that the

participating industries have already paid the bills in respect of surplus energy to APGPCL and the participating industries are only questioning the action of A.P.Transco in revising the bills, in respect of surplus energy.

16.2. Learned counsel for some of the participating industries has invited our attention to common order dated 08.10.2010 by the learned Single Judge in a batch of writ petitions, namely W.P.No.11317 of 2006 and other connected writ petitions and has submitted that at the instance of some of participating industries a batch of writ petitions were filed questioning the action of A.P.Transco in issuing the revised bill for the surplus energy. It is further submitted that learned Single Judge of this court by an order dated 08.10.2010 has quashed the demand notices issued by the A.P.Transco with the liberty to work out its remedies, if any available to it under the law. It is also pointed out that the aforesaid order passed by the learned Single Judge in respect of similarly situated industries in quashing the revised bills has been accepted by

A.P.Transco and therefore, appeals filed by A.P.Transco should be dismissed.

16.3. Learned counsel for some of the participating industries has adopted the submissions made by learned Senior Counsel for the participating industries referred to in previous paragraph.

(iv) Submissions on behalf of T.S. Transco (formerly A.P.Transco)

17. Mr. R.Vinod Reddy, learned counsel for T.S. Transco (formerly A.P.Transco) submits that in pursuance of Judgment of Hon'ble Supreme Court in **Andhra Pradesh Gas Power Corporation Limited** (supra), A.P.Transco by communication dated 28.04.2004 informed APGPCL that it does not have the licence to allot surplus power to other participating industries and A.P.Transco alone is entitled to allot surplus power and bill the same as per tariff order. Despite the aforesaid communication, APGPCL allotted surplus power to participating industries for the month of April/May, 2004 and therefore, the revised bills as per

tariff order were issued to the participating industries in respect of the surplus power allotted to them.

17.1. It is contended that A.P.Transco is competent to issue the revised bills and has rightly issued the same as per the tariff order fixed by the APERC. It is, therefore, submitted that learned Single Judge ought not to have issued a direction to fix the rates or prices to be determined between the A.P.Transco and APGPCL after notice to the participating industries and erred in directing that till said decision is arrived at, the revised bills made by A.P.Transco shall not be given effect. It is contended that aforesaid direction be set aside.

(v) Submissions on behalf of A.P.Transco (present A.P.Transco)

18. Mr. Venkat Challa, learned counsel for A.P.Transco submits that the participating industries should avail the alternative remedy available to them under clause 7 of MoU-II and resort to settlement of dispute by Arbitration.

(vi) Submissions on behalf of APGPCL

19. Mr. M.Karthik Pavan Kumar, learned counsel for APGPCL submitted that advance notice was given by the participating industries to APGPCL and supported the case of participating industries.

(vii) Analysis:

20. We have considered the rival submissions made on both sides and perused the record. The grievance of the participating industries in these appeals is with regard to recovery of excess amount by way of revised bill issued by the A.P.Transco i.e., the difference between the charges paid by the participating industries to APGPCL on account of the consumption of surplus energy and the tariff sought to be recovered by the A.P.Transco under the tariff order.

21. Twin issues arise for consideration in this batch of writ appeals and writ petition:

(i) Whether A.P.Transco has authority in law to issue revised demands?

(ii) If yes, whether it has authority to recover the amount due on account of supply of surplus energy without affording an opportunity of hearing about the quantum of amount to participating industries?

22. Before proceeding further, it is apposite to take note of relevant clauses of MoUs:

22.1. Clauses 2, 3, 4 and 17 of MoU-I read as under:

MoU-I dated 17.10.1988

> 2. The Participating Industries shall invest in the equity share capital of APGPCL in proportion to their allotted share of power. A.P. Transco/T.S. Transco shall hold not less than 15% of the paid-up share capital of APGPCL at any point of time.
>
> 3. The electricity viz., both power and energy to be generated by APGPCL shall be shared between the Participating Industries and A.P. Transco/T.S. Transco in proportion to their paid-up share capital. The energy sharing shall be pro-rata of actual energy generated and shall be regulated on monthly basis. The power sharing will be proportional to the actual capacity on bars during the month.
>
> 4. The Participating Industries may transfer their share of energy and power from APGPCL to their sister concern subject to the said sister concern being located within the State of Andhra Pradesh and is a

HT consumer of A.P. Transco / T.S. Transco. Provided also such transfer shall be on month to month basis viz. from the beginning of the month to the end of the month and not a part of the month. For such transfer, application shall be made to APGPCL and prior approval of APGPCL shall be obtained before actual availment. Such transfer shall also be informed to A.P. Transco/T.S. Transco in advance.
EXPLANATION: A: Sister concern means a concern under the same group.

EXPLANATION: B: For purposes of this clause month means Billing Month in accordance with the practice followed for A.P. Transco/ T.S. Transco supply.

17. (a) It is agreed that if the power generation by APGPCL could not be utilized by the Participating Industries either in full or in part, then A.P. Transco/T.S. Transco shall have first claim to utilize such power. The price for such surplus energy shall be mutually settled between A.P. Transco/T.S. Transco and APGPCL based on fuel cost plus O&M charges plus depreciation but not exceeding rate for energy as per HT category-I of A.P. Transco/T.S. Transco.

(b) It is agreed that as a rule APGPCL shall not settle power outside the State of Andhra Pradesh and State of Telangana.

22.2. Clauses 1.17, 2.6 and 2.8 of MoU-II, dated 19.04.1997 read as under:

1.17 **Participants, Participant Industry/ Participating Industries** means and includes the concerns as defined in the preamble to this MOU.

2.6 **Non Utilisation of Energy by any of the Participating Industries to full extent:**

When a Participant Industry, for any reason is unable to utilize its full share of energy from APGPCL, it shall give an advance notice of at least 15 days before the Billing Month to APGPCL. APGPCL shall then reallocate the surrendered energy of the Participant Industry on pro-rata basis, among those of the rest of the Participants who require additional power. However, when the advance notice is not received by APGPCL within the stipulated period mentioned above, the unutilized power shall be fully allocated to A.P. Transco/T.S. Transco.

2.8. Where the Participant Industry does not give advance notice for unutilized power to APGPCL mentioned in [6] above, such unutilized power shall be transferred to A.P. Transco/T.S. Transco, as follows:-

(A) <u>During R&C Period</u>: The unutilized power, transferred to A.P. Transco / T.S. Transco shall be billed by APGPCL at full cost [i.e. fixed + variable cost] and in such a case for the unutilized power, the Participant Industry need not pay any charges.

(B) <u>During Non-R&C Period</u>: The unutilized power, transferred to A.P. Transco / T.S. Transco by APGPCL shall be billed at variable cost and for this power the

fixed charges will be met by the Participant Industry itself.

22.3. Clause 17(a) of MoU-I provides that in respect of surplus energy which is not utilised by the participating industries either in full or in part, the A.P.Transco shall have the first claim to utilise such power. The price for such surplus energy shall be mutually settled between A.P.Transco/TS Transco and APGPCL based on fuel cost and O&M charges plus depreciation but not exceeding rate for energy as per HT category-I of A.P.Transco/TS Transco.

22.4. Clause 2.6 of MoU-II provides that when a participating industry is unable to utilise its full share of energy from APGPCL, it shall give advance notice of at least 15 days before bill month to APGPCL. APGPCL was then reallocate the surrendered energy of participating industry on prorata basis to the rest of the participating industries who require additional power. However, in case an advance notice is not received by APGPCL, the unutilised power shall be fully allocated to A.P.Trasnco/TS Transco.

22.5. However, before proceeding further, it is pertinent to take note of clause 11 of MoU-I and clauses 2.1, 2.2, 2.7 and 3.2 of the MoU-II, which are extracted as under:

> MoU-I
>
> 11. The Participating Industries will be common consumers of A.P. Transco/T.S. Transco and APGPCL. It is agreed that APGPCL shall be free to formulate its tariff taking into account its financial commitments towards O&M expenses, fuel costs including minimum guarantees, if any, financing commitments and other items in accordance with various statutory provisions. Out of the energy used by the Participating Industries, the share of power allocated by APGPCL shall be billed as per APGPCL tariffs. **The balance energy used by the Participating Industries shall be billed as per A.P. Transco/T.S. Transco tariffs.** In case the actual utilization of any Participating Industry falls short of its share from APGPCL, the billing will be for actual utilization only subject to minimum charges payable to A.P. Transco/T.S. Transco under its tariffs and terms and conditions of supply. The actual arrangement between A.P. Transco/T.S. Transco, APGPCL the Participating Industries shall be worked out in detail.

MoU-II

2.1 **Basis for sharing of Demand and Energy**:

The Participants agree that both demand and energy to be generated out of the proposed Power Generating Station of the Company shall be shared by

them in proportion to the number of shares held in the explanation project from time to time.

The sharing of Actual Delivered Capacity [i.e. Demand and Energy] out of the proposed power Generating station shall be pro-rata with reference to the number of shares held in the expansion project i.e. the capacity sharing shall be proportional to the actual delivered capacity and net energy delivered at the interconnection point during the Billing Month. The demand and energy delivered shall be regulated on monthly basis by the party of the first part.

2.2. **Transfer of Energy:**

APGPCL agree that the Participating Industries may transfer their share of energy to their sister concern(s) subject to the condition that the said sister concern(s) is/are located within the State of Andhra Pradesh and is/are HT consumers of A.P. Transco/T.S. Transco.

The Participating Industries agree that any such transfer by them to their sister concern shall be made on month to month basis – i.e., from the beginning of the Billing Month to the end of the Billing Month and not a part of the Billing Month.

The Participating Industries also agree that for such transfer, an application shall be made to APGPCL and prior approval of APGPCL shall be obtained before actual availment by the transferee concern(s) and before the commencement of the next Billing Month.

The Participating Industries agree that such transfer shall also be informed to the A.P. Transco / T.S. Transco simultaneously.

2.7 **Where the Participant Industry gives advance notice mentioned in [6] above:**

(A) During Restriction & Control [R&C] period:

APGPCL shall collect full cost from the reallocated Participant [including A.P. Transco/T.S. Transco] during the R&C period of A.P. Transco / T.S. Transco.

(B) During Non-R&C Period:

The power surrendered to APGPCL shall be first offered to the rest of the Participating Industries, who require additional power. Such industries will pay full cost [i.e. fixed + variable cost] for the additionally allotted energy. Any power left over after this allocation will be transferred to A.P. Transco / T.S. Transco. APGPCL shall, however, collect only the variable cost from A.P. Transco / T.S. Transco on such power allocated to it during the Non-R&C period. The Participant Industry not utilizing its share of energy during Non-R&C period is liable to pay fixed charges on that part of its share of energy, so transferred to A.P. Transco/T.S. Transco.

3.2 **Tariff Fixation:**

It is agreed to between hereto that power tariff to be charged on the A.P. Transco/T.S. Transco and Participating Industries shall be governed by the two part tariff formula which contains the following elements, subject to modifications, if any.

The tariff shall cover both fixed charges and variable costs.

The fixed charges shall be fully recovered at the plant working at 6,000 hours in a financial year. There shall be no incentive for the plant working beyond 6,000 hours in a financial year. However, in its place, the fixed charges per kilowatt hour shall remain constant even beyond 6,000 hours.

I. Fixed Charges:

It is agreed to by all the parties to this Memorandum of Understanding that the fixed charges payable by the participants as part of the Tariff in each Billing Month shall be arrived at, based on the following:

Sl.No.	Particulars	Rate of Charges	Remarks (Basis/Variation, if any)
1.	Depreciation @ Expect on land	7.84%	I. On all chargeable fixed assets. II. On the opening balance of the fixed assets which includes addition and deletions upto the previous financial year.
2.	Interest on Loan: A. Term Loan including Suppliers' Credit	At the rates specified by financial institutions/Suppliers' Credit/banks etc. on actual.	I. On the outstanding balances of Loan. II. Total interest payable for the year shall be computed in advance at the beginning of the year for the existing loans. III. In case of new loans availed during any financial year, charge shall be made from the date of availment of such loans for the balance period in that year
	B. Working capital Loan	At the rates specified by financial institutions/banks etc., on actual.	IV. The working capital is arrived based on one month of fuel cost, one month of O&M cost, cost of spares at 1% of capital cost less one fifth of the

			cost of initial spares capitalized and two month of receivable.
	C. Other financial charges such as B.G. Commission LC Charges Commitment charges etc.	At actual charges by F.Is/Banks etc.	V. Based on the previous year expenditure any variation on actual the allowance charge such as shall be made at the end of the year i.e., March Billing Month.
3.	Return on Equity	@ 12%	I. On the amount determined as equity by the financial institutions. II. Variation in this return based on actual Equity, on completed cost basis. III. No variation in this return is envisaged beyond this period, subject to Clause-1 of article-4 of this MoU.
4.	O & M Cost	@ 2% of the project, excluding major replacements.	Project cost means project as appraised / at actual at the end of commissioning period whichever is higher and shall include additions/deletions made during the year for which charges / allowance is to be given in the March billing Month of each year. The expenditure on O&M in each subsequent year shall be revised on the basis of weighted price index.
5.	Insurance	@0.5% of project cost excluding land cost.	
6.	Exchange rate variation	At actuals	To be recouped with six months from the date of incurrence.
7.	Income Tax	At actuals	Based on Advance Tax paid. Any variations/to be allowed/charges based on the provision created in the Audited Balance sheet. To be recouped within 3 months of its incurrence fully. However, tax incidence for any

			particular year, on being determined at the time of assessment by revenue authorities, shall be given credit/recovered within 3 months of assessment
II.	**Variable Cost:**		
1.	Fuel cost	At actuals	Any charge in pride during Billing Month shall be consolidated in the subsequent billing months. For this purpose, FIFO method of pricing the fuel consumption shall be made, considering storage capacity and actual fuel available at the time of notification for change.
2.	Auxiliary Consumption	@3% gross energy generated (to be charged on the above costs)	For this purpose, PLF @ 68.5% is considered as normal level and heat rate of the plant as given by the equipment manufacturer which shall not be less than 3% ceiling.

Any general expenses incurred by the Company during a financial year which cannot be directly identifiable shall be proportionately charged between 100 MW and 172 MW power plants respectively, based upon the number of units generated and shall be charged in the tariff accordingly.

It is agreed to between all the parties that till all the costs that are incurred are recouped fully from the participating Industries, no further benefits in the form of dividend or bonus shall be made unless necessary provisions are made on the reserves on the above items.

22.6. Thus, from close scrutiny of clause 11 of MoU-I, it is evident that the participating industries have agreed that

the balance energy utilised by participating industries shall be billed as per A.P.Transco tariff. Similarly, from a conjoint reading of clauses 2.1, 2.2, 2.6 and 3.2 of MoU-II, it is axiomatic that clauses 2.1 discloses basis of sharing of demand and energy, whereas clause 2.2 deals with transfer of energy. Similarly, clause 2.6 deals with an eventuality where there is non-utilisation of energy by any of the participating industry to full extent. Clause 3.2 deals with tariff fixation. The participating industries have agreed that power tariff to be charged on the A.P.Transco and the participating industries, shall be governed by the two-part tariff formula which contains the following elements namely, fixed charges and variable costs subject to modifications, if any.

22.7. The participating industries as well as A.P.Transco/ TS Transco are bound by the stipulations contained in the MoUs. Neither the participating industries nor A.P.Transco have challenged the aforesaid stipulations in the MoUs. The APGPCL has also not challenged the terms and conditions of the MoUs and therefore, the participating

industries are bound by the conditions contained in MoU-I and MoU-II.

22.8. Therefore, we hold that A.P.Transco under clause 11 of the MoU-I and 3.2 of MoU-II has the authority to issue the revised bills in respect of surplus energy supplied by the APGPCL to participating industries. Therefore, we answer the first issue in affirmative and hold that under MoU-I and MoU-II, A.P.Transco has authority to issue revised demands in respect of surplus energy supplied to participating industries.

23. Now, we may advert to the second issue, namely, *whether it has authority to recover the amount due on account of supply of surplus energy without affording an opportunity of hearing to participating industries, about the demand*?

23.1. In **Cooper v. Wandsworth Board of Works**[2], while dealing with principles of *audi alteram partem,* it was held that *audi alteram partem* is the first principle of the

[2] (1863) 143 ER 414

civilized jurisprudence and the second long arm of natural justice is to "*hear the other side*" or "*no man should be condemned unheard*" or the "*rule of fair hearing*". This doctrine is a code of procedure and hence covers every stage through which administrative decision making passes. The laws made by God and man gives the opportunity to the party to defend himself, thus, a person who is facing charges must be given an opportunity to be heard before any decision is passed against him.

23.2. In *Administrative Law by Wade & Forsyth, 8th Edition*, pages 436-437, principles of natural justice have been described as under:

> *"In its broadest sense natural justice may mean simply the 'natural sense of what is right and wrong' and even in its technical sense it is now often equated with fairness. It has been said that 'that romantic word "natural" adds nothing 'except perhaps a hint of nostalgia'; and that 'justice is far from being a "natural" concept - the closer one goes to a state of nature, the less justice does one find.'*
>
> *But in administrative law natural justice is a well-defined concept which comprises two fundamental rules of fair procedure: that a man may not be a judge in his own cause;* ***and that a man's defence must always be fairly heard. In courts of law and in***

statutory tribunals it can be taken for granted that these rules must be observed. But so universal are they, so 'natural', that they are not confined to judicial power."

23.3. In **A.K.Kraipak v. Union of India**[3], the Hon'ble Supreme Court, in paragraph 20, has held as under:

> **20.** The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (*1*) no one shall be a judge in his own case (*Nemo debet esse judex propria causa*) and (*2*) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of

[3] (1969) 2 SCC 262

> the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George* v. *University of Kerala* [Civil Appeal No. 990/68, decided on15-7-1968] the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case.

23.4. The breach of principles of natural justice is of two primary kinds, namely absence of notice of the proceedings or failure to afford the defendant an opportunity of

substantially presenting his case. (See **Jet Holdings Inc., v. Patel**[4].

23.5. While dealing with the principles of natural justice, the Hon'ble Supreme Court in **State Bank of Patiala v. S.K.Sharma**[5] and **Rajendra Singh v. State of Madhya Pradesh**[6] has held that "*some real prejudice must have been caused to the complainant on account of violation of principles of natural justice. Mere non-compliance with principles of natural justice does not ipso facto result in order being rendered nullity. In other words, the complainant has to show the prejudice.*"

23.6. In **Viveka Nand Sethi v. Chairman, J&K Bank Limited**[7], it was held that "*the Court applies the principles of natural justice having regard to the fact situation of the case*".

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[4] (1989) 2 All ER 648
[5] (1996) 3 SCC 364
[6] (1996) 5 SCC 460
[7] (2005) 5 SCC 337

23.7. A three-Judge Bench of the Hon'ble Supreme Court in **Rajeev Suri v. Delhi Development Authority[8]** has held that "*natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigants' defence".*

23.8. In **Madhyamam Broadcasting Limited v. Union of India[9]**, after taking note of previous judgments of Hon'ble Supreme Court, it has been held that "*the party affected by the decision must establish that the decision was reached by a process that was unfair without complying with principles of natural justice*".

23.9. In the backdrop of the aforesaid legal principles, we advert to the facts of the case. The case of the participating industries as pleaded in the writ petitions is that the levy in respect of surplus energy made by A.P.Transco is far higher than the tariff payable to APGPCL. However,

[8] (2022) 11 SCC 1
[9] 2023 SCC OnLine SC 366

admittedly no notice has been issued to participating industries before revising the demand for surplus energy. The action of A.P.Transco in seeking to recover the amounts from the participating industries on account of surplus energy is violative of principles of *audi alteram partem.* The amounts as indicated in the revised bills are sought to be recovered from the participating industries without even issuing notices to them and without affording them an opportunity of hearing. The participating industries have suffered prejudice on account of non-compliance with the principles of natural justice. Therefore, we hold that A.P.Transco has no authority to recover the amount due on account of supply of surplus energy without affording an opportunity of hearing to participating industries about the quantum of amount sought to be recovered from them. Therefore, we answer the second issue in the negative and hold that A.P.Transco has no authority to recover the amount due on account of supply of surplus energy without affording an opportunity of hearing about the quantum of the amount to the participating industries.

24. The issue whether APGPCL requires licence for generation of electrical energy generated by it which is used by the participating industries has been answered by the Hon'ble Supreme Court in **Andhra Pradesh Gas Power Corporation Limited** (supra) and it has been held that no licence is required under the Reforms Act for utilisation of energy generated by APGPCL which is utilised by the participating industries. However, the licence has been held to be necessary for supply of energy to sister concerns which are distinct and separate entities. Therefore, the contention of the A.P.Transco that since APGPCL does not have the licence, it has the authority to issue the revised bills does not deserve acceptance.

25. The electrical energy generated by the two power generating stations covered under the MoU-I and MoU-II executed between the parties including the excess electrical energy is put in the grid and is utilised by the participating industries. It has not been specifically pleaded in the petition that the revised bills have been issued in respect of the excess electricity supplied from which of the thermal

power plants. In any case, once the electricity generated from two power plants is put in the grid, it is not possible to ascertain whether the excess energy is from power plant covered under MoU-I or MoU-II. Therefore, the contention that learned Single Judge erred in applying clause 17(a) of MoU-I and ought to have applied clause 2.6 of MoU-II cannot be accepted.

26. The issue whether the 'electricity' falls under goods is no longer *res integra*. The Hon'ble Supreme Court in **CST v. M.P.Electricity Board, Jabalpur**[10], after taking into account the definition of 'goods' in Article 366 (12) of the Constitution held that electricity is 'goods' and is therefore covered under Entry 54 of List II of Schedule VII to the Constitution for the purposes of sales tax. The aforesaid view taken by the Hon'ble Supreme Court was reiterated by a Constitution Bench of the Hon'ble Supreme Court in **State of Andhra Pradesh v. National Thermal Power Corporation Limited**[11]. The issue whether or not electricity is 'goods' has been settled by the aforesaid decisions of the

[10] (1969) 1 SCC 200
[11] (2002) 5 SCC 203

Hon'ble Supreme Court. However, it is not necessary for us in these cases to examine the contention urged on behalf of participating industries whether title in goods i.e., electricity passes on to A.P.Transco and whether as owner it can issue revised demands, as we have already held that A.P.Transco under MoU-I and MoU-II has authority to issue the revised bills for surplus energy supplied to the participating industries.

27. So far reliance placed by participating industries on the order dated 08.12.2010 in W.P.No.11317 of 2006 and other connected matters is concerned, suffice it to say that learned Single Judge did not take note of relevant clauses of MoU-I, namely clause 11 of MoU-I and clause 3.2 of MoU-II and has held that A.P.Transco has no authority to issue revised bills as it is not the owner of goods. However, the learned Single Judge further held that action of A.P.Transco in seeking to recover revised bill is violative of natural justice. For the reasons already assigned by us, in preceding paragraphs, we do not concur with the view expressed in order dated 08.12.2010 in W.P.No.11317 of

2016 and other connected matters, which does not even otherwise bind us. Therefore, the aforesaid order dated 08.12.2010 is of no assistance to participating industries in the facts of the case.

28. It is pertinent to note that it is not the case of the participating industries that the revised bills have been issued by the A.P.Transco in violation of conditions of MoUs. Therefore, the A.P.Transco is well within its right to issue the revised bills under the MoU-I and MoU-II. However, the learned Single Judge failed to take note of the relevant clauses of MoUs referred to supra and erred in holding that there is no price fixation agreement contemplated in MoUs. The parties have agreed to fixation of price under clause 11 of MoU-I and under clause 3.2 of MoU-II. The learned Single Judge further erred in directing that the rates or prices have to be determined between A.P.Transco and APGPCL after notice to the participating industries. The learned Single Judge further erred in restraining the A.P.Transco from recovery of amount

mentioned in the revised bills, subject to ultimate determination of price between A.P.Transco and APGPCL.

29. The A.P.Transco is entitled to charge the tariff under clause 11 of MoU-I and clause 3.2 of MoU-II. The notices have already been issued to the participating industries. The participating industries shall be entitled to file objections, if any, to the demand notices issued by A.P.Transco to point out that the same is not in conformity with clause 11 of MoU-I or clause 3.2 of Mou-II. Thereafter, A.P.Transco shall consider the objections, if any, preferred by the participating industries. Needless to state that after decision on the objections preferred by the participating industries to the demand notices impugned in these appeals and the writ petition, A.P.Transco shall be entitled to recover the amount from the participating industries in accordance with law.

30. To the aforesaid extent, the common orders dated 06.12.2004 passed in W.P.Nos.9154 of 2004 and connected matters and order dated 20.12.2004 passed in

W.P.Nos.9945 of 2004 and connected matters passed by the learned Single Judge are modified.

31. The writ appeals and the writ petition are accordingly disposed of.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

ALOK ARADHE, CJ

T.VINOD KUMAR, J

16.08.2023

Note: LR copy be marked.
(By order)
Pln