IN THE HIGH COURT OF DELHI AT NEW DELHI

CW No.18634-35.2005

G.V.K. Industries Limited & Anr. ...Petitioners through
Mr. C.A. Sundaram, Sr. Adv.
Mr. Manmohan, Sr. Advocate
with Mr. P.C. Sen,
Mr. Ramesh Singh and
Mr. A. Babu, Advocates

Versus

Central Electricity Authority & Ors. ...Respondent through
Mr. P.P.Malhotra, ASG with
Mr. Arjun Harkauli and
Ms. Preeti Khanna, Advocates
for Respondents 1 & 4
Mr. A.T.M. Ranga Ramanujam,
Sr. Adv. with Ms. Gouri K. Das
and Mr. R.K. Sharma, Advs.

Date of Hearing : February 16, 2006

Date of Decision: February 27, 2006

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN

1. Whether reporters of local papers may be allowed to see the Judgment? YES

2. To be referred to the Reporter or not? YES

3. Whether the judgment should be reported in the Digest? YES

: VIKRAMAJIT SEN, J.

1. The Petitioner has prayed for the issuance of an

appropriate writ, Order or direction to the Central Electricity Authority (CEA) to take a decision on the approval of the completed cost of the subject power project established and commissioned by the Petitioner in Andhra Pradesh. The CEA had commenced proceedings earlier, but with the enforcement of the Electricity Act, 2003 has now adopted the view that its jurisdiction has been taken away. A host of preliminary or technical objections have been raised.

PRELIMINARY OBJECTIONS

2. By way of prefatory remarks, generally speaking, the writ jurisdiction of the High Court under Article 226 of the Constitution cannot be circumscribed, and the fetters and frontiers are almost entirely judicially self imposed. One of the question that had arisen before the Constitutional Bench comprising seven learned Judges of the Supreme Court in landmark precedent titled **L. Chandra Kumar** vs. Union of India, **(1997) 3 SCC 261** was whether the powers of the High Court under Article 226 of the Constitution could be

curtailed by statutes such as the Administrative Tribunals Act, 1985. The Court pronounced that the powers of judicial review over legislative action vested, inalienably, in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution, and were integral and essential features of the Constitution constituting part of its basic structure. Ordinarily, therefore, the power of these Courts to test the constitutional validity of legislations could not be ousted or excluded. It was further held that the power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions was also a concomitant of the basic structure of the Constitution. Divesting the High Courts of these powers had therefore to be abjured. It was further held that the provisions of the statute which excluded the jurisdiction of the High Courts and the Supreme Court, such as Section 28 of the Administrative Tribunals Act, 1985 were unconstitutional. The Apex Court has on several occasions including **Harbans Lal** Sahni v. Indian Oil Corporation Ltd., (2003) 2 SCC 107

explained the effect of existence of alternative remedies on the maintainability of a writ petition. In that case the relationship between the parties was contractual and the Dealership agreement contained an arbitration clause. Nevertheless the appeals were allowed by the Supreme Court, which opined thus :

> 7. 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. vs. 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.

(A) Disputed Questions of Fact

3. On behalf of Respondent No.2 it has been contended that the disputes raised in the petition relates to adjudication of several delicate questions of fact which require evidence for computing Completed Capital Cost of the project from Rs.866 crores to Rs.1025 crores and, therefore, since complicated questions of fact would inevitably arise, the writ petition should not be entertained. This objection manifests a failure to appreciate and fully comprehend the prayers in the writ petition. The Petitioner does not challenge the capital cost of the project; in fact this has not been determined as yet. The legal conundrum which has to be unravelled in this case is whether the CEA still retains the power to fully and completely carry out this determination. In deciding this

issue no complicated questions of fact arise. In fact it is a pure question of law.

3.1 In **ABL International** Ltd. vs. Export Credit Guarantee Corporation of India Limited, JT 2003 (10) SC 300 the following principles have been culled out and explained :

> 27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:-
>
> (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
>
> **(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.**
>
> (c) A writ petition involving a consequential relief of monetary claim is also maintainable.
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> 28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by

any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The court has imposed upon itself certain restrictions in the exercise of this power [See: Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Ors. JT 1998 (7) SC 243 : 1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.

(B) Delay and Laches

4. On behalf of Respondent No.2 it has also been contended that the petition ought to be dismissed on account of latches. Avowedly, the Petitioner has been reminding the CEA to complete the computation of capital costs of the project for several years. The cause of action for filing the present petition, however, is the somersault in the

position taken by the Respondents, namely, that it is the State Electricity Authority and not the Central Electricity Authority which must now carry out this exercise. The question of delay and latches would arise if this decision had been taken several years ago. Learned counsel for the Petitioner has relied on the pleadings of this Respondent to the effect that Respondent No.1 must rule on the completed capital cost of the project. Even if these pleadings can be read to convey a different meaning, it is nobody's case that Respondent No.1 had declined to perform this obligation so much before the filing of this petition that the principles of laches would intervene. The objection is vexatious and meritless.

(C) **Effect of Arbitration Clause**

5. The existence of an arbitration clause between the parties has also been used as ammunition for carrying out an assault on the consideration of the writ petition. As has been seen above the question which falls for consideration in this writ petition is whether it is the CEA or the SEA which is

competent to compute the completed capital cost of the project. No doubt, after the computation is fully undertaken, disputes may arise which could prima facie be covered by the arbitration clause. It is not for Arbitrators to rule on legal issues beyond arbitrable disputes.

5.1 When the Writ Court is faced with the existence of an Arbitration Clause it must be careful not to venture into the field of the Arbitrator. Equally, the Arbitrator is not competent to decide issues beyond the parameters of arbitrable disputes. There may be several aspects of a dispute which fall beyond the sweep of the Arbitration Clause. For example, in **Haryana Telecom** Ltd. vs. Sterlite Industries (India) Ltd., (1999) 5 SCC 688, in which it has been opined that Section 8 of the Arbitration & Conciliation Act contemplates the reference to the Arbitrator of only those disputes which the Arbitrator is competent or empowered to decide. In the present case there are several disputes that have arisen between the parties, not all of which would automatically become arbitrable.

(D) Territoriality

6. The territorial jurisdiction of this Court has been assailed by way of preliminary objection. The decision in **Patel Roadways** Limited Bombay vs. M/s. Prasad Trading Company, AIR 1992 SC 1514 is that if a Corporation has a subordinate office in the place where the cause of action arises, litigation must be commenced in that place alone, regardless of apparently wider enabling provision in Section 20 of the Code of Civil Procedure. The Court adopted a realistic, businesslike and expedient approach in opining that - "It would be a great hardship if, in spite of the Corporation having a subordinate office at the place where the cause of action arises (with which in all probability the plaintiff has had dealings), such plaintiff is to be compelled to travel to the place where the Corporation has its principal place. That place should be convenient to the plaintiff; and since the Corporation has an office at such place, it will also be under no disadvantage". The significance of this Judgment is that it restricts jurisdiction, whether a contractual clause of this nature exists

or not, to the particular place where the cause of action has **substantially** arisen, overruling other places which may have jurisdiction under Section 20 of the CPC. This rationale commends itself even in the context of Article 226 of the Constitution of India.

6.1 An analysis of the various pronouncements of the Supreme Court reveals that even though the express terms of Section 20 of the CPC permit the filing of a suit against a Corporation at its principal office, primacy and preeminence has been accorded to the place where the cause of action had substantially arisen, as against those places where it has incidentally or partially arisen. Whilst the Supreme Court has indubitably enumerated in **ABC Laminart** vs A.P. Agencies, AIR 1989 SC 1239 = 1989(2) SCC 163 the several places where the cause of action could be seen to have arisen, this was done primarily to investigate and determine whether the place to which jurisdiction had been restricted, by ousting all others, itself enjoyed jurisdiction. Otherwise, as is trite, such a clause would become legally unefficacious since it is not

possible to infuse by contract jurisdiction on Court which does not otherwise possess it. The position that obtains today is that primacy is accorded to the place where the cause of action substantially arises. The following passage of ABC Laminart is extremely instructive:

> 15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action

and a suit in respect of the breach can always be filed at the place where the contract should have (been) performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the Court where the suit is filed and that contract is found to be invalid, such part of cause of the action disappears. The above are some of the connecting factors.

6.2 In Sector Twenty One Owners Welfare Association vs. **Air Force Naval Housing Board,** 65(1997) DLT 81(DB), a Division Bench of this Court has held that a trivial or insignificant part of the cause of action arising at a particular place would not be enough to confer writ jurisdiction on the

court to entertain the lis. The Division Bench deduced from various precedents that the emphasis had shifted from the residence or location of the person or authority sought to be proceeded against, to the situs of the accrual of cause of action. There is no reason why the observations pertaining to writ petitions should not be extrapolated and inter changed between suits and writ petitioners. The Bench held as follows :-

> "13. The law as reflected by the above-said decisions is that the emphasis has shifted from the residence or location of the person or authority sought to be proceeded against to the situs of the accrual of cause of action wholly or in part. It is also clear that a trivial or insignificant part of the cause of action arising at a particular place would be not enough to confer writ jurisdiction; it is the cause of action mainly and substantially arising at a place which would be determinating action mainly and substantially arising at a place which would be determinating factor of territorial jurisdiction. So also it shall have to be kept in view who are the real persons or authorities sought to be proceeded against or against whom the writ to be issued by the Court

would run. Joining to proforma or ancillary parties and certainly not the joining of unnecessary parties, would be relevant for the purposes of Article 226(1).

14. Reverting back to the case at hand, it is clear that the cause of action has wholly arisen in NOIDA within the State of U.P. The principal and substantial grievance of the petitioner-association is against the respondents No.2 and 3 though incidentally, the respondent No.1 may also be required to be bound by the writ. The reverse is not correct. The writ, if any, to be issued by the Court would not serve any purpose if issued against respondent No.1 alone. In the matter of registration of the sale deed-cum-sub-lease deed merely because a document can be registered at Delhi by virtue of Section 30(2) of the Registration Act, territorial jurisdiction in the Courts at Delhi cannot be inferred. Moreover, the petitioner-association is already having some litigation before the Courts of U.P. And at one point of time the Delhi High Court had declined to entertain the petitioner-association's writ for want of territorial jurisdiction in Delhi."

6.3. In **Oil & Natural Gas Commission** vs. Utpal Kumar Basu and others, JT 1994 (5) SC 1, the action of ONGC rejecting the tender was challenged before the Calcutta High

Court by way of a writ petition, which was entertained by the High Court. The Supreme Court held that the Calcutta High Court had no jurisdiction to deal with the matter. While setting aside the impugned decision, the Supreme Court observed as follows:-

> "8. From the facts pleaded in the writ petition, it is clear that NICCO invoked the jurisdiction of the Calcutta High Court on the plea that a part of the cause of action had arisen within its territorial jurisdiction. According to NICCO, it became aware of the contract proposed to be given by ONGC on reading the advertisement which appeared in the Times of India at Calcutta. In response thereto, it submitted its bid or tender from its Calcutta office and revised the rates subsequently. When it learnt that it was considered ineligible it sent representations, including fax messages, to EIL, ONGC, etc. at New Delhi, demanding justice. As stated earlier, the Steering Committee finally rejected the offer of NICCO and awarded the contract to CIMMCO at New Delhi on January 27, 1993. Therefore, broadly speaking, NITCO claims that a part of the cause of action arose within the jurisdiction of the advertisement in Calcutta, it

submitted its bid or tender from Calcutta and made representations demanding justice from Calcutta on learning about the rejection of its offer. The advertisements itself mentioned that the tenders should be submitted at New Delhi and that a final decision whether or not to award the contract to the tenderer would be taken at New Delhi. Of course, the execution of the contract work was to be carried out at Hazira in Gujrat. Therefore, merely because it read the advertisement at Calcutta and submitted the offer from Calcutta and made representations from Calcutta would not, in our opinion, constitute facts forming an integral part of the cause of action. So also the mere fact that it sent fax messages from Calcutta and received a reply thereto at Calcutta would not constitute an integral part of the cause of action. Besides the fax message of January 15, 1993, can not be construed as conveying rejections of the offer as that fact occurred on January 27, 1993, We are, therefore, of the opinion that even if the averments in the writ petition are taken as true, it cannot be said that a part of the cause of action arose within the jurisdiction of the Calcutta High Court.

.....

12. .... Notwithstanding the strong observations made by this Court in the aforesaid decisions and in the

earlier decisions referred to therein, we are distressed that the High Court of Calcutta persists in exercising jurisdiction even in cases where no part of the cause of action arose within its territorial jurisdiction. It is indeed a great pity that one of the premier High Courts of the country should appear to have developed a tendency to assume jurisdiction on the sole ground that the petitioner before it resides in or carries on business from a registered office in the State of West Bengal. We feel all the more pained that notwithstanding the observations of this Court made time and again, some of the learned Judges continue to betray that tendency only recently while disposing of appeals arising out of SLP Nos.10065-66 of 1993, Aligarh Muslim University & Anr. Vs. M/s.Vinny Engineering Enterprises (P) Ltd. & Anr., this Court observed:

"We are surprised, not a little, that the High Court of Calcutta should have exercised jurisdiction in a case where it had absolutely no jurisdiction."

In that case, the contract in question was executed at Aligarh, the construction work was to be carried out at Aligarh, the contracts provided that in the event of dispute the Aligarh Court alone will have jurisdiction, the arbitrator was appointed at Aligarh and was to function at Aligarh and yet merely

because the respondent was a Calcutta based firm, it instituted proceedings in the Calcutta High Court and the High Court exercised jurisdiction where it had none whatsoever. It must be remembered that the image and prestige of a Court depends on how the members of that institution conduct themselves. If an impression gains ground that even in cases which fall outside the territorial jurisdiction of the Court, certain members of the Court would be willing to exercise jurisdiction on the plea that some event, however trivial and unconnected with the cause of action had occurred within the jurisdiction of the said Court, litigants would seek to abuse the process by carrying the cause before such members giving rise to avoidable suspicion. That would lower the dignity of the institution and put the entire system to ridicule. We are greatly pained to say so but if we do not strongly deprecate the growing tendency we will, we are afraid, be failing in our duty to the institution and the system of administration of justice. We do hope that we will not have another occasion to deal with such a situation"

6.4 Primacy has been given to the place where the cause of action has substantially arisen, as is evident from the

decision of the Supreme Court in **South East Asia Shipping Co. Ltd** versus Nav Bharat Enterprises Pvt. Ltd., (1996) 3 SCC 443. The admitted position was that performance of the obligations and liabilities under the contract was to be carried out in Bombay. The Apex Court found it wholly irrelevant that the subject Bank Guarantee had been executed at Delhi and transmitted for performance to Bombay and held that Delhi Courts did not possess jurisdiction to decide the dispute.

6.5 This question has been considered in detail by the Supreme Court in Union of India vs. **Adani Exports Ltd.**, AIR 2002 SC 126. In its opinion, "each and every fact pleaded in the application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the Court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the lis that is involved in the case. Facts which have no bearing with the lis or the dispute involved in the case do not give rise to a cause of action so as to confer territorial jurisdiction on the Court concerned".

6.6 In the case of **Kusum Ingots** & Alloys Ltd. vs. Union of India, (2004) 6 SCC 254 the Hon'ble Supreme Court has held that -

> 19. Passing of a legislation by itself in our opinion does not confer any such right to file a writ petition unless a cause of action arises therefor.
>
> 20. A distinction between a legislation and executive action should be borne in mind while determining the said question.
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> 21. A parliamentary legislation when it receives the assent of the President of India and is published in the Official Gazette, unless specifically excluded, will apply to the entire territory of India. If passing of a legislation gives rise to a cause of action, a writ petition questioning the constitutionality thereof can be filed in any High Court of the country. It is not so done because a cause of action will arise only when the provisions of the Act or some of them which were implemented shall give rise to civil or evil consequences to the petitioner. A writ court, it is well settled, would not determine a constitutional question in a vacuum.
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> ....
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> 30. We must, however, remind ourselves that even if a small part of cause of action arises within

> the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.

In this landmark Judgment, which overruled the earlier opinion in **U.P. Rashtriya Chini Mill Adhikari Parishad**, the enunciation of the law in paragraph 30 above came after the Court had observed that a part of the cause of action arises at the place where the impugned Order is passed by the executive Authority. In **Ansal Buildwell Ltd** vs. North Eastern Indira Gandhi Institute of Health and Medical Science, 118 (2005) DLT 274 this Court has held that by "invoking the doctrine of forum conveniens a court may refuse to exercise its discretionary jurisdiction notwithstanding that some part of cause of action had arisen within the territorial jurisdiction of the Court."

6.7 Mr. P.P. Malhotra, learned Additional Solicitor General, has drawn attention to the decision of the Hon'ble Division Bench in **Dr. Subramanian Swamy** vs. Union of

India, 120(2005) DLT 274 where it had been held that the Court in Delhi had no jurisdiction to entertain a petition pertaining to the alleged piracy committed in Tamil Nadu and to articles exported on false certificate from Chennai and Bangalore International Airports. The Hon'ble Division Bench had extracted relevant portions of the Judgment in Subodh Kumar Gupta v. Shrikant Gupta, (1993) 4 SCC 1 as well as Navinchandra N. Majithia v. State of Maharashtra, 2000(7) SCC 640. The learned ASG had, in particular, stressed upon the following passage in **Swamy's** case :-

> 23. In para 41 in the case of Navin Chandra N. Majithia (supra), the Apex Court considered the case of State of Rajasthan v. Swaika Properties, (1985) 3 SCC 217 and quoted the observations made in the case of ONGC (supra) which are as under:
>
> "It is well settled that the expression 'cause of action' means that bundle of facts which the petitioner must prove, if traversed to entitle him to a judgment in his favour. Having given such a wide interpretation to the expression Ahmadi, J (as the learned Chief Justice then was) speaking for M.N. Venkatachaliah, C.J. and B.P. Jeevan Reddy, J.,

utilised the opportunity to caution the High Courts against transgressing into the jurisdiction of the other High Courts merely on the ground of some insignificant event connected with the cause of action taking place within the territorial limits of the High Court to which the litigant approaches at his own choice or convenience. The following are such observations (SCC p. 722 para 12)--

> "If an impression gains ground that even in cases which fall outside the territorial jurisdiction of the Court, certain members of the Court would be willing to exercise jurisdiction on the plea that some event, however, trivial and unconnected with the cause of action had occurred within the jurisdiction of the said Court, litigants would seek to abuse the process by carrying the cause before such members giving rise to avoidable suspicion. That would lower the dignity of the institution and put the entire system to ridicule. We are greatly pained to say so but if we do not strongly deprecate the growing tendency we will, we are afraid, be failing in our duty to the institution and the system of administration of justice. We do hope that we well not have another occasion to deal with such a situation."

6.8 In order to exercise the extraordinary jurisdiction vested in this Court under Article 226 of the Constitution of India it is imperative to locate the umbilical cord which links and joins the cause of action to the High Court whose portals have been knocked upon. Mr. P.P. Malhotra, learned ASG as well as Mr. A.T.M. Ranga Ramanujam, Senior Advocate for Respondent No.2, have meticulously narrated the details of litigation which had been filed by the Petitioners in the High Court of Andhra Pradesh. They have also underscored the pendency of investigation by the State CBCID into alleged inflation of the Capital Cost of the Project by manipulative accounting. In my view these are not relevant factors, since it is the relief claimed in the petition that must be kept foremost in mind. Succinctly stated, the prayer in the Petition is to the effect that the Central Electricity Authority, Respondent No.1 (hereafter referred to as CEA), should decide on the completed cost of the Petitioners' Project. The CEA is situate and functions from New Delhi. The admitted position is that the CEA had entered upon this task not merely because it was

the CEA upon which powers in this regard had been reposed till the coming into effect of the Electricity Act, 2003, but also for the reason that under the Power Purchase Agreement dated 19.4.1996, it is this Authority which possesses the power to approve any excess to the already approved project cost.

6.9. The CEA has now adopted the stand that it no longer possesses power in this regard and by virtue of the sundry provisions of the Electricity Act, 2003 this exercise must fall upon the State Electricity Authority. The relief is essentially directed against the CEA which has discontinued its task of determining the Capital Project Cost. The other Respondents are at the highest proper parties to the lis. The cause of action has arisen wholly and entirely in Delhi, so far as the present petition is concerned, and, therefore, the Division Bench decision of this Court (to which I was signatory) titled **Indian Charge Chrome** vs. Union of India, 2002 (65) DRJ 567 is entirely distinguishable on facts.

DECISION ON MERITS

7. So far as the merits of the case are concerned, the relevant facts are that the Government of India had devised a policy in 1990 calculated to attract private participation in the power sector. The Petitioners had submitted a proposal for establishment of a power project pursuant thereto. On 25.11.1993 the CEA recorded its Techno-Economic Clearance to the Project for an estimated capital cost of Rs.827 crores. Thereafter, the Power Purchase Agreement (PPA) was entered into on 19.4.1996 between the Petitioners and the Transmission Corporation of Andhra Pradesh (APTRANSCO), viz. Respondent No.2. Article 1.1 (iv) thereof defines 'Authority' to mean the CEA referred to in Section 3 of the Indian Electricity (Supply) Act, 1948 or any **successor entity** entrusted with its functions and capacities. In paragraph 11 of the writ petition it has been pleaded that costs in excess of the agreed Capital Cost would have to be approved by the CEA before it could be taken into reckoning, and this has been admitted by APTRANSCO in its Counter.

8. It appears that the Project commenced commercial production in August, 1996. On 2.5.1998 the Petitioners submitted a Statement of the Completed Capital Cost to APTRANSCO, being the cost allegedly actually incurred by the Company in completing the Project. On 14.2.2000 APTRANSCO recommended the acceptance of a capital cost of Rs.851.83 crores to the CEA for its approval. The Petitioners' case is that the Completed Capital Cost has escalated even further. On 18.5.2001 the CEA had called a Meeting of the Standing Committee for 8.6.2001 with the purpose of examination of Final Completion Cost of the Power Plant. On 15.6.2001 APTRANSCO had called upon the Petitioners to forward relevant information to the CEA, which was allegedly made available to the CEA by the Petitioners in October, 2001. All the Petitioners' entreaties made to the CEA for an expeditious finalisation of the Completed Capital Cost of the Project have not been responded to. The Petitioners' case is that till the filing of the present Petitions the CEA had not adopted its present stand viz. to the effect that it no longer

possesses powers in this regard.

9. Apart from the covenants in the PPA, it is the Petitioners' contention that by virtue of the provisions of the Electricity (Supply) Act, 1948 (hereinafter referred to as the Supply Act) it is the CEA which exclusively possesses powers to complete the said determination in terms of Section 43A(2) of the repealed Supply Act. The Section reads as follows:

> 43A. Terms, conditions and tariff for sale of electricity by Generating Company.--(1) A Generating Company may enter into a contract for the sale of electricity generated by it--
>
> (a) with the Board constituted for the State or any of the States in which a generating station owned or operated by the company is located;
>
> (b)with the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section (3) of section 15A; and
>
> (c)with any other person with consent of the competent government or governments.
>
> (2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid

down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette:

Provided that the terms, conditions and tariff for such sale shall, in respect of a Generating Company, wholly or partly owned by the Central Government, be such as may be determined by the Central Government and in respect of a Generating company wholly or partly owned by the one or more State Governments be such as may be determined, from time to time, by the government or governments concerned.

10. Before venturing further it will be relevant to recall that by virtue of Section 51 of the Electricity Regulatory Commission Act, 1998 sub-section (2) above shall be omitted with effect from such date as the Central Government may appoint. In this regard it will be appropriate to underscore that in the Notification dated 30.3.1992 the Central Government has laid down that the 'capital cost' shall be determined by the CEA. The Central Government, by Notification dated 30.3.1992, has declared capital cost to be

one of the criterion for fixation of tariff and has provided that the CEA shall be the Competent Authority to fix the capital cost. The relevant portion of the said Notification reads as follows:

> 1.2 The capital expenditure of the project shall be financed as per the approved financial package set out in the technoeconomic clearance of the Authority.
>
> The project cost shall include capitalised initial spares. The approved project cost shall be the cost which has been specified in the techno-economic clearance of the Authority.
>
> The actual capital expenditure incurred on completion of the project shall be the criterion for the fixation of tariff. Where the actual expenditure exceeds the approved project cost the excesses as approved by the Authority shall be deemed to be the actual capital expenditure for the purpose of determining the tariff.
>
> Provided that such excess expenditure is not attributable to the Generating Company or its suppliers or contractors:
>
> Provided further that where a power purchase agreement entered between the Generating

Company and the Board provides a ceiling on capital expenditure, the capital expenditure shall not exceed such ceiling.

11. In this Notification, as well as the subsequent Notification dated 12.1.1995, it is the CEA which is referred to, in contradistinction to the State Electricity Act (SEA). Article 2.3(a) of the latter Notification records that - "The capital expenditure of the project shall be financed as per the approved financial package set out in the Techno-Economic Clearance of the Authority".

12. The neat question to be answered is whether the Electricity Act, 2003 has rendered nugatory Section 43A(2) of the Supply Act and the sundry Notifications issued by the Central Government from time to time. This is so because the powers and/or functions of the CEA as contemplated in the Electricity Act no longer span the computation or fixation of the 'capital cost' of the power project concerned. This is palpably obvious from a combined reading of Section 43-A(2) of the Supply Act, and Sections 73 and 74 of the Electricity Act, and Section 86 (1) (a) (f) and 2(iv) of the Electricity Act. It

is in these circumstances that Mr. Sundaram has drawn attention to Section 185(2) (a) and (5) of the Electricity Act, 2003 and Section 6 of the General Clauses Act. These provisions are reproduced below for facility of reference --

> 185. Repeal and saving.--
> .....
> (2) Notwithstanding such repeal,--
> (a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;
> .....
> (5) Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeals.

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General Clauses Act.

6. Effect of repeal.--Where this Act, or any or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c)affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d)affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

Predicated on these Sections Mr. Sundaram has contended that "the Notification dated 30.03.1992 issued by the Central Government empowering the CEA to determine cost is, therefore, saved under the new Act on account of the saving provision". He has argued that "for the power of the CEA to determine capital cost to be ousted(sic. by) the Electricity Act, 2003 has to expressly destroy the said power. Further, for the vested right of the Petitioner to have its capital cost determined by the CEA to be taken away the said right has to be expressly taken away".

13. Mr. Sundaram has placed reliance on the following judgments:

1. The **Brihan** Maharashtra Sugar Syndicate Ltd. v.Janardan Ramchandra Kulkarni, AIR 1960 SC 794.

2.**Universal Imports** Agency vs. The Chief Controller of Imports and Exports, AIR 1961 SC 41.

3.**Hasan Nurani** Malak vs. S.M. Ismail, Assistant Charity Commissioner, Nagpur, AIR 1967 SC 1742.

4.**Jayantilal Amrathlal** vs. The Union of India, (1972) 4 SCC 174.

5.M.S. **Shivananda** vs. Karnataka State Road Transport Corporation, (1980) 1 SCC 149.

13.1 In **Brihan** an application under Section 153-C of the Companies Act, 1913 had been filed, but before it could be decided that Act was repealed by Companies Act, 1956. The Court after taking note of Section 6 of the General Clauses Act carried out a comparison between Section 153-C of 1913 Act and Section 647 of the 1956 Act and concluded that the provisions of the repealed Section were "substantially re-enacted" in the current Act. It was in those circumstances that the proceedings pending before the District Judge by virtue of Section 153-C of the 1913 Act were held to continue to be competent. In **Universal Imports** Agency it was observed by the Constitution Bench that the words "things done" were comprehensive enough to validate legal effects and consequences projected into the post-merger period. This decision appears to me not to be relevant since a decision has not been rendered by the CEA. For the same reason **Hasan Nurani,** in which it had been pronounced that the object behind the words "anything duly done" in Section 6 of the General Clauses Act is to save what has been previously

done under the repealed Act, is not of any assistance to the Petitioners. Neither of these decisions validate continuing or inchoate proceedings, which is the situation which obtains in the case in hand. **Shivananda** is not relevant for these very reasons. In **Jayantilal Amrathlal** the Constitution Bench enunciated that "in order to see whether the rights and liabilities under the repealed law have been put an end to by the new enactment, the proper approach is not to enquire if the new enactment has by its new provisions kept alive the rights and liabilities under the repealed law but whether it has taken away those rights and liabilities. The absence of a saving clause in a new enactment preserving the rights and liabilities under the repealed law is neither material nor decisive of the question." The Court referred to its previous views expressed in State of Punjab vs. Mohar Singh Pratap Singh, AIR 1955 SC 84 and T.S. Baliah vs. T.S. Rangachari, Income Tax Officer, Central Circle VI, Madras, AIR 1969 SC 701. In that case the Collector had issued a notice for confiscation of gold under Gold Control Rules, 1963 which in

turn were repealed by virtue of Section 117 of the Gold Control Act, 1968. The Court was of the view that the Act did not exhibit any difference with the repealed Act and, therefore, the proceedings were deemed to have continued. On the foundation of the decision in **Brihan** and **Jayantilal Amrathlal** it is essential for the Court to compare the relevant provisions of the repealed statute with the current statute to ascertain whether or not the same regime has been preserved and continued.

14. The gravamen of Mr. Sundaram's argument is that the erstwhile powers of the CEA to compute and thereby approve the Completed Capital Cost of the subject project are preserved despite the enforcement of the Electricity Act. This argument assumes that presently this power no longer vests in the CEA and therefore I need not dilate upon the question of whether Section 62 of the Electricity Act bestows the power to determine tariff de hors Completed Capital Cost of the project. It has not been controverted that Section 43-A of the Supply Act reposed the latter power on the CEA, and

therefore upon the completion of this exercise this component would be taken into account while fixing the tariff. There is no gainsaying that tariff will invariably include Capital Cost. Equally, both computations can be carried out by the same person/Authority. Ergo, since the old regime has been displaced by the Electricity Act, henceforward it is the SEA which must perform both functions; in fact there is no distinction in them any more, as the dichotomy in the computation exercise has been removed.

15. On a holistic reading of the Electricity Act it cannot but be concluded that the CEA has an advisory role to play. There is no provision akin to Section 43-A of the Supply Act which, read with the Notification dated 30.3.1992, envisages that the capital cost shall be calculated and fixed by the CEA. As has already been noted the distinction between the `tariff' and `capital cost', which arguably existed earlier, has now been merged into one composite exercise which is to be completed by the SEA. Reverting back to Section 185(2) of the Electricity Act it cannot possibly be predicated that the

appointment of the CEA for purposes of calculating the completed capital costs is consistent with the provisions of the Electricity Act which now contemplates that this exercise shall be completed by the SEA. Once this conclusion is arrived at, and the relevant provisions of the erstwhile and the extant statutes are found to be incompatible with each other, the opinion of the CEA that it no longer possesses power to compute the completed capital cost, that in fact the continuance of this exercise would be inconsistent with the Electricity Act, cannot be faulted or repulsed. The grievance of the Petitioner that the CEA has delayed decision making regarding finalisation of capital costs takes the case beyond the purview of Section 6 of the General Clauses Act. The complaint that the inaction of the CEA is causing grave prejudice to the Petitioner is quite clearly the obverse of the same coin. Whilst the repealed statutory provisions specified that the completed capital cost was to be computed/approved by the CEA, the present Act reposes in the SEA the power to determine the tariff including the capital cost of the completed

power project. Equally importantly, the PPA explicitly records that the successor of the CEA must fix the said capital cost; by statutory amendment this duty would now fall on the SEA.

16. In these circumstances the writ of mandamus that has been prayed for cannot be granted. No proceedings completed by the CEA are likely to be undermined or undone. In my considered opinion it is for the SEA to compute the completed capital cost and while fixing the tariff it must take the said completed capital cost into consideration. However, before departing from the case I cannot but observe that if this exercise is diverted to CBCID it will amount to dereliction of the statutory powers, duties and obligations now transferred to the SEA.

17. With these observations the writ petition is dismissed.

(VIKRAMAJIT SEN)
JUDGE

February 27, 2006
`tp/n'

CM 1317/06 (Correction)