(2011) 06 MAD CK 0412

Madras High Court

Case No: Writ Petition No''s. 20820, 20821, 20730 to 20733 and 29752 to 29757 of 2000

E.I.D. Parry (I) Ltd.		APPELLANT
	Vs	
The State of Tamil Nadu, Tamil Nadu Electricity Board and Union of India (UOI) Rajasshree Sugars and Chemicals Limited Vs The State of Tamil Nadu and Tamil Nadu Electricity Board		RESPONDENT

Date of Decision: June 6, 2011

Acts Referred:

- Constitution of India, 1950 - Article 14, 226, 253, 32, 73
- Electricity (Supply) Act, 1948 - Section 43(A), 43A(2), 44(1), 78A
- Electricity Act, 1910 - Section 3

Hon'ble Judges: S. Nagamuthu, J

Bench: Single Bench

Advocate: Gopal Choudary for A. Bdul Hameed, in W.P. Nos. 20820, 20821, 20730 to 20733 of 2000, Nalini Chidambaram, Rahul Balaji, for S. Silambanan, in W.P. Nos. 20624 to 20629 of 2000 and Nalini Chidambaram for S. Silambanan, in W.P. Nos. 29752 to 29757/2010, for the Appellant; V. Srikanth, A.G.P. for R1, P.S. Raman, General for A. Selvlendran, for R2 and V.M.G. Rama Kannan, for R3, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S. Nagamuthu, J.
The Petitioners in these writ petitions are all Sugar Mills in the State of Tamil Nadu who have set up Co-generation plants to generate electricity and to supply the surplus electricity to the Tamil Nadu Electricity Board as per the agreements entered into with the Tamil Nadu Electricity Board in accordance with the provisions of the Electricity (Supply) Act of 1948. The main dispute in all these writ petitions is in

respect of the fixation of price for the electricity supplied by these sugar mills to the Tamil Nadu Electricity Board.

2. Since common issues are involved in these writ petitions, they were all heard together and disposed of by means of this common order.

3. These writ petitions have come to be filed in the following background:

Prior to 1991, private sector entrepreneurs cannot set up thermal projects, coal/lignite or gas based hydel projects and wind/solar energy projects of any size. However, the Electricity (Supply) Act, 1948 was so amended in 1991 by which private sector entrepreneurs were allowed to set up enterprises, either as Licensees, or as generating companies. Now, licenses u/s 3 of the Indian Electricity Act can be issued by the State Governments to private units willing to enter the electricity sector as licensee companies to supply and distribute energy in a specified area, who may or may not have a generating station. Prior to 1991, generating companies could be set up only by the Central or State Governments or both. After 1991, generating companies can now be set up and such companies can set up one or more generating stations and offer to sell electricity to the grid, unlike licensees, who supply and distribute energy within a specified area and who may or may not have generating stations. It is thus possible for an enterprise to combine the functions of a generating company in one area and that of a lincensee in another area. The generating company, will sell power to State Electricity Boards (SEBs), on the basis of an agreement, and, at tariff based on parameters applicable to generating companies. Power plants in the private sector are captive power plants, set up to serve an industrial or other unit, where the requirement of that unit is for a large/continuous supply of electricity and a reliable source of electricity is necessary. Surplus electricity from captive power plants can be offered for sale to the State Electricity Boards. In this regard, the Government of India, Ministry of Power, issued a policy known as "Policy on Private Participation in the Power Sector" dated 22.10.1991.

4. As per Clause 4(5) of the said policy published in the Government Gazette of India dated 22.10.1991, generating companies can enter into a contract for the sale of electricity generated by it with the State Electricity Board in any State where it owns/operates generating station(s) or in any other State where it is carrying on its activities or with any other person with the consent of the competent Government. To suit this, amendment has been incorporated in Section 43(A) of the Electricity (Supply) Act, 1948.

5. In pursuance of the above policy decision, the Petitioners herein, who are the companies manufacturing sugar in their respective mills in various places in the State of Tamil Nadu offered to set up co-generation units in their respective factories. The main by-product which emerges in the manufacture of sugar in these factories is bagasse which is used in co-generation plants as fuel.

6. On account of the above policy and the amendments brought in the Electricity (Supply) Act 1948, they set up co-generation plants in their respective sugar mills after getting necessary consent u/s 44(1) of the Electricity (Supply) Act. After erecting power generation units, they entered into Power Purchase Agreements with Tamil Nadu Electricity Board. As per the said Power Purchase Agreements (hereinafter referred to as PPA), the surplus power exported by Sugar Mills to Tamil Nadu Electricity Board grid as recorded by the export meter will be purchased by the Tamil Nadu Electricity Board on outright basis at the rate of Rs. 2 per unit and the rate will be reviewed and refixed if different norms are fixed by the Central Government/Government of Tamil Nadu.

7. Even before the setting up of generation units by the Petitioners mills and the execution of PPAs the Government of Tamil Nadu under G.O. Ms. No. 724 (Industries (MIC.I) Department dated 23.12.1992, based on the D.O letter No. 11152/B1/89 dated 06.11.1992, from the Commissioner of Sugar, constituted a Committee known as "Co-generation (Sugar Mills) Committee" to go into the issues concerning Co-generation of electricity in Sugar Mills and make suitable recommendations to the Government. The Commissioner of Sugar was the Member Secretary of the said Committee, besides the Principal Secretary, Industries Department, Secretary, Public Works Department, Secretary, Finance Department, Member (Accounts) and Member (Generations) Tamil Nadu Electricity Board as the members of the Committee. The purposes for which the Co-generation (Sugar Mills) Committee was constituted are as follows:

i. To evolve a methodology for pricing of electricity purchased by Tamil Nadu Electricity Board from Sugar Mills Co-generating electricity;

ii. To establish a formula for regular revision of the price at Fixed intervals to reflect changes in costs and other prices;

iii. To establish the mode and terms of payment by Tamil Nadu Electricity Board to the Co-generation Units.

iv. To review the scheme of wheeling and banking to make it more effective by allowing wheeling to any party at market driven price to be mutually negotiated between the co-generator and the end user.

8. In paragraph 4 of the said G.O, the Government directed as follows:

Based on the recommendations of this Committee, the Government shall take decisions on pricing, payment terms, wheeling etc., and finalise suitable programmes to set up co-generation plants in the sugar mills in Tamil Nadu.

9. The Committee, accordingly, went into all the issues and finally submitted a report to the Government making various recommendations in respect of the price of co-generated power, time limit for payment, banking and wheeling of power, and exemption from Electricity Generation Tax. The report of the Committee was

accepted by the Government and thereafter, the Government issued G.O. Ms. No. 230, Industries (MISC.I) Department dated 16.06.1993. In the said G.O., the Government has directed as follows:

The Committee has now given its report. The Government have considered the recommendations contained therein. Accordingly, the following orders are issued by the Government.

i. Price of Co-generated Power:

For the power supplied to the State grid by the co-generating sugar mills, Tamil Nadu Electricity Board shall pay a price equal to HT-1 tariff charged for industrial consumers less 2% for transmission cost.

ii. Time Limit for payment:

The Tamil Nadu Electricity Board shall be required to make the payments for the power purchased from the co-generating mills within 30 days of the date of receipt of invoices from the mills with a suitable rebate/surcharge for earlier/later payments. The rebate/surcharge shall be decided taking into account the prevailing bank interest rates.

iii. Banking and Wheeling:

The Co-generating sugar mills shall be permitted to tank the power generated and wheel it through the Tamil Nadu Electricity Board, grid for sale to other consumers at mutually agreed rates subject to approval by the Government and the Tamil Nadu Electricity Board, shall charge 10% of the power for wheeling through the grid and 2% of the power for banking.

iv. Exemption from Electricity Generation Tax:

Co-generating sugar mills shall be exempted from the Electricity Generation Tax both for power consumed captively as well as power supplied to the Tamil Nadu Electricity Board, and other third parties.

10. According to the Petitioners, when the Petitioners approached Tamil Nadu Electricity Board seeking permission for establishment of co-generation units offering to sell the surplus co-generated energy to the Tamil Nadu Electricity Board, they were under the impression that the purchase of power will be governed by G.O. Ms. No. 230 dated 16.06.1993 and the price equal to HT-1 tariff will be paid less 2% for transmission cost as per the said G.O. When the Petitioners approached the Tamil Nadu Electricity Board, for entering into PPAs, the Tamil Nadu Electricity Board, according to the Petitioners, forwarded a draft agreement, wherein, to their surprise, they noticed that the price for power supply shall not be paid as per G.O. Ms. No. 230 and instead, it will be paid as per B.P.(FB) 96 dated 31.03.1995.

11. At this juncture, it is worthwhile to refer to B.P.(FB) 96, (Technical Branch) issued by the Tamil Nadu Electricity Board on 31.03.1995. The said B.P. relates to the fixation of price for the energy sold to Tamil Nadu Electricity Board by sugar mills. The B.P (FB) 96 reads as follows:

In the Board''s Proceedings Permanent (FB) No. 241 (Tech. Br) dt.20.08.1994, the cost at which the surplus energy sold to TNEB by the Sugar Mills was fixed at Rs2/- per unit.

In order to encourage further private sector participation in power generation through Co-generation, the purchase price of surplus energy to the grid by Co-generating sugar mills is revised to Rs. 2.25 ps (Rupees two and paise twenty five only) per unit with effect from 01.04.1995 and with a price increase of 5% over the previous year for a period of five years. This will be reviewed after five years. Till the review is made and new rates are finalised, the rate at which the payment is made at the fifth year will continue.

The wheeling charges of 2% for wheeling power to their sister concerns of sugar mills is also approved. The Sugar Mills are permitted to wheel the power to their sister concerns which are situated within 2 kilometers radius from the Sugar Mills. The Government may be requested to revise the G.O. Ms. No. 230 dt.16.06.1993 of Industries Department.

12. In the Power Purchase Agreements entered into between the Petitioners and the Tamil Nadu Electricity Board after the coming into being of B.P.(FB) 96, it was specifically mentioned that the purchase price for surplus energy to be supplied by Sugar Mills from co-generating units will be paid as per B.P.(FB) 96. When the draft agreements were forwarded, they raised objection for the same, instead they stated that they were made to believe all along that the price will be paid as per G.O. Ms. No. 230 and the contrary stand taken by the Tamil Nadu Electricity Board that it would pay the charges only as per B.P.(FB)96 is arbitrary, illegal and void.

13. However, the Sugar Mills, according to them, signed the Power Purchase Agreements because they were kept under constant pressure. According to them, the co-generation plants had already been set up by investing huge money and by raising huge loans from financing institutions. Further, if the co-generating units were not commissioned soon, it would have been impossible for the Mills even to go for crushing sugar cane. Therefore, subject to protest, according to the Petitioners, they entered into the Power Purchase Agreements reserving their right to claim the purchase price as per G.O. Ms. No. 230 dated 16.06.1993.

14. Subsequently, the Tamil Nadu Electricity Board issued B.P.(FB) No. 91 (Technical Branch) dated 10.06.1998 wherein after referring to B.P.(FB) No. 96, the Board directed as follows:

The purchase price of power generated by the sugar Mills during off-season, using lignite as fuel, is fixed on par with the rate applicable for the bagasse based co-generated power contemplated vide B.P (FB). No. 96 dt.31.03.1995 i.e. Rs. 2.25 per unit with effect from 1.04.1995 with 5% annual increase for a period of five years.

The above tariff is applicable only to those Co-generating Sugar Mills exporting power to TNEB grid and have utilised the entire bagasse produced during the crushing season for power generation.

Thus, as per B.P(FB) No. 91, uniform price was fixed for off-season supply also, though, the Sugar Mills may not use Bagasse as fuel and instead, they may use other conventional fuels like coal, lignite etc. In that Board Proceedings also it was specifically stated that the Government of Tamil Nadu may be requested to revise the G.O. Ms. No. 230 dated 16.06.1993, Industries Department.

15. In the year 2000, as per B.P.(FB) 96 of the year 1995, which stipulates that revision of tariff shall be done on completion of every 5 years, the Tamil Nadu Electricity Board revised the tariff and accordingly issued yet another Board Proceedings in Permanent B.P (FB) No. 1 dated 11.01.2000, which reads as follows:

i. The purchase Price of Co-generated Power from the Sugar Mills for the year 2000-2001 effective from 01.04.2000 is fixed at Rs. 2.73 (Rupees two and paise seventy three) per unit and this price will be increased by 5% every year over the previous year rate for a period of Nine Years upto 2010. The price so fixed shall not exceed 90% of the prevailing H.T. Tariff I rate applicable for the industrial consumers, which may get revised from time to time.

ii. The above purchase price is applicable for the energy generated and exported by the co-generating sugar mills during the non-crushing season also, using alternative fuels like lignite, subject to the conditions stipulated vide (B.P.(FB) No. 91 dt.10.06.1998.

iii. The above purchase price is applicable for the individual sugar mills participating either in the proposed Joint Venture Company approved by the Government of Tamil Nadu or any other individual sugar mills proposing such Joint Venture.

iv. The above Purchase Price will be reviewed after ten years during 2010. Till such review is made and a new rate is finalised, the tenth year rate will be continued to be paid if the company/sugar Mills supplies its surplus power to TNEB.

v. The Power Purchase Agreement (PPA) shall be kept in force, from the date of agreement, for a period of fifteen years or for the useful life period of the plant whichever is less.

Thus, the Board Proceedings came to be issued contrary to the price as contemplated in G.O. Ms. No. 230. In this Board Proceedings, as noticed above, the

Purchase Price for the year 2000-2001 with effect from 01.04.2000 was fixed at Rs. 2.73 per unit. The uniform Purchase Price for the off-season as introduced by B.P.(FB) 91 dated 10.06.1998 shall continue.

16. Lastly, Tamil Nadu Electricity Board issued yet another Board Proceeding in B.P.(FB) No. 93, Technical Branch, dated 16.05.2000. The said Board Proceeding reads as follows:

i. To permit those sugar mills, having tie-up arrangement with TNPL for supply of bagasse to generate power using pith and fossil fuels during crushing and non-crushing season and export surplus power to TNEB grid. However, the plant capacity is to be restricted to the quantum of bagasse produced and supplied to TNPL.

ii. The purchase price of power generated by the existing and future co-generation plants of the sugar mills, using alternate conventional fuel, including those co-generation plants under Joint Venture model proposed in the Co-operative Sector sugar Mills, may be fixed at the captive power rate with 2000-2001 as the base year.

iii. The purchase price of power generated by the sugar mills having tie up with TNPL for the supply of bagasse and generating power using pith and fossil fuels during crushing and non-crushing season also may be fixed at the captive power rate with 2000-2001 as the base year.

iv. The price of captive power is Rs. 2.48 per unit effective from 01.04.2000 with 5% annual increase over the previous year rate, for a period of nine years.

v. The above rate will be reviewed after ten years during 2010. Till such review is made and new rates applicable from 01.04.2010 is finalised, the tenth year rate will be continued to be paid if the sugar mills continued to supply its surplus power to TNEB.

vi. To adopt the above differential pricing policy uniformly for all the existing and future co-generation plants of the sugar mills.

17. According to the Petitioners, thus, Board Proceedings (FB) No. 96 dated 31.03.1995, Board Proceedings (FB) No. 91 dated 10.06.1998, Board Proceedings (FB) No. 1 dated 11.01.2000 and Board Proceedings (FB) No. 93 dated 16.05.2000 are contrary to G.O. Ms. No. 230 and therefore, they are void. According to them, they are entitled for price for the energy supplied by them at the rates prescribed by G.O. Ms. No. 230.

18. It is the further case of the Petitioners that they are also entitled for the price as per the guidelines issued by the Ministry of Non Conventional Energy Sources dated 25.11.1994. As per the said guidelines, the base electrical energy purchase price valid for 1994-95 shall be a minimum of Rs. 2.25/kwh. The Guidelines 1 and 2 read as follows:

The State Electricity Board will announce a base purchase price every year for the electrical energy purchased by it from non-conventional energy based power projects. These rates shall be valid from 1st April to 31st March of the following year.

The base electrical energy purchase price valid for 1994-95 shall be a minimum of Rs. 2.25 kwh.

The base price shall be escalated at a minimum rate of 5% every year. Announcement of revised base prices shall be made by the SEB on1st April every year.

The base prices shall be applicable to all non-conventional energy based power projects based on solar, wind, small hydro, biomass, etc. for which Power Purchase Agreements are signed during a year.

2. A promote/developer shall be entitled to receive the base price set out in PPA for all electrical energy delivered from his project to the State Grid for the duration of the Power Purchase Agreement. The rate shall be equal to base price in the year of signing of PPA, escalated at a rate of 5% per year for a period of 10 years, from the date of signing of the Power Purchase Agreement. From the end of the 10th year, and for the remaining duration of the Power Purchase Agreement, the new purchase price shall be equal to the purchase price at the end of the 10th year, or the High Tension (HT) tariff prevalent in the State at that time, whichever is higher.

19. The grievance of the Petitioners is that instead of fixing the base price for the year 1994-95 at Rs. 2.20/kwh with an increase of 5% every year in accordance with G.O. Ms. No. 230, the Tamil Nadu Electricity Board has fixed Rs. 2.25 as base price only for the year 1995-96 as per B.P. No. 96. It is also pointed out that as per G.O. Ms. No. 230, the base price for the year 1995-96 shall be Rs. 2.50 per unit. Thus, according to them, the price for the year 1995-96, namely, Rs. 2.25 per unit, fixed by the Tamil Nadu Electricity Board as per the above Board Proceedings (B.P. No. 96) is quite contrary to either the price fixed by the G.O. Ms. No. 230 at Rs. 2.50 per unit or as per the Guidelines at Rs. 2.36. Similarly, as per G.O. Ms. No. 230, for the year 2000-2001, the TNEB ought to have fixed Rs. 3.50 as base price. But, the TNEB has fixed Rs. 2.73 as base price as per B.P:No. 1/2000. Consequently, according to them, they have been put to huge loss because of the low price fixed by the Tamil Nadu Electricity Board as per the above Board Proceedings. It is in these circumstances, the Petitioners have come up with these writ petitions, almost on common grounds with common prayers.

20. The main prayer in some of the writ petitions is for a direction to implement G.O. Ms. No. 230 scrupulously from 01.03.1994 onwards. In some writ petitions, the challenge is to B.P. No. 96 dated 31.03.1995. In some other writ petitions, the challenge is to the Board Proceedings No. 91 dated 10.06.1998. In some other writ petitions, the challenge is to the Board Proceedings No. 1 dated 11.01.2000 and in some other writ petitions, the challenge is to the Board Proceedings No. 93 dated

16.05.2000. In few more writ petitions, the Petitioners have prayed for immediate payment of price for the electricity supplied during the past.

21. The main contention of the Petitioners is that G.O. Ms. No. 230 has got statutory force as the same is traceable to Section 78A of the Electricity (Supply) Act, 1948 and the same binds the Tamil Nadu Electricity Board. Therefore, all the above Board Proceedings, which run contrary to G.O. Ms. No. 230, are void. In order to substantiate this contention, it is submitted that the State Government, u/s 78A of the Electricity (Supply) Act, has got power to issue directions to the Tamil Nadu Electricity Board, on questions of policy and such policy decisions issued by way of directions of the Government are binding on the Tamil Nadu Electricity Board. According to them, G.O. Ms. No. 30 is one such direction of the Government on policy issued u/s 78A of the Electricity (Supply) Act.

22. But it is the contention of the Respondents that G.O. Ms. No. 230 is only an executive instruction issued by the Government and the same was not issued u/s 78A of the Electricity (Supply) Act. Since in the counter filed by the Tamil Nadu Electricity Board it was specifically contended that G.O. Ms. No. 230 is not binding on the Tamil Nadu Electricity Board, in order to find out the stand of the Government, this Court directed an affidavit to be filed by the Government in this Regard. In response to the same, the Joint Secretary to the Government, Industries Department has sworn to an affidavit dated 15.03.2011, wherein in paragraph 6, he has stated as follows:

It is submitted that Section 78A of the Indian Electricity (Supply) Act, 1948 gives the power to the State Government to guide the Electricity Board in the discharge of their functions on questions of policy. I state that G.O.(Ms) No. 230 Industries Department, dated 16.06.1993 was not issued u/s 78A of the Act.

23. There is no controversy before this Court that if G.O.(Ms). No. 230 is found to have been issued under Section78A of the Act, surely, the same shall be binding on the Tamil Nadu Electricity Board. Since it is specifically contended by the Tamil Nadu Electricity Board as well as the Government that the said G.O was not issued as per Section 78A of the Act and instead, it was only an executive instruction issued by the Government, it becomes imperative for this Court to decide the question as to whether the said G.O is traceable to Section 78A of the Act.

24. For this purpose, as rightly contended by the learned Counsel for the Petitioners, it is worthwhile to refer to G.O. Ms. No. 724, Industries (MISC.I) dated 23.12.1992 referred to above (see para 7). A reading of the said G.O would go a long way to show that the Co-generation (Sugar Mills) Committee was specifically constituted by the State Government only for the purpose of going into the question of pricing of electricity purchased by the Tamil Nadu Electricity Board from Sugar Mills Co-generating Electricity. It is noticeable that apart from the representatives of the Government at the Secretary level, the Member (Accounts) and Member

(Generations) of Tamil Nadu Electricity Board were also members of the said Committee. The G.O further states that the Government shall take decisions on pricing, payment terms, wheeling etc., and finalise suitable programmes to set up co-generation plants in the sugar mills in Tamil Nadu. Had not the Government had in mind to issue policy declaration in respect of pricing, it would not have constituted such a committee consisting of not only the Government representatives, but also the representatives from the Tamil Nadu Electricity Board. The very purpose of the said Government Order itself is only to evolve methodology for pricing and to establish a formula and for regular revision of price at fixed intervals etc., This would go to show that the Government by constituting the committee decided to issue a policy decision on the question of pricing.

25. Indisputably, the Committee which included two representatives from the Tamil Nadu Electricity Board went into the questions and made a number of recommendations. The summary of recommendations are as follows:

i. For the power supplied to the State grid by the co-generating sugar mills, TNEB may pay a price equal to HT-1 tariff charged for industrial consumers less 2% for transmission cost.

ii. The TNEB may be required to make the payments for the power purchased from the co-generating mills within 30 days of the date of receipt of invoices from the mills with a suitable rebate/surcharge for earlier/later payments.

iii. The co-generating sugar mills may be permitted to bank the power generated and wheel it through the TNEB grid for sale to other consumers at mutually agreed rates subject to approval by the Government and the TNEB may charge 10% of the power for wheeling through the grid and 2% of the power for banking.

iv. Co-generating sugar mills may be exempted from the Electricity Generation Tax both for power consumed captively as well as power supplied to the TNEB and other third parties.

26. The said Committee''s report was accepted by the Government and that is how G.O. Ms. No. 230 came into being. The contention of the learned Advocate General is that there is no reference made of Section 78A of the Act, in the G.O and therefore, it is far-fetched to say that the said G.O has been issued in exercise of the power conferred u/s 78A of the Act. In my considered opinion, it is immaterial as to whether G.O. Ms. No. 230 contains a specific reference about Section 78A of the Act or not. As I have already stated, the way in which G.O. Ms. No. 230 was brought into being would go only to indicate that the said G.O was nothing but the policy of the Government issued by way of direction u/s 78A of the Act.

27. In order to strengthen the said conclusion arrived at by me, I may also refer to few more proceedings of the Tamil Nadu Electricity Board. The learned Counsel for the Petitioners would refer to a letter from the Chairman, Tamil Nadu Electricity

Board, in Letter No. CE/NCES/EA/F. Cogen/0.449/93 dated 20.12.1993, which was sent in response to the request of the Arooran Sugar Mills Ltd., for establishing a co-generation unit. In the said letter, while giving consent for the proposed co-generation plant to be established by Arooran Sugar Mills Ltd., the Chairman, Tamil Nadu Electricity Board has stated in paragraphs 1 and 2 as follows:

1. The surplus power generated by the co-generation plant after local consumption by your mill shall be sold to T.N.E.B only.

2. The purchase of power will be governed by G.O. Ms. No. 230 dated 16.06.1993.

In my considered view, had it been the case of the Tamil Nadu Electricity Board that the G.O. Ms. No. 230 is not a policy direction issued by the Government, the above reference to G.O. Ms. No. 230 would not have come to be made in the said consent letter.

28. The learned Counsel has referred to yet another letter from the Chairman, Tamil Nadu Electricity Board in Lr. No. CE/NCES/EA/F. Cogen/D1545/94 dated 21.11.1994 to the Government. In paragraphs 6 and 7 of the said letter, the Chairman, Tamil Nadu Electricity Board has stated as follows:

6. Further the H.T Tariff I indicated in G.O. Ms. No. 230 dated 26.06.1993, is the Tariff prevailing on that date, viz. Rs. 1.70. The G.O has not been revised subsequent to revision of tariff. Board has modified this by rounding off as Rs. 2/-per unit without Transmission charges. Hence, it is not correct to say that Board is not following the G.O. The Board''s orders are more beneficial than the G.O.

7. The basic point to be understood is that the cost of generation in co-generation unit will not go up year by year since the bagasse which otherwise go as waste is being used for generation of power in the name of co-generation, renewable energy, generation etc. The Sugar Mill Owners should not be encouraged to generate power with oil and lignite.

This letter was in response to a letter from the Government wherein the Government had called for remarks from the Tamil Nadu Electricity Board, as to whether G.O. Ms. No. 230 was being scrupulously followed in the matter of payment of price for electricity purchased from co-generation units of sugar mills. Had it been the case of the Tamil Nadu Electricity Board that G.O. Ms. No. 230 is not binding and that the same was not issued u/s 78A of the Act, by all means, the Chairman of Tamil Nadu Electricity Board would have told the Government that the G.O. Ms. No. 230 is not binding on the Tamil Nadu Electricity Board. Instead, the Chairman has categorically stated that it is not correct to say that the Board is not following the G.O. Ms. No. 230. This would again indicate that G.O. Ms. No. 230 was treated only as policy direction of the Government.

29. In this regard, I may also refer to Permanent B.P.(FB). No. 153, (Technical Branch) dated 22.05.1995, issued by the Tamil Nadu Electricity Board, wherein also, there is a

reference to G.O. Ms. No. 230. In paragraph 1 of the said Board Proceeding, the Tamil Nadu Electricity Board has stated as follows:

The Government of Tamil Nadu has issued order in the G.O cited that the power supplied from the Co-generation Plant of the Sugar Mills may be purchased at the H.T.I Tariff charged for industrial consumers after deducting 2% towards transmission cost. Accordingly, payments were made to MRK Sugar Mills/Sethiathope and Cheyyar Sugar Mills/Cheyyar. Subsequently in the Board B.P.(2) cited, it has been decided to pay only Rs. 2/-(Rupees Two only) per unit as followed in the case of Wind Energy. However, in respect of MRK Sugar Mills and Cheyyar Sugar Mills, Board had paid at HT Tariff I less 2% transmission cost up to the issue of the B.P. dated 20.08.1994.

This letter also would go to show that G.O. Ms. No. 230 was scrupulously followed as a policy direction of the Government.

30. In yet another letter dated 26.05.1995, in No. CE/NCES/EA/F. Cogen/D706/95, the Chairman of the Electricity Board had informed the Government of TamilNadu, Energy Department as follows:

The decision of the 723rd Board meeting held on 24.03.1995 is enunciated below:

The Board has approved the revised rate of Rs. 2.25 per unit with effect from 01.04.1995 for purchase of power from co-generated Sugar Mills with a price increase of 5% over the previous year instead of 10% for a period of 5 years towards the net surplus energy exported to the grid by the Sugar Mills. This rate will be reviewed after 5 years. Till the review is made and the new rates are finalised, the rate at which the payment is made at the 5th year will continue. The 2% wheeling charges recommended for wheeling the power to sister concerns of the Sugar Mills who are generating power and exporting to grid may be limited to the industries located within 25 kms radius from the Sugar Mills.

Based on this, B.P.(FB) 96 dated 31.03.1995 is issued and a copy enclosed, in which the revised rate of Rs. 2.25 per unit is fixed with effect from 01.04.1995 and with a price increase of 5% over the previous year for a period of five years and 2% wheeling charges for wheeling of power to sister concerns of Sugar Mills located within 25 kms radius from the sugar mills. It is requested that G.O. Ms. No. 230 Industries Department, Madras dated 16.06.1993 may kindly be amended as above and communicated early.

31. Several other such communications between the Tamil Nadu Electricity Board and the Government have been placed for perusal of this Court. In one such letter from the Government in Letter No. 14056/MIC I/98-2 dated 31.08.1998, the Government informed its proposal even to amend the G.O. Ms. No. 230. The said letter reads as follows:

I am directed to state that it is proposed to issue amendments to the existing paragraphs (2(i) and para 2(iv) of G.O. Ms. No. 230 Industries Department, dated 16.06.1993, by substituting the following paragraphs:

2(i) Price of Co-generated Power:

For the Power supplied to the State grid by the Co-generating sugar mills, Tamil Nadu Electricity Board shall pay a price equal to HT-I tariff charged for industrial consumption less 10% for transmission cost/overheads:

2(iv) Exemption from Electricity Generation Tax

Co-generating sugar mills shall be exempted initially for a period of 5 years from the Electricity Generation Tax both for power consumed captively as well as power supplied to the Tamil Nadu Electricity Board and other third parties.

32. In response to the said letter, the TNEB sent a letter dated 15.07.1999, wherein the TNEB requested the Government to amend the Government Order at the earliest. The said letter reads as follows:

Consequent to the issue of the G.O. under reference first cited, several policy initiatives had been taken by the Board in order to encourage co-generation of power in sugar mills based on the guidelines issued by the Ministry of Non-Conventional Energy Sources. A comprehensive report on the decision taken by the Board were communicated vide references (2) and (4) cited.

Based on your request made vide reference (6) cited, copies of references sought for were also sent vide reference (7) cited requesting amendment to the G.O.(Ms) No. 230, dated 16-6-93. Board''s decision regarding the Government''s proposal to amend the said G.O. on the purchase price and exemption from Generation tax has also been communicated vide reference (9) cited. It has been further intimated, vide reference (10) cited, that Board has now decided to bear the cost of power evacuation facilities to the co-generating sugar mills as a special case, based on the suggestions made by the MNES.

However, orders of the Government of Tamil Nadu are yet to be issued on these issues. Hence, I request that G.O. Ms. No. 230, dated 16-6-93 may be arranged to be amended, in consultation with Energy Department, at the earliest, as the matter is pending at Government level for a long time.

Thus, though the Tamil Nadu Electricity Board was repeatedly requesting the Government to amend G.O. Ms. No. 230, the Government by letter dated 04.08.1999 in Letter No. 22576/MIC 1/99-1, has informed its policy not to amend G.O. Ms. No. 230. The letter reads as follows:

I am directed to invite attention to the letter cited wherein you have requested orders of the Government for issuing amendment to G.O. Ms. No. 230,Industries, dt.16.06.1993. In this connection, I am to state that it is proposed to set up

cogeneration projects, in 10 sugar mills in joint venture. IL & FS and Adviser, Government of India, MNES have sought for certain relaxation from Tamil Nadu Electricity Board for these co-generation projects. It has therefore, been decided that it is adequate to follow up on the proposal document prepared by IL & FS for the co-generation projects (illegible) in which certain relaxation have been sought for (illegible) from the Tamil Nadu Electricity Board and that no action need be taken for issue of amendment to the above mentioned G.O at present.

From this letter, it is very clear that the Government was very firm in its stand that G.O. Ms. No. 230 should be scrupulously implemented by the Tamil Nadu Electricity Board.

33. From the above narration of the facts, it may be easily concluded without any room for doubt that though there has been no specific reference with regard to Section 78A of the Act in G.O. Ms. No. 230, in fact, it is a direction regarding the policy of the Government in respect of price to be paid by the Tamil Nadu Electricity Board for the electricity supplied by the Sugar Mills from Co-generation units by using bagasse traceable to Section 78A of the Electricity (Supply) Act. Thus, I hold that G.O. Ms. No. 230 is binding on the Tamil Nadu Electricity Board and it is not an executive instruction as it is contended by the Respondents.

34. The learned Advocate General raised a preliminary objection regarding the maintainability of the writ petitions. According to him, all the writ petitions do not relate to statutory contract. The relief sought for, according to him, falls within the realm of private contracts and therefore, the remedy for the Petitioners is to workout before the appropriate Civil Court.

35. Per contra, the learned Counsel appearing for the Petitioners would submit that of course it is indisputable that Power Purchase Agreements are not statutory contracts. Nevertheless, the Respondent, Tamil Nadu Electricity Board, being a State instrumentality is bound to implement the statutory directions given by the Tamil Nadu Government, it is contended.

36. The learned Counsel would submit that in order to compel such State Instrumentality to implement the statutory provisions or statutory directions, writ petitions could be maintained under Article 226 of the Constitution of India. In this regard, the learned Advocate General would rely on Section 43A of the Act, under which a generating Company may enter into a contract with the State Electricity Board for sale of electricity. It is in tune with the said provision, the Power Purchase Agreements with these writ Petitioners, were entered into. Therefore, according to the learned Advocate General, these Power Purchase Agreements are, pure and simple, private contracts and in order to enforce the same, the writ jurisdiction of this Court cannot be invoked.

37. In this regard, the learned Advocate General, placed reliance on the judgment of the Hon''ble Supreme Court in India Thermal Power Ltd. Vs. State of M.P. and

Others, , wherein in paragraph 11, the Hon''ble Supreme Court in an identical situation has held as follows:

... Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory.

Therefore, the PPAs can be regarded as statutory only to the extent it contains provisions regarding the determination of operation and other statutory requirements of 43-A (2) opening and maintaining of an escrow account or an escrow agreement are not the statutory requirement and therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory.

38. Similarly, in Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, , in paragraph 11, the Hon''ble Supreme Court has held as follows:

A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil Court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the Appellant to pay it, is justified or not, are not the matters which could have been agitated and

decided in a writ petition. The contractor should have relegated to other remedies.

39. Nextly, the learned Advocate General placed reliance on the judgment of the Hon''ble Supreme Court in National Highway Authority of India Vs. Ganga Enterprises and Another, wherein, in paragraph 6, the Honb''le Supreme Court has held as follows:

It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of Kerala SEB v. Kurien E. Kalathil, State of U.P. v. Bridge & Roof Co. (India) Ltd. and Bareilly Development Authority v. Ajai Pal Singh. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ Court was not the proper forum. Mr. Dave, however, relied upon the cases of Verigamto Naveen v. Govt. of A.P. and Harminder Singh Arora v. Union of India. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus, on the ground of maintainability the petition should have been dismissed.

40. Lastly, the learned Advocate General relied on a judgment of the Hon''ble Supreme Court in Pimpri Chinchwad Municipal Corporation and Others Vs. Gayatri Construction Company and Another, . In the said judgment, after referring to various other earlier judgments including the judgments referred to above, the Hon''ble Supreme Court in an identical situation, had negatived the request for a writ on the ground that the party to a private contract has to work out his remedy only before the Civil Court.

41. Regarding the above settled legal proposition, there is no controversy before this Court. Even the learned Counsel for Petitioners tacitly admitted across the Bar that it is not at all the claim of the Petitioners that the Power Purchase Agreements are statutory contracts. But all that the learned Counsel would contend is that though the Power Purchase Agreements are not statutory contracts, nevertheless the writ petitions are maintainable because there is an obligation on the part of the Respondent-State instrumentality to implement the statutory provisions contained in Section 78A of the Act and G.O. Ms. No. 230 issued by the Government of Tamil Nadu.

42. In this regard, the learned Counsel would rely on a judgment of the Hon''ble Supreme Court in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, , wherein in paragraph 10, the Hon''ble Supreme Court has held as follows:

It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution

and the Court depending on facts of the said case is empowered to grant the relief.

43. Again in paragraph 23 of the judgment, the Hon''ble Supreme Court has held as follows:

It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the Appellants the first Respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first Respondent.

44. Nextly, the learned Counsel placed reliance on the judgment of the Hon''ble Supreme Court in Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , wherein in paragraph 7, the Hon''ble Supreme Court has held as follows:

So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the Appellants and therefore, the writ petition filed by the Appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies:(i) where the writ petition seeks enforcement of any of the fundamental rights;(ii)where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks) The present case attracts applicability of the first two contingencies. Moreover, as noted, the Petitioners'' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the Appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.

45. Very recently, in Zonal Manager, Central Bank of India Vs. Devi Ispat Ltd. and Others, , in paragraph 28, the Hon''ble Supreme Court has held as follows:

It is clear that (a) in the contract if there is a clause for arbitration, normally, a writ court should not invoke its jurisdiction;(b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c)if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably, discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if

any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power and the writ petition is maintainable.

46. A close reading of the above judgments would make it manifestly clear that the power of this Court under Article 226 of the Constitution of India is unlimited and the same is not circumscribed by any of the provisions of the Constitution of India. But at the same time, in course of time, the Courts have evolved certain self imposed restrictions in the matter of exercising writ jurisdiction of the High Court under Article 226 of the Constitution of India. One such restriction is to decline to entertain a writ petition when the party aggrieved has got an alternative remedy, which is more efficacious. It is also the law, as held by the Hon''ble Supreme Court in the judgments referred to above, in appropriate cases, at least in certain contingencies, like violation of fundamental rights more particularly, when the action of the State or State Instrumentality is wholly unfair, arbitrary, etc., Article 14 of the Constitution of India, this Court can surely entertain a writ petition to compel the State or State Instrumentality to discharge its statutory obligations.

47. Keeping in mind the above settled position of law, if we analyse the facts of the present case, as I have already stated, G.O. Ms. No. 230 creates a statuary obligation on the part of the Tamil Nadu Electricity Board, in view of the specific provision contained in Section 78A of the Act and since the grievance of the Petitioners is that the Tamil Nadu Electricity Board has declined to discharge its statutory obligations, I am of the firm view that all these writ petitions are maintainable.

48. Nextly, the learned Counsel for Petitioners would submit that the guidelines issued by the Government of India, Ministry of Non Conventional Energy Sources dated 25.11.1994, in respect of purchase price from the year 1994-95 shall also be binding on the Electricity Board. As I have already extracted, in the said guidelines, the electrical energy purchase price valid for the year 1994-95 shall be a minimum of Rs. 2.25 per kwh. There shall be an increase of 5% every year for a period of ten years. The grievance of the Petitioners is that the said guidelines issued by the Central Government also has not been scrupulously followed by the Tamil Nadu Electricity Board while entering into the Power Purchase Agreements and while issuing the Board Proceedings impugned in these writ petitions.

49. The learned Counsel for the Petitioners would further submit that the promotion of energy from renewable sources and/or by co-generation is pursuant to international policies and treaties including U.N. General Assembly Resolutions (for instance para 35(g) of A/RES/42/186 of UN GA 96th plenary on 11.12.1987 and India''s reports on the subject to UN). India is a party to the said resolution. The object is to preserve environment and the natural resources of the planet and to achieve sustainable development and inter-generational equity. Therefore, according to the learned Counsel, the State is bound to pursue the same as the law of the land as laid down in Vellore Citizens Welfare Forum Vs. Union of India and others, . He would further submit that since India is a party to the international

treaties and protocols, the promotion of energy from renewable sources of energy is the obligation of the Nation. He would further submit that the Central Government is competent under Article 73 read with Article 253 of the Constitution of India and is bound to initiate policies to implement the same. The State Governments should act in accordance with the same. The guidelines referred to above have been rightly issued by the Central Government and it is, in turn, the duty of the State Governments to implement the same.

50. As contended by the learned Counsel, since there is also a question as to whether the State Government itself is bound by the Central Government guidelines and as to whether the Tamil Nadu Electricity Board is again bound by the same, in my considered opinion, the writ petitions are maintainable to decide the said question.

51. Now, let me move on to the next ground. It is the main contention of the Petitioners that since TNEB is bound by G.O. Ms. No. 230, the Power Purchase Agreement (PPAs) and the subsequent Board Proceedings in BP No. 96 and the other Board Proceedings referred to above are not binding on the Petitioners since they run contrary to the said Government Order. The learned Counsel would submit that the TNEB, having given an assurance in the consent letters issued in exercise of the powers vested with the Board by the Electricity (Supply) Act, 1948 that the purchase of power will be governed by G.O. Ms. No. 230 dated 16.06.1993, the Board is estopped from contending that the Board will not fix or refix the tariff payable to the sugar mills as per G.O. Ms. No. 230. In this regard, the learned Counsel has taken me through the consent letter wherein, the TNEB has stated as follows:

1. Surplus power generated by the Co-generation Plant after local consumption by the mill shall be sold to TNEB only.

2. Purchase of power will be governed by G.O.230 dated 16.06.2003.

However, contrary to the said assurance given in the consent letter, when the draft Power Purchase Agreement was sent to the Petitioners, they were shocked to note that in Clause 7, the TNEB had sought to include as follows:

Surplus energy left unavailed by the sugar mills at the end of non crushing season will be purchased by the TNEB on out right basis at the rate of Rs. 2.25 per unit as per proceedings in permanent BP 96 (Technical Branch) dated 31.03.1995.

52. The learned Counsel would submit that when the said fact was brought to the notice of the Petitioners, all the sugar mills sent individual letters protesting against the said clause. For instance, the Chairman and Managing Director of Thiru Arooran Sugars Limited has sent a letter on 06.09.1995 wherein he has stated as follows:

Further to our letters cited above, and subsequent discussions thereon with the Member (Generation) on 01.09.1995 and yourself on 04.09.1995, regarding

modifications to be incorporated in the draft Power Purchase Agreement (PPA), we wish to inform you that pending final decision on the issues raised therein and incorporation of our suggestions, we are proceeding to sign the PPA with the Superintending Engineer, Tanjore Distribution Circle, Thanjavur, as per draft furnished to us, on, provisional basis, as advised by you, in view of the imminent readiness of our Co-generation plant for commissioning.

We shall be extremely grateful to you if you could kindly extend favourable consideration to our request for modifications in respect of the terms and conditions at the earliest so as to enable incorporation of the same in the revised final Power Purchase Agreement.

53. The learned Counsel would, therefore, contend that because of the said assurance given in the consent letter and subject to protest, the Petitioners entered into the PPAs wherein the clause running contrary to G.O. Ms. No. 230 was also incorporated. Placing reliance on these facts, the learned Counsel would submit that the doctrine of promissory estoppel would be very much applicable inasmuch as the Petitioners had set up the power plant only on the above promise made by the TNEB to purchase the surplus electricity and fix the tariff as per G.O. Ms. No. 230. In this regard, the learned Counsel would rely on the judgment in Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, wherein the Hon''ble Supreme Court in paragraphs 121 and 122 has held as follows:

121. The doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff. Such a policy decision on the part of the State shall not only be expressed by reason of notifications issued under the statutory provisions but also under the executive instructions. Appellants had undoubtedly been enjoying the benefit of payment of tax in respect of sale/consumption of electrical energy in relation to the co-generating power plants.

122. Unlike an ordinary estoppel, promissory estoppel gives rise to a cause of action. It indisputably creates a right. It also acts on equity. However, its application against constitutional or statutory provisions is impermissible in law. This aspect of the matter has been considered in State of Bihar and Others Vs. Project Uchcha Vidya, Sikshak Sangh and Others, stating:

77. We do not find any merit in the contention raised by the learned Counsel appearing on behalf of the Respondents that the principle of equitable estoppel would apply against the State of Bihar. It is now well known, the rule of estoppel has no application where contention as regards a constitutional provision or a statute is raised. The right of the State to raise a question as regards its actions being invalid under the constitutional scheme of India is now well recognized. If by reason of a constitutional provision, its action cannot be supported or the State intends to

withdraw or modify a policy decision, no exception thereto can be taken. It is, however, one thing to say that such an action is required to be judged having regard to the fundamental rights of a citizen but it is another thing to say that by applying the rule of estoppel, the State would not be permitted to raise the said question at all. So far as the impugned circular dated 18-2-1989 is concerned, the State has, in our opinion, a right to support the validity thereof in terms of the constitutional framework.

54. The learned Counsel would also submit that the doctrine of legitimate expectation also would enure in their favour. According to the learned Counsel there is every justification on the part of the Petitioners to legitimately expect the TNEB to implement G.O. Ms. No. 230 as it is nothing short of a direction issued u/s 78A of the Electricity (Supply) Act, 1948. For this proposition, the learned Counsel relies on paragraphs 132 and 133 of the above said judgment of the Hon''ble Supreme Court which read thus:

132. We may also notice the emerging doctrine in this behalf, viz., Legitimate Expectation of Substantive Benefit. Ordinarily, the said principle would not have any application where the legislature has enacted a statute. As, according to us, the legislature in this case allowed the parties to take benefit of their existing rights having regard to the repeal and saving clause contained in Section 20(1) of the 2003 Act, the same would apply. If, thus, principle of promissory estoppel would apply, there may not be any reason as to why the doctrine of legitimate expectation would not.

133. Legitimate expectation is now considered to be a part of principles of natural justice. If by reason of the existing state of affairs, a party is given to understand that the other party shall not take away the benefit without complying with the principles of natural justice, the said doctrine would be applicable. The legislature, indisputably, has the power to legislate but where the law itself recognizes existing right and did not take away the same expressly or by necessary implication, the principles of legitimate expectation of a substantive benefit may be held to be applicable.

55. I have no doubt that these two doctrines are applicable to the Petitioners and, therefore, the Respondent TNEB cannot decline to implement G.O. Ms. No. 230. Having made a promise in the consent letter itself that the tariff would be fixed as per G.O. Ms. No. 230, it is neither open nor fair, for the TNEB to contend that G.O. Ms. No. 230 is not a mandatory direction issued u/s 78A of the Electricity (Supply) Act and the same is not binding on them. As I have already concluded G.O. Ms. No. 230 is, in effect, a policy direction issued only u/s 78A of the Electricity (Supply) Act and, therefore, the same is binding. Thus, the Petitioners are entitled for the benefit of the doctrines of promissory estoppel as well as legitimate expectation. As held by the Hon''ble Supreme Court, the doctrine of promissory estoppel gives a rise to a cause of action and indisputably it creates a right in favour of the Petitioners.

56. But what all that the learned Advocate General would argue is that assuming that a right has accrued in their favour, the Petitioners are guilty of laches and, therefore, they are not entitled for any relief in these writ petitions. The learned Advocate General would place reliance on the judgment of a Constitution Bench of the Hon''ble Supreme Court in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, , wherein, in the majority judgment in paras 65 & 66 the Hon''ble Supreme Court has held as follows:

65. ...The decisions of various High Courts in India have firmly laid down that in the matter of the issue of, a writ under Article 226 the courts have a discretion and may in suitable cases refuse to give relief to the person approaching it even though on the merits the applicant has a substantial complaint as regards violation of fundamental rights, Although the Limitation Act does not apply, the courts have refused to give relief in cases of long or unreasonable delay. As noted above in Bhailal Bhai''s case(1), it was observed that the "maximum period fixed by the legislature as the time within Which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured." On the question of delay we see no reason to hold that a different test ought to be applied when a party comes to this Court under Article 32 from one applicable to applications under Article 226. There is a public policy behind all statutes of limitation and according to Halsbury''s Laws of England (Third Edition, Vol. 24), Article 330 at p. 181:

The courts have expressed at least three different reasons supporting the existence of statutes of limitation, namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a Defendant might have lost the evidence to disprove a stale claim and (3) that persons with good causes of action should pursue them with reasonable diligence.

66. In my view, a claim based on the infraction of fundamental rights ought not to be entertained if made beyond the period fixed by the Limitation Act for the enforcement of the right by way of suit. While not holding that the Limitation Act applies in terms. I am of the view that ordinarily the period fixed by the Limitation Act should be taken to be a true measure of the time within which a person can be allowed to raise a plea successfully under Article 32 of the Constitution.

57. In this case, according to the learned Advocate General, though the PPAs were entered in the year 1994-95, these writ petitions have been filed only in the year 2000 and some of the writ petitions have been filed in the year 2010. Applying the principles stated by the Constitution Bench of the Hon''ble Supreme Court cited supra, the learned Advocate General would contend that the Petitioners are guilty of laches and on that ground the writ petitions are liable to be dismissed.

58. Per contra, the learned Counsel appearing for the Petitioners would submit that the principle of laches has got no application to the facts of the present cases. Here,

in the instant cases, even after the PPAs, there were series of discussions held on various occasions between the TNEB, Government and Sugar Mills on the claims made by the Petitioners repeatedly for paying the electricity tariff as per G.O. Ms. No. 230. Because of failure of such discussions and persuasions, they have at last come to this Court by way of writ petitions. The learned Counsel would further submit that some of the writ petitions filed in the year 2000 by the Associations of the Sugar Mills were withdrawn and while permitting to withdraw the same, this Court granted permission to its members to file separate writ petitions and that is how, some of the writ petitions under consideration came to be filed in the year 2010. Thus, according to the learned Counsel, absolutely, there is no laches on the part of the Petitioners.

59. I have considered the above submissions. Indisputably, the Limitation Act, 1963 has got no application to the writ proceedings. However, in the above judgment, the Hon''ble Supreme Court has held that ordinarily the period fixed by the Limitation Act should be taken to be a true measure of the time within which a person can be allowed to raise a plea successfully either by way of writ petition under Article 226 or by way of petition under Article 32 of the Constitution. Here, in the instant cases, the Petitioners have filed the writ petitions only for mandamus to implement the G.O. Ms. No. 230, but, in effect the relief sought for in these writ petitions are only for recovery of the price for the electricity supplied in terms of G.O. Ms. No. 230. As per Article 14 of the Limitation Act, 1963 a period of 3 years has been prescribed for filing a suit for recovery of the price of goods sold from the date of delivery of goods. It is the contention of the learned Advocate General that since these writ petitions are in effect for recovery of the amount due from the TNEB and since they have been filed beyond the period of 3 years, the Petitioners are guilty of laches. I find every force in the said argument. The contention of the Petitioners is that there were number of correspondences between the Petitioners and the TNEB and in this regard even at one stage, there was also a proposal on the part of the Government to amend G.O. Ms. No. 230. Therefore, according to the Petitioners, they are not guilty of laches. In my considered opinion, mere correspondences between the parties, discussions and the meetings will not save the limitation. All these writ petitions have been filed much beyond the period of limitation prescribed in Article 14 of the Limitation Act. Thus, I have no hesitation to hold that the Petitioners are guilty of laches and on that ground the writ petitions are liable to be dismissed.

60. The learned Advocate General would nextly contend that the Petitioners have waived their right by express agreement and, therefore, they are not entitled for any relief. For this proposition, the learned Advocate General would rely on the judgment of the Hon''ble Supreme Court in Parmod Kumar Jain v. Sudha Choubey and others, (2004) 8 SCC 228 .

61. But, the learned Counsel for the Petitioners would submit that the Petitioners never waived the right accrued in them on account of G.O. Ms. No. 230. The learned

Counsel would place reliance on a letter written by Thiru Arooran Sugars Limited on 24.02.1995, which is a request to the Government to direct the TNEB to implement G.O. Ms. No. 230. In paragraph 5 of the said letter, the ultimate request made by the Petitioner Arooran Sugars Limited is as follows:

5. The prevailing HT-I tariff for industrial consumers is Rs. 2.40/2.50 per unit excluding maximum demand charges. The same less 2%, as provided for in G.O. Ms. No. 230 would still be inadequate in the light of the computations furnished in Annexure-I. As such, it is respectfully submitted that the price for power supplied to TNEB by our unit be fixed at least in accordance with G.O. Ms. No. 230 which governs the original consent accorded to our project. The supporting calculations are enclosed in Annexures II to IV and we will be happy to furnish any further information or clarifications that may be required.

As stated earlier our project is at an advanced stage of implementation and is expected to be commissioned by end March-mind of April 1995. Under these circumstances, we request you to kindly extend favourable consideration to our representation and recommend fixation of a price which is at least the same as guaranteed by G.O. Ms. No. 230, for power supplies to the grid, both during the season as well as the off-season irrespective of fuel used.

62. The learned Counsel would rely on a judgment of the Hon''ble Supreme Court in P. Dasa Muni Reddy Vs. P. Appa Rao, wherein the Hon''ble Supreme Court has held that waiver is an intentional relinquishment of a known right or advantage. In this case, since there is no positive act on the part of the Petitioner to relinquish a right accrued in them by virtue of G.O. Ms. No. 230, the question of waiver does not arise, he contended.

63. I have carefully considered the above submissions. As I have already concluded that G.O. Ms. No. 230 which is a direction issued under the Statute is binding on the TNEB and the Petitioners have a right to force the TNEB to implement the same. As I have already stated, even on the principle of promissory estoppel also, a right had accrued in favour of the Petitioners. As I have also concluded above, it is not open for the TNEB to contend that G.O. Ms. No. 230 is not binding and that the Petitioners cannot compel the TNEB to implement G.O. Ms. No. 230. Therefore, there can be no doubt that by virtue of G.O. Ms. No. 230, a right has accrued in favour of the Petitioners to demand for tariff fixation as per the said G.O. Now, the question is whether such right has been waived by the Petitioners or not. In the judgment relied on by the learned Counsel for the Petitioners in P. Das Muni Reddy cited supra in paragraph 13, the Hon''ble Supreme Court while dealing with the doctrine of waiver has held as follows:

13. Abandonment of right is much more than mere waiver, acquiescence or laches. The decision of the High Court in the present case is that the Appellant has waived the right to evict the Respondent. Waiver is an intentional relinquishment of a

known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The Doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognize is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one''s as a right at the time of waiver. Some mistake or misapprehension as to some facts which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the court in saying that there was no consent.

64. In view of the above law laid down by the Hon''ble Supreme Court, it is to be seen whether in the given cases, the Petitioners have relinquished their right in favour of them on account of G.O. Ms. No. 230 intentionally by their act.

65. At this juncture, I may also refer to the judgment relied on by the learned Advocate General in Pramod Kumar Jain cited supra wherein the Hon''ble Supreme Court in paragraphs 9 and 10 has held as follows:

9. The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppelis not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.

66. From the above judgment, it is crystal clear that the right accrued in favour of an individual whether on account of a Statute or otherwise, can be waived by him.

Here, in the instant cases, the right in favour of the Petitioners has accrued on account of the statutory provision contained in Section 78A of the Electricity (Supply) Act as well as by means of the doctrine of promissory estoppel. Such right, as held by the Hon''ble Supreme Court, can be relinquished. Such relinquishment can be either by means of an express agreement or by the conduct of the parties. In the instant cases, the learned Advocate General would submit that by entering into PPAs in the years 1995 and 1996 thereby agreeing for tariff fixation outside the scope of G.O. Ms. No. 230, the Petitioners have waived their right.

67. The learned Counsel for the Petitioner would submit that the PPAs came to be entered into with the said offending clause because of the promise already made and because the Power Plants had already been set up by investing huge sum by raising loan from the financial institutions. However, they signed the agreements with protest to this clause. In my considered opinion, this contention cannot be accepted. If the Petitioners were not agreeable to the above clause in the draft PPA, they should have protested forthwith and worked out their remedies by approaching this Court by way of writ petitions for mandamus to direct the TNEB to implement the Government Order. The Petitioners did not do so. Instead, they entered into the PPAs and according to the said agreements they had also started receiving the price for the electricity supplied to the TNEB. Though there were several discussions and correspondences between the TNEB and the Petitioners, they have come to the Court only in the year 2000 by way of these writ petitions. The said conduct would further strengthen the case of the Respondent that the Petitioners have waived their right accrued under G.O. Ms. No. 230. To put it precisely, the waiver is on account of PPAs and the conduct of the Petitioners. Therefore, I hold that the Petitioners are not entitled to seek a direction to the TNEB to implement the G.O. Ms. No. 230 in their favour.

68. Let me now consider the next contention of the learned Counsel for the Petitioners regarding the guidelines issued by Ministry of Non-conventional Energy Sources dated 25.11.1995. The promotion of energy from renewable sources of energy and/or by co-generation is pursuant to International Policies and Treaties including U.N. General Assembly Resolutions and India''s reports on the subject to the UN. India is a party to the same. The object is to preserve environment and the natural resources of the planet and to achieve sustainable development and inter-generational equity. Therefore, according to the Petitioners, the State is bound to pursue the same as the law of the land as laid down in Vellore Citizens Welfare Forum Vs. Union of India and others, .

69. Since the guidelines of the Central Government are binding on the State Government and the Central Government, both the Governments are obliged to implement the international policies as per Articles 73 read with 253 of the Constitution and the TNEB, as State Instrumentality is therefore liable to pay the electricity tariff as per the said guidelines. According to the said guidelines, for the

year 1994-95, the tariff should be at Rs. 2.25 per KWH and that the base price shall escalate at the minimum rate of 5% every year. Announcement of revised base price shall be made by the Electricity Board on 1st April every year. Relying on this, the learned Counsel would contend that in the cases on hand, base price at Rs. 2.25 per KWH was not fixed by the TNEB for the year 1994-95 and instead it was fixed only for the year 1995-96. Similarly, the periodical escalation was also not given. The learned Counsel would further contend that as per G.O. Ms. No. 230, the base price for the year 1994-95 is Rs. 2.25 per KWH and there shall be escalation as per the said G.O. But, in the cases on hand, quite contrary to G.O. Ms. No. 230, the base price at Rs. 2.25 per KWH was fixed only for the year 1995-96 with periodical increase as per Board''s proceedings in BP No. 96. In the year 1999, the base price was fixed at Rs. 2.73 per KWH. But, in the year 2000-2001, it was again fixed at Rs. 2.73 per KWH instead of escalation of 5%.

70. It is the contention of the learned Advocate General that it is not binding on the State Government as well as the TNEB because it is only a guideline having no statutory backdrop. In this regard, the learned Advocate General relies on the judgment of the Hon''ble Supreme Court in Poonam Verma and Ors. v. Delhi Development Authority 2007 (13) SCC 134 wherein the Hon''ble Supreme Court in paragraphs 27 & 28 has held as follows:

27. Guidelines per se do not partake the character of statute. Such guidelines in absence of the statutory backdrop are advisory in nature. Mr. Ram Prakash himself has relied upon a decision of this Court in Narendra Kumar Maheshwari Vs. Union of India (UOI) and Others, , wherein it has been laid down:

107. .... This is because guidelines, by their very nature, do not fall into the category of legislation, direct, subordinate or ancillary. They have only an advisory role to play and non-adherence to or deviation from them is necessarily and implicitly permissible if the circumstances of any particular fact or law situation warrants the same. Judicial control takes over only where the deviation either involves arbitrariness or discrimination or is so fundamental as to undermine a basic public purpose which the guidelines and the statute under which they are issued are intended to achieve.

28. Guidelines being advisory in character per se do no confer any legal right.

71. A close reading of the above judgment would go to show that unless the guidelines have got statutory backdrop, it shall be construed only as advisory in nature. In the cases on hand, the Central Government guidelines were not issued in pursuance of any statute. Therefore, the claim of the Petitioners that they are entitled for the tariff as per the guidelines of the Central Government cannot be accepted and accordingly, the same is rejected.

72. In these background facts, according to the learned Counsel there must be a direction issued to the TNEB to pay the differential value of the electricity supply

made by the Petitioners right from the year 1995 onwards till the Electricity Regulatory Commission was constituted. In my considered opinion, the Petitioners are not entitled for such relief because, as I have already stated, the Petitioners are not only guilty of laches but also they have waived their right accrued under G.O. Ms. No. 230. Similarly, the Petitioners are not entitled for tariff as per guidelines of the Ministry of Non-Conventional Energy Sources also.

73. The last contention of the learned Advocate General is that the power supplied by these co-generating sugar mills is supplied in turn by the TNEB not only to HT users, but also to the other users including the free supply to the farmers. Thus, the TNEB cannot be expected to incur a huge loss by purchasing the electricity at the HT tariff rate less 2% from the sugar mills and supplying the same to non-HT consumers at a lower tariff. According to him, it is because of this reason, the TNEB though, had regard to G.O. Ms. No. 230 as well as the Central Government guidelines, it did not fix the tariff on par with either G.O. Ms. No. 230 or with the guidelines. In my considered opinion, the correctness of the fixation of the tariff contrary to G.O. Ms. No. 230 need not be gone into in deep in these writ petitions in view of the conclusions arrived at by me herein before that the Petitioners are guilty of laches and that they have waived their right accrued by virtue of G.O. Ms. No. 230.

74. In view of the above, the Petitioners are not entitled for any relief in these writ petitions and the writ petitions are liable to be dismissed.

75. In the result, the writ petitions fail and the same are accordingly dismissed. Consequently, connected MPs are closed.