

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**IA No. 79 of 2019
In
Petition No. 155/MP/2019**

**Coram:
Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member**

Date of Order: 26th March 2020

In the matter of:

Interlocutory Application under Section 94 (b) and Section 142 of the Electricity Act, 2003, and Regulations 54, 55 and 74 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 read with principles of Section 30 and Order XI, XII and XIII of the Code of Civil Procedure, 1908.

And

In the matter of

Udupi Power Corporation Limited
1st Floor, Lotus Towers
Devaraja Urs Road, Race Course
Bangalore, Karnataka

.....Petitioner

Vs

1. Power Company of Karnataka Limited
KPTCL Building, Kaveri Bhavan
K.G. Road
Bangaluru-560009
2. Gulbaraga Electricity Supply Company Limited
Station Main Road
Gulbarga - 585102
3. Hubli Electricity Supply Company Limited
Corporate Office, Navanagar, PB Road
Hubli – 580025
4. Chamundeshwari Electricity Supply Corporation
No. 29, Kaveri Grameena Bank Road
Vijaynagara 2nd stage, Hinkal
Mysore – 570017
5. Bangalore Electricity Supply Company Limited



K.C. Circle
Bangaluru – 560009

6. Mangalore Electricity Supply Company Limited
Corporate Office, MESCOM Bhavan, First Floor
Kavoor Cross Road, Balaji
Mangalore – 575004
7. Karnataka Power Transmission Corporation Limited
Corporate Office, Kaveri Bhavan
Bangalore – 560009

.....Respondents

Parties present:

1. Shri Amit Kapur, Advocate, UPCL
2. Ms Poonam Verma, Advocate, UPCL
3. Ms. Abiha Zaidi, Advocate, UPCL
4. Ms. Aprajita Upadhaya, Advocate, UPCL
5. Ms. Tanesha Singh, Advocate, UPCL
6. Shri M.G.Ramchandran, Senior Advocate, PCKL
7. Shri Arunav Partnaik, Advocate, PCKL
8. Shri Shikhar Saha, Advocate, PCKL
9. Ms Bhabna Das, Advocate, KPTCL

ORDER

Background of the Case

The Petitioner, Udupi Power Corporation Limited (UPCL), has filed Petition No. 155/MP/2019 under Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as the Act) read with Articles 3, 6, 7.2(b) and other provisions of the Power Purchase Agreement dated 26.12.2005 between the Petitioner and the Karnataka Electric Supply Companies (ESCOMs) seeking adjudication of the disputes related to outstanding dues payable by the Karnataka ESCOMs to UPCL for the period from 2010-11 to 2018-19. In para 78(j) of the Petition, UPCL has sought a direction to the Respondents to place on record the PCKL's Technical Committee Report, Report of Mr. V.J. Talwar, ex-Member, Appellate Tribunal for Electricity and Report of M/s Ramraj & Co., Chartered accountant.

2. The Commission in its Record of Proceedings for the hearing dated 23.7.2019 had directed Respondent No. 1/PCKL to provide copies of the said reports. The relevant paras of the RoP are extracted as under:

"2. Learned counsel for the daysPetitioner submitted that the Respondents have relied on the PCKL Technical Committee Report, Report of Mr. V.J. Talwar and Report of M/s Ramraj & Co. to disallow claims of the Petitioner. However, these reports have not been shared with the Petitioner. Accordingly, learned counsel requested to direct the Respondents to provide copy of the aforesaid reports to the Petitioner.

3. Learned counsel for the Respondent, PCKL accepted notice and sought time to file reply to the Petition. Learned counsel submitted that it will seek instructions from the Respondents regarding availability of the reports.

4. After hearing the learned counsels for the parties, the Commission admitted the Petition and directed to issue notice to the Respondents. The Commission directed the Petitioner to serve the copy of the Petition on the Respondents immediately. The Respondents were directed to file their replies by 16.8.2019, with an advance copy to the Petitioner, who may file its rejoinder, if any, by 30.8.2019.

5. The Commission allowed the Petitioner to make amendments in the Petition in light of order dated 27.6.2019 in Petition No. 160/GT/2012 and directed the Respondents to provide the copies of the above reports to the Petitioner."

3. PCKL vide its reply dated 18.9.2019 submitted that the report of PCKL Technical Committee, report of Mr. V.J. Talwar and report of M/s Ramraj and Co. are internal reports of PCKL and no reliance can be placed by the Petitioner on these reports in making its claim. PCKL has submitted that a Technical Sub-Committee of PCKL without coming to any final decision recommended that the opinion of an external consultant may be sought regarding the alleged discrepancies of declared capacity of UPCL's generating station for the period from November 2010 to September 2014. Accordingly, Mr. Talwar was requested to provide a report on the issue. Mr. Talwar's report was placed before the Board of Directors of PCKL who after considering the said report have reaffirmed that the position of PCKL/ Karnataka ESCOMs as regards declared capacity is correct. Further, M/s Ramraj and Co. has been requested by PCKL to prepare its final report regarding any amounts that may be payable by the Petitioner to PCKL. Once PCKL's Board of Directors has taken a

decision on the report and PCKL is proceeding with the case on the basis of the said decision before this Commission, no reliance can be placed by the Petitioner on the report of Mr. V.J. Talwar.

4. The Petitioner issued a communication dated 3.10.2019 seeking compliance of the directions of the Commission in RoP dated 23.7.2019. Since the Petitioner did not get any response, the Petitioner has filed the present Interlocutory Application (IA).

Submission of the Petitioner in the IA

5. The Petitioner has filed this IA No. 79 of 2019 under Sections 94(b) and 142 of the Electricity Act, 2003 (the Act) and Regulations 54, 55 and 74 of Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (hereinafter referred to as the Conduct of Business Regulations) read with Section 30 and Order XI, XII and XIII of the Code of Civil Procedure, 1908 (CPC). The Petitioner has submitted that PCKL had unilaterally disallowed certain claims for capacity charges and energy charges of UPCL. Subsequently, when UPCL requested for payment of past dues, PCKL construed a Technical Committee and engaged Mr. V.J. Talwar and M/s Ramraj & Co. for resolution of the disputes. However, copies of the reports of the Technical Committees i.e. of Mr. V.J. Talwar and M/s Ramraj & Co. have not been supplied to UPCL despite UPCL being party to the proceedings. UPCL has submitted that it needs these reports so that it is able to verify the recommendations in the report as well as PCKL's decision to disallow certain claims of UPCL. UPCL has submitted that the Commission has the power under Section 30 and Order XI Rule 14 of the CPC and Regulation 54(1), 55, 56 and 74(d) of the Conduct of Business Regulations to direct PCKL to produce the copies of the reports sought by UPCL. UPCL has also submitted that for non-compliance of the direction of the Commission in RoP dated

23.7.2019, PCKL is liable for action under Order XI Rule 21(1) of the CPC and Section 142 of the Act. In the IA, UPCL has sought the following reliefs:

“(a) Direct PCKL to place on record copies of the following reports before this Ld. Commission:

(i) PCKL Technical Committee Report;

(ii) Report of Mr. V.J. Talwar; and

(iii) Report of M/s Ramraj & Co.

(b) Initiate action against PCKL under Section 142 of the Act on account of PCKL's non-compliance of the directions of this Ld. Commission dated 23.07.2019; and

(c) Pass such further or other orders as this Ld. Commission may deem just and proper in the circumstances of the case.”

Reply of PCKL to the IA

6. PCKL vide its reply filed on 5.11.2019 has submitted that PCKL and the Respondents have not relied on the above-mentioned reports to reject or disallow the claims of UPCL and the rejection of the claims of UPCL was by a decision of the Board of Directors of PCKL. PCKL has further submitted that the reliefs claimed by UPCL for making available the reports or for initiation of action against the Respondents is contrary to law and cannot be granted for the following reasons:

(a) The reports sought by UPCL are internal reports given to PCKL and no reliance can be placed by UPCL on them in making its claim. UPCL has no right under the law to have any access to these reports.

(b) The Record of Proceedings of the hearing on 23.7.2019 was based on factually erroneous and misleading submission made by UPCL to the effect that PCKL had relied on the reports for rejecting the claims of UPCL. Further, UPCL had not made any prayer for interim relief for supply of copies of the reports but had made a prayer for final relief. The Commission without affording an opportunity of hearing to the Respondents granted final relief to UPCL for supply of the reports which is contrary to the basic principle of law governing the issue of production of documents as given in Order 11 Rules 13 and 20 of CPC.

(c) PCKL has right to object to the disclosure of the above mentioned reports on the grounds of, inter-alia, professional privilege, the reports being confidential internal reports and the admissibility as well as the relevance of the report in dealing with the present claims of the Petitioner as raised in the Petition No. 155/MP/2019.

(d) Any report received from Mr. Talwar is a confidential communication between PCKL and its professional legal advisor and is exempt from production/disclosure before any forum in terms of Section 129 of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act).

(e) The report is confidential in nature to assist the management of PCKL and is not a decision or document which has relevance in the settlement of dispute between UPCL and PCKL.

(f) M/s Ramraj & Co. is a Chartered Accountant Firm which has been engaged by PCKL for the purpose of advising PCKL in the calculation of amount payable to PCKL. The report of M/s Ramraj & Co. was received on 18.9.2019 and is currently pending verification and finalization.

(g) The reports cannot be relied on in evidence since the same are not expert evidence admissible in terms of provisions of Section 45 of the Evidence Act.

Rejoinder by UPCL

7. The Petitioner/ UPCL vide its rejoinder dated 8.11.2019 has submitted that the Committee Report cannot be construed as confidential/ internal as the same have been prepared with the participation and information provided by UPCL. UPCL has further submitted that even assuming that a particular document is confidential, it must be produced before the Court so that the Court can decide on the admissibility of such report. UPCL has relied on the judgment of the Hon'ble Supreme Court in S.P. Gupta v. Union of India [1981 Supp SCC 87] and State of U.P. v. Raj Narain [(1975) 4 SCC

428] in which it has been held that the Court may disallow production of a confidential document only when the same is against public interest. Since the reports are not contrary to public interest, they cannot be concealed from the Commission on the ground of confidentiality by PCKL. UPCL has further submitted that in terms of Section 162 of the Evidence Act, PCKL is obliged to produce the reports before the Commission notwithstanding any objection that PCKL may have regarding its production. UPCL has further submitted that the reports have utmost relevance with respect to the resolution of the dispute between UPCL and PCKL which is the subject matter of the present proceeding due to the following reasons:

(a) The Technical Committee was construed by PCKL on 29.12.2015 for the sole purpose of resolving the issue of difference in the declared capacity of UPCL's plant. UPCL was directed to attend the meetings of the Technical Committee and was asked to submit the relevant information for the purpose of resolving the issues.

(b) Thereafter, the matter was referred to Mr. V.J. Talwar, ex-Technical Member, Appellate Tribunal for Electricity for his independent views on the issues and UPCL was asked to submit all relevant information to Mr. Talwar and to reply to any queries raised in this regard which was duly complied with by UPCL.

(c) The Commercial Committee comprising the representatives of PCKL, Karnataka ESCOMs, UPCL and M/s Ramraj & Co. (Chartered Accountant) was constituted by PCKL to deliberate on the issues regarding energy charges payable to UPCL including the issue of short procurement of coal and adoption of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as the 2014 Tariff Regulations). UPCL participated in the meetings and submitted all information required by M/s Ramraj & Co. to be incorporated in their report.

(d) UPCL has further submitted that in case PCKL has not relied on any of the Committees' Reports to pass its final decision on the issue of UPCL, then

PCKL must explain and give reasonable explanation as to why these Committees were constituted and why was UPCL requested to share information with these Committees.

8. In response to PCKL's objection that the report of Mr. V.J. Talwar is a confidential communication between PCKL and its Professional Legal Advisor and hence is exempt from disclosure before any forum in terms of Section 129 of the Evidence Act, UPCL has submitted that the privilege provided under Section 129 of the Evidence Act is only applicable to lawyers practicing the legal profession and to no other class of professionals. Since the report of Mr. Talwar was a report of a technical expert and not in the capacity of a lawyer, the protection of Section 129 of the Evidence Act is not applicable in this case. Moreover, legal advice can be given only by a person who is an Advocate under the Advocates Act, 1961 (hereinafter referred to as the Advocates Act). Referring to the information furnished by PCKL in its reply stating that Mr. Talwar is an Engineer with a Bachelor's Degree in Law and, therefore, it cannot be construed that Mr. Talwar is an Advocate in terms of the Advocates Act and the report prepared by Mr. Talwar cannot be claimed to be a confidential privileged document protected under Section 129 of the Evidence Act.

Hearing on 12.12.2019

9. The IA was heard on 12.12.2019. Learned Counsel for UPCL submitted during the hearing that PCKL has failed to comply with the Commission's directions contained in the RoP dated 23.7.2019 and without there being any challenge to the said direction before APTEL, PCKL cannot continue to be in non-compliance of the directions of the Commission. Learned Counsel further submitted that in view of the contention of PCKL that the reports are confidential, PCKL be asked to submit the reports before the Commission in a sealed envelope so that Commission may take a view on the question of confidentiality. Learned counsel submitted that the report of Mr. V.J.



Talwar was sought by PCKL as a Technical Expert and not in the capacity of a lawyer or legal advisor and hence protection of Section 129 of the Evidence Act is not available. Learned counsel further submitted that since the Committees were constituted for the sole purpose of resolution of payment disputes between PCKL and the Petitioner and the Petitioner had participated in the proceedings before the Committees and submitted all data sought by the Committees, the Petitioner must be allowed to go through the reports submitted by the Committees.

10. Learned counsel for PCKL submitted that the Petitioner is seeking the copies of the reports based on an erroneous submission that PCKL relied upon these reports to reject or disallow the claims of the Petitioner. Learned counsel further submitted that under Section 129 of the Evidence Act, there is no need to be an advocate under the Advocates Act to render professional advice and any person having a law degree can render professional advice. Learned counsel further submitted that in terms of Section 129 of the Evidence Act, there is restriction in disclosing the communication that has taken place between a person and his legal professional advisor even before a Court.

11. In response to a query of the Commission with regard to the documents in support of appointment of Mr. V.J. Talwar in capacity of a legal professional advisor and his report being in the nature of legal professional advice, learned counsel for PCKL sought permission to file written submission in this regard which was allowed. The Petitioner was also allowed to file its written submission after filing of the written submission by PCKL.

12. PCKL in its written submission dated 27.12.2019 has submitted that no reliance can be placed on internal deliberations/ reports and a Court or an adjudicatory body

is required under law to arrive at its own conclusion and not seek reliance on internal documents. In this connection, PCKL has relied on the judgment of the Hon'ble Supreme Court in the following cases:

(a) Sethi Auto Service Station v. DDA, [(2009) 1 SCC 180]; and

(b) Union of India (UOI) and Ors. v. Ashok Kumar Aggarwal, (MANU/SC/1222/2013).

13. PCKL has submitted that since the internal deliberations of the Technical Sub-Committee and Commercial Committee of PCKL did not result in any final decision on any of the issues, PCKL referred the matter to Mr. V.J. Talwar for his professional legal opinion through letter dated 18.11.2017. PCKL has submitted that legal opinion issued by a person such as Mr. Talwar, who also holds a LLB Degree, on the legal provisions is clearly prohibited from disclosure under Section 129 of the Evidence Act if the person obtaining it does not want to tender it as evidence. PCKL has further submitted that Section 129 of the Evidence Act uses the words "legal professional advisors" whereas Section 126 of the Evidence Act uses the words "barrister, attorney, pleader or vakil" who are the classes of persons who are entitled to practice before Courts of Law under Section 29 of the Advocates Act. PCKL has submitted that the use of the words "legal professional advisors" in Section 129 as opposed to the language used in Section 126 clearly indicates that the protection under Section 129 of the Evidence Act applies even in respect of persons who do not appear before Courts of Law but are otherwise persons competent to give legal advice. PCKL has also submitted that reliance placed by the Petitioner on the English case of Regina (Prudential Plc and another) v. Special Commissioner of Income Tax and Anr. (2013 2 WLR 325), judgment of the Supreme Court in State of Punjab v. Sodhi Sukhdev Singh, [(1961) 2 SCR 371] and judgment of the Bombay High Court in Larsen & Toubro Limited v.

Prime Displays Pvt. Ltd., (2002 SCC On Line Bom 267) are misplaced. PCKL has submitted that simply because the Petitioner may have provided the information before the Technical Committee, M/s Ramraj and Co., and Mr. Talwar, that does not bestow any right on the Petitioner for access to the copies of these internal reports/ deliberations. PCKL has submitted that at no time, it represented to the Petitioner that any of these reports and deliberations would be shared with the Petitioner and, therefore, there can be no legitimate expectations of the Petitioner for being entitled to copies of such reports/ internal deliberations. PCKL has submitted that Mr. Talwar's opinion or Technical Committee's deliberations cannot be termed as an expert opinion for the purposes of the provisions of Section 45, 45A, 46 and 47 of the Indian Evidence Act. PCKL has submitted that the Petitioner has misled the Commission by making a factually erroneous statement before the Commission that PCKL had relied on the reports to arrive at its conclusion based on which the direction to produce the reports was issued by the Commission.

14. PCKL vide its additional affidavit dated 27.12.2019 has submitted that Mr. Talwar was engaged by PCKL in the capacity of a "legal professional advisor" and, therefore, any report prepared by him cannot be disclosed to any court as the same is prohibited under Section 129 of the Evidence Act. PCKL has placed on record the letter dated 18.11.2017 written by CMD, PCKL to Shri V. J. Talwar, ex-Member (Technical), Appellate Tribunal for Electricity seeking his willingness to render his opinion with reference to the issues related to declared capacity to be considered for payment of capacity charges to the Petitioner.

15. The Petitioner in its written submission dated 6.1.2020 has submitted that Section 94 of the Act confers powers on the Commission as are vested in the Civil

Court under CPC in relation to, inter alia, discovery and production of any document. Section 30, Order 11 Rule 14 and Rule 1(6) of the CPC empowers a Court to issue directions to the parties for production of documents in relation to any matter which is in question in the proceedings. Therefore, the Petitioner is within its rights under law to seek production of the reports sought in the IA. The Petitioner has further submitted that the Commission has also power under Regulations 54(1), 55, 56 and 74(d) of the Conduct of Business Regulations to direct parties to produce documents. In response to PCKL's submission that the Petitioner has obtained directions of the Commission for production of the reports on an incorrect submission, the Petitioner has submitted that the copy of the Petition No. 155/MP/2019 was served on PCKL by e-mail through the Commission's e-filing portal on the date of filing i.e. 27.5.2019. Further, the Petitioner has given specific reasons for seeking the reports from PCKL and has also made specific prayer for production of the said reports and, therefore, PCKL cannot claim that the Commission's direction to produce the reports are solely based on the Petitioner's submission dated 23.7.2019. Since the reports are not contrary to public interest and cannot be concealed from the Commission on the ground of confidentiality, PCKL must be put to strict proof with regard to its contention that the reports are not relevant for the present proceedings. The Petitioner has further submitted that in terms of Section 162 of the Evidence Act, PCKL is obligated to produce the reports once so directed by the Commission which alone can decide the admissibility of such reports. The Petitioner has submitted that the Technical Committee and the Commercial Committee were constituted for the purpose of resolving the dispute between UPCL and PCKL in which the Petitioner has participated and provided documents as desired by PCKL. These proceedings would be governed by Article 7.1 of the PPA which is not meant to be confidential *inter partes*. Therefore,

it is not open to PCKL to contend that outcome of the Committees' meeting is internal and the reports cannot be shared with the Petitioner. The Petitioner has submitted that the contention of PCKL that the reports were prepared to assist the management of PCKL and have no relevance in the settlement of the disputes between the Petitioner and PCKL is wrong as the said reports have utmost relevance with respect to the resolution of the disputes between the parties. The Petitioner has averred that since the recommendations of M/s Ramraj and Co. were discussed and considered by the Board of Directors of PCKL in their 46th meeting, there is no reason to believe that PCKL's Board of Directors could have disallowed the claims of UPCL without referring to the views taken by the Commercial Committee and M/s Ramraj and Co. in the subsequent Board meetings. Therefore, the Petitioner is entitled to know or being informed regarding the view taken by the Committees after deliberating the issues raised and information provided by the Petitioner. The Petitioner has submitted that from the information furnished by PCKL in its reply, it cannot be construed that Mr. Talwar is an Advocate in terms of the Advocates Act. Referring to PCKL's letter dated 18.11.2017 requesting Mr. Talwar to provide his opinion based on the Commercial Committee Report and Technical Committee Report, the Petitioner has submitted that the said letter clearly shows that the report prepared by Mr. Talwar cannot be considered as a confidential privileged document protected under Section 129 of the Evidence Act.

16. The Petitioner has submitted that the letter dated 18.11.2017 written by PCKL to Mr. V.J. Talwar is admittedly for seeking opinion on the issues raised in the Technical Committee Report and Commercial Committee Report relating to the project of the Petitioner and therefore, PCKL cannot assert that Mr. Talwar's opinion was sought on legal issues. The Petitioner has submitted that PCKL be directed to produce

all the three reports before the Commission and the Commission may take a view on the admissibility and relevance of these reports in the present proceedings. The Petitioner has further submitted that since PCKL has deliberately and intentionally not complied with the express directions of the Commission, necessary action may be taken against PCKL under Section 142 of the Act.

Analysis and Decision

17. We have considered the submissions of the Petitioner and PCKL. The main issues for consideration are as under:

- (a) Issue No. 1: Whether the directions in the RoP dated 23.7.2019 was issued in violation of any procedure or settled position of law?**
- (b) Issue No. 2: Whether the reports of the Technical Sub-Committee and Commercial Committee of PCKL and the report of M/s Ramraj & Co, Chartered Accountant are in the nature of internal deliberations/report and cannot be considered as admissible evidence?**
- (c) Issue No.3: Whether the report of Mr. V.J. Talwar is in the nature of confidential communication between PCKL and its professional legal advisor and its disclosure is prohibited under Section 129 of the Indian Evidence Act?**
- (d) Issue No.4: Whether PCKL has deliberately not complied with the directions of the Commission in the RoP dated 23.7.2019 and is liable for action under Section 142 of the Act?**
- (e) Issue No.5: Reliefs to be granted to the Petitioner?**

18. These issues have been analysed and decided ad seriatim in the succeeding paragraphs.

Issue No. 1: Whether the directions in the RoP dated 23.7.2019 was issued in violation of any procedure or settled position of law?

19. PCKL has submitted that the Record of Proceedings of the hearing of the Petition No.155/MP/2019 was based on factually erroneous and misleading submissions made by UPCL that the reports of Technical Committee, Mr V.J. Talwar

and M/s Ramraj & Co. were relied upon by PCKL in rejecting the claims of UPCL. PCKL has further submitted that UPCL had not made any prayer on interim relief for supply of copies of these reports but had made a prayer for supply of these reports as final relief. PCKL has also submitted that the Commission without affording an opportunity to the Respondents has granted final relief to UPCL for supply of copies of the report which is contrary to the principle of law governing the issue of production of documents as given in Order 11 Rule 13 and 20 of CPC. UPCL has submitted that the provisions of Order 11 Rules 13 and 20 of the CPC are not applicable in cases of commercial disputes of a specified value. Further, UPCL has submitted that in terms of Order 11 Rule 5(1) of the CPC, the Commission at any time during the pendency of the case can order production of documents in possession of PCKL.

20. We have considered the submissions of PCKL and UPCL. Petition No.155/MP/2019 was filed by UPCL under Section 79(1)(f) of the Act for adjudication of the dispute with regard to outstanding dues payable by Karnataka ECSOMs to UPCL for the period 2010-11 to 2018-19. At para 78(j) of the Petition (prayers), UPCL had sought a direction to the Respondents to place on record the PCKL Technical Committee Report, Report of Mr. V.J. Talwar, ex-Member, Appellate Tribunal for Electricity and Report of M/s Ramraj & Co., Chartered Accountant. The Petition was listed for admission on 23.7.2019. During the hearing, the Learned Counsel for UPCL submitted that the Respondents had relied on the aforementioned reports to disallow the claims of UPCL, without sharing such reports with UPCL and requested the Commission to issue necessary directions to the Respondents to provide the copy of the said reports. The Learned Counsel for PCKL submitted that he would seek instructions from the Respondents regarding the availability of the reports. The Commission after hearing the learned counsel for both the parties directed the

Respondents to provide the copies of the reports to the Petitioner. Therefore, the submission of PCKL that the Commission has passed the said interim order without giving an opportunity of hearing to the Respondents is not correct. Further, learned counsel for PCKL during the hearing neither argued that the reports had not been relied upon for disallowing the claims of the Petitioner nor took any objection that no direction could be issued with regard to the supply of the documents in the absence of an interim prayer to that effect. Had the learned counsel argued on these points, the Commission could have taken an appropriate view before issuing directions for supply of these documents. As regards the submission of PCKL that the main prayer for supply of document could not have been allowed at the interim stage, we are of the view that there is no provision in the Conduct of Business Regulations which prohibits the Commission from issuing an interim direction on the basis of a prayer made as a part of main prayer. Regulation 68 of the Conduct of Business Regulations provides as under:-

“68. The Commission may pass such interim orders as the Commission may consider appropriate at any stage of the proceedings.”

21. As per the above regulation, the Commission may pass interim orders at any stage of the proceeding if it is considered appropriate. In the present case, the Commission has issued the interim direction through RoP dated 23.7.2019 to the Respondents to supply copies of the reports to the Petitioner after hearing both the parties.

22. At this stage, it is pertinent to mention that under Section 94(1)(b) of the Act, the Commission shall for the purpose of proceedings under the Act have the same power as are vested in the Civil Court under the CPC in respect of discovery and production of any document or other material object producible as evidence.

Therefore, Section 30 and Order 11 of the CPC which deals with discovery and inspection are applicable in case of the proceedings before the Commission.

23. Section 30 of the CPC deals with the power of the Court to order discovery of the documents. The said Section is extracted as under:-

“30. Power to order discovery and the like:- Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party:-

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence.”

Order 11 Rule 14 of the CPC provides as under:-

“14. Production of documents:- It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.”

Regulation 56 of the Conduct of Business Regulations also provides for the power of the Commission to call for discovery and production of any document or other material producible in evidence. The said regulation is extracted as under:

“56. The Commission may direct the summoning of the witnesses, discovery and production of any document or other material objects producible in evidence, requisition of any public record from any office, examination by an Officer of the commission the books, accounts or other documents or information in the custody or control of any person which the Commission considers relevant to the matter.”

Therefore, the Commission has the discretion to order for production of any document by any party at any time during the pendency of any petition and to deal with such documents when produced in such manner as shall appear just. Therefore, the directions of the Commission to the Respondents to supply copies of the reports to the Petitioner are in conformity with the provisions of the CPC and the Conduct of Business Regulations.

24. PCKL has submitted that the order of the Commission in the RoP dated 23.7.2019 directing the Respondents to supply the copies of the reports to PCKL is contrary to Order 11 Rules 13 and 20 of the CPC. Rules 13 of Order 11 of CPC is extracted as under:-

“R. 13. Affidavit of documents:- The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.”

On perusal of Rule 13 of Order 11 reveals that the affidavit required under the said Rule relates to the order issued under the preceding rule i.e. Rule 12 of Order 11 of CPC which is extracted as under:-

“R. 12. Application for discovery of documents:- Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary or not necessary at the stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit:

Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.”

25. As per the above provision, a party may apply to the Court for an order directing any other party to the suit to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the suit. The Court has the absolute discretion to either refuse the application if it is satisfied that such discovery is not necessary or make such order either generally or limited to certain classes of documents. Rule 13 provides that where such an order is made under Rule 12, the party against whom such an order is made shall through an affidavit specify the documents which the said party objects to produce. Therefore, Rule 13 has to be read along with Rule 12, and not independently. In the present case, UPCL had made a prayer in Petition No. 155/MP/2019 for supply of certain reports by the Respondents. The Commission after hearing the learned counsel for both UPCL and

PCKL has ordered the respondents to supply of the said reports to UPCL. Therefore, the Commission's direction in RoP dated 23.7.2019 satisfies the requirements of Rule 12 Order 11 of CPC. Under Rule 13, PCKL has the right to file an affidavit specifying the documents for the production of which it has any objection. However, the right of PCKL under Rule 13 to take objections to the production of some or all documents cannot be a condition precedent for passing of an order under Rule 12 of the CPC. In any case, the Commission enjoys discretion to order for production of documents under Rule 14 at any stage of the proceedings.

26. PCKL has also submitted that the direction of the Commission is contrary to Order 11 Rule 20 of the CPC. The said rule is extracted as under:

“R. 20. Premature discovery:- Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.”

This Rule deals with premature discovery or inspection of documents. Since no objection was taken by the learned counsel for PCKL during the hearing on 23.7.2019 with regard to the production of reports and merely stated that he would check the availability of the report, the Commission directed for supply of the said reports. An order under Rule 12 or 14 does not preclude an order being made subsequently under Rule 20. PCKL has filed its reply to the IA in which it has claimed privilege for production of the reports which is an issue being addressed in the present order. In our view, the directions in RoP dated 23.7.2019 is not contrary to Order 11 Rule 20 of CPC.

27. In the light of the above discussion, we are of the view that the directions in RoP dated 23.7.2019 has been issued after hearing the learned counsels for both UPCL and PCKL and does not suffer from any legal infirmity.

Issue No. 2: Whether the reports of the Technical Sub-Committee, Commercial Committee of PCKL and M/s Ramraj &Co, Chartered Accountant are in the nature of internal deliberations/report and cannot be considered as admissible evidence?

28. PCKL has submitted that as per the settled law, no reliance can be placed on internal deliberations/ reports and they are not meant for external exposure. PCKL has further submitted that a court or an adjudicatory body is required under law to independently arrive at its own conclusion and not seek reliance on internal documents for the said purpose. Since the reports of the Technical Sub-Committee and Commercial Committee of PCKL are internal documents of PCKL, there can be no legitimate expectations of UPCL that it is entitled to copies of such internal deliberations/ reports. PCKL has submitted that simply because UPCL might have provided information before the Technical Committees does not bestow any right on UPCL to the copies of the internal reports/ deliberations. At no time was it represented to UPCL that any of these reports/ deliberations would be shared with it. PCKL has also submitted that Technical Committee deliberations cannot be termed as an expert opinion for the purposes of provisions of Section 45, 45 (a), 46 and 47 of the Indian Evidence Act. In this connection, PCKL has relied upon the judgments of the Hon'ble Supreme Court in (a) Sethi Auto Service Station v. DDA, [(2009) 1 SCC 180]; (b) Union of India (UOI) and Ors. v. Ashok Kumar Aggarwal, (MANU/SC/1222/2013); (c) Jasbir Singh Chhabra v. State of Punjab, [(2010) 4 SCC 192].

29. UPCL has submitted that the Committee reports are not confidential or internal documents since reports have been prepared with the participation and information

provided by UPCL. According to UPCL, the Technical Committee and the Commercial Committee were constituted for the purpose of resolving the disputes between UPCL and PCKL. UPCL has submitted that having actively participated in the Committee meetings and having provided all information and documents sought by PCKL, it is not open to PCKL to contend that the outcome of the Committee meetings is internal and the reports cannot be shared with UPCL. UPCL has further submitted that contrary to the submission of PCKL, the reports have utmost relevance with respect to the resolution of the disputes between UPCL and PCKL.

30. UPCL has submitted that even assuming that a particular document is confidential, it must be produced before the Commission so that the Commission can decide on such production. In this connection, UPCL has relied upon the judgments of Hon'ble Supreme Court in *S. P. Gupta Vs Union of India* [1981 Supp SCC 87] and *State of U.P. Vs Raj Narain* [(1979) 4 SCC 428]. UPCL has submitted that a court may disallow production of a confidential document if the same is against public interest. The reports sought by the Petitioner are not contrary to public interest and cannot be concealed from the Commission on the ground of confidentiality by PCKL. As regards the contention of PCKL that these reports are not relevant to the present proceedings, UPCL has submitted that the Commission has power to determine the relevance and admissibility of the reports. In this connection, reliance has been placed on Section 162 of the Evidence Act and judgments of the Hon'ble Supreme Court in *People's Union for Civil Liberties & Another Vs. Union of India* [(2002) 2 SCC 476] and *A. Sowkath Ali Vs. Union of India* [(2000) 7 SCC 148].

31. We have considered the submissions of PCKL and UPCL in the matter. The point for consideration is whether the reports of the technical committee, commercial

committee and M/s Ramraj & Co., Chartered Accountant are in the nature of internal reports which cannot be shared with UPCL.

32. We first consider the reports of the technical committee and commercial committee. On perusal of the documents on record, it is revealed that Commercial Committee of PCKL held its meetings on 29.12.2015 and 11.2.2016 and combined minutes of the meetings has been issued (Annexure P-29 of the Petition). The Committee comprised of MD of PCKL, representatives of Karnataka ESCOMs, State Load Despatch Centre and officers of PCKL. The meetings were also attended by the representatives of UPCL and M/s Ramraj & Co., Chartered Accountant. The meetings were held in the backdrop of the determination of tariff of the generating station of UPCL by the Commission vide order dated 20.2.2014 which was partially modified by the Appellate Tribunal for Electricity vide judgement dated 15.5.2015 and consequential order dated 10.7.2015 issued by the Commission for implementation of the judgement. The minutes clearly notes that in order to finalize the balance payment of power purchase bills from the date of CoD of first unit i.e. from 11.11.2010 to 31.3.2014 and from 1.4.2014 to 31.3.2015, the task was entrusted to M/s Ramraj & Co, Chartered Accountant and the detailed report dated 28.10.2015 submitted by M/s Ramraj & Co was circulated amongst the Karnataka ESCOMs to elicit their views. In the Commercial Committee meetings, several issues were discussed out of which two issues are of relevance in so far as the prayers in the IA are concerned, namely, adoption of the 2014 Tariff Regulations from 1.4.2014 onwards; and spot procurement of coal. Under the issue of adoption of the 2014 Tariff Regulations, the dispute regarding declared capacity of the UPCL's plant was discussed and following was recorded:

“The Additional Director (Projects), PCKL has clarified that SLDC has furnished the 15 min block wise Declared Capacity alongwith written messages to PCKL. However, there are some differences between Declared Capacity by UPCL and SLDC which has to be resolved. After deliberation on this issue, it was decided to form a technical sub-committee to look into this matter.”

33. Pursuant to the said decision, a Technical Committee was formed and meetings were held on 27.7.2016, 3.8.2016, 24.8.2016 and 6.9.2016 for discussing the issues relating to declared capacity of UPCL furnished by SLDC. Notices for the said meetings have been placed on record as Annexure P-28 Colly to the petition in which UPCL was invited to participate in the meetings. However, minutes of the said meetings have not been placed on record. Another meeting was held under the aegis of Additional Chief Secretary, Energy Department, Government of Karnataka with the representatives of PCKL and UPCL on 12.8.2016 for discussing and resolving the past issues related to UPCL, the minutes of which is placed at P-30 of the petition. In para 2 of the minutes, it is mentioned that *“the Report of M/s Ramraj & Co. and Commercial Committee meeting was placed before the 41st Board of Directors meeting of PCKL on 05.04.2016 for discussion and decision”*. In para 3 of the said minutes, it is recorded that *“PCKL has constituted a technical sub-committee based on the recommendations of commercial sub-committee to look into the plant availability factor as certified by SLDC for the tariff control period 2010-14 with respect to Ex-Bus Capacity declared by UPCL”*. In para 49 of the reply dated 18.9.2019 filed in response to the main petition, PCKL has submitted that *“a technical Sub-Committee of PCKL, without coming to any final decision recommended that the opinion of the external consultant may be sought regarding alleged discrepancies of declared capacity of UPCL’s generating station for the period from November 2010 to September 2014”*. In response to the directions of the Commission, PCKL has placed on record a letter dated 18.11.2017 written to Mr. V. J. Talwar seeking his willingness for his opinion on the issues related to 1200 MW

Udupi Power Project. In the penultimate para of the said letter, the following has been recorded:

“It is requested to give your opinion on the issues raised in technical committee report enclosed as Annexure-A and minutes of commercial committee enclosed as Annexure B and any other issue found relevant by you on pursuance of the report.”

34. From the above, it is apparent that the Technical Committee had prepared a report which was shared with Mr V.J. Talwar and his opinion was sought on the issues raised in the Technical Committee report. Since UPCL had participated in the meetings of Technical Committee and Commercial Committees and the issues pertained to the declared capacity of the generating station, the contention of PCKL that these are internal documents of PCKL is incorrect. More so, since on many occasions, minutes of meetings were issued to record deliberations during the meeting. We, therefore, are of the view that these are not internal documents of PCKL.

35. Next we consider the report of M/s Ramraj & Co, Chartered Accountant. In the minutes of the Commercial Committee meeting held on 29.12.2015 and 11.2.2016, it has been mentioned that the work for finalizing the balance payment of power purchase bill was assigned to M/s Ramraj & Co, Chartered Accountant who had submitted a detailed report on 28.10.2015. The said report including the views of PCKL, UPCL and Ms. Ramraj & Co. was circulated to Karnataka ESCOMs on 19.12.2015. The issues brought out in the report were discussed in the Commercial Committee meeting held on 29.12.2015 and 11.2.2016. The report was also discussed in the meeting taken by the Additional Chief Secretary, Energy Department, Government of Karnataka on 12.8.2016. On perusal of the records, it is noticed that M/s Ramraj & Co. vide their letters dated 22.6.2017, 5.7.2017, 10.7.2017, 15.7.2017 and 1.12.2017 had sought certain information/ document from PCKL which were duly forwarded to UPCL for submitting the necessary information. UPCL submitted the

information to M/s Ramraj & Co., copies of which are placed in the Petition. M/s Ramraj & Co. has submitted an interim report on verification of capacity charges payable to UPCL vide its letter dated 22.6.2018, a copy of which is placed at Annexure P-44 of the Petition. On perusal of Annexure P-51, it is noticed that PCKL vide its letter dated 18.1.2019 has granted extension of 30 days to M/s Ramraj & Co. for submission of the final report. In para 12 of its reply to the IA, PCKL has submitted that a report from M/s Ramraj & Co. was received on 18.9.2018 and currently pending verification and finalization.

36. From the above, it is clear that the reports of the Technical Committee, Commercial Committee and M/s Ramraj & Co. have been prepared on the basis of the information submitted by UPCL and PCKL. Further, UPCL has also participated in the meetings of the Technical Committee and Commercial Committee. Since these committees and M/s Ramraj & Co. were engaged for settlement of the payment issues between UPCL and PCKL arising out of determination of tariff of the generating station, we are of the view that these cannot be construed to be internal documents of PCKL.

37. PCKL has submitted that these reports cannot be shared since they are in the nature of internal deliberations. PCKL has relied upon certain judgments in support of its contentions. We have gone through the judgments and find that these judgments pertain to the internal notings on the file of the concerned department or organisation, and do not deal with the reports of the Committees which are constituted to find solutions to the commercial disputes with affected party and the said affected party has participated in the deliberations of the Committees or given the inputs/ information as required by the consultant firm. In the case of Sethi Auto Service Station v. DDA,

[(2009) 1 SCC 180], the Hon'ble Supreme Court was considering whether the recommendations of the Technical Committee vide minutes dated 17.5.2002 for resitement of the Appellant's petrol pump constituted an order/ decision binding on the management of DDA. In that connection, Hon'ble Supreme Court observed as under:-

“14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his view point on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision making authority in the department, gets his approval and the final order is communicated to the person concerned.”

In the case of Union of India (UOI) and Ors. v. Ashok Kumar Aggarwal, (MANU/SC/1222/2013), the Hon'ble Supreme Court held that the notings in the files could not be relied upon by the Tribunal and Court as the same cannot be treated as the decision of the Government.

38. The present case is distinguishable from the above two cases. UPCL is not asking for the copies of any internal notings of PCKL. UPCL is asking for the reports of the Technical Committee and Commercial Committee which were constituted by PCKL and that of M/s Ramraj & Co. which was engaged to give reports for resolution of the commercial dispute between PCKL and UPCL regarding the declared capacity and energy charges payable by PCKL in the light of the tariff orders issued by this Commission as modified by way of implementation of the directions of the Appellate Tribunal for Electricity. Evidently, UPCL had participated in the meetings of the Technical Committee and Commercial Committee and has submitted all necessary information as required by M/s Ramraj & Co. In fact the copies of the minutes of the meetings and the interim report of M/s Ramraj & Co. are available with UPCL which have been placed on record as Annexures to the Petition. By no stretch of imagination, these reports can be considered as internal file notings of PCKL. Therefore, we do not

see any reason as to why the copies of the reports of the Technical Committee, Commercial Committee and M/s Ramraj & Co. should be denied to UPCL. Further, PCKL has relied on Section 45, 45 (a), 46 and 47 of the Indian Evidence Act which in our view are not relevant in the facts of the present case.

Issue No.3: Whether the report of Mr. V.J. Talwar is in the nature of confidential communication between PCKL and its professional legal advisor and its disclosure is prohibited under Section 129 of the Indian Evidence Act?

39. UPCL has submitted that PCKL had engaged Shri V.J.Talwar and sought his opinion on the issue of declared capacity and, therefore, the report of Shri Talwar should be shared with UPCL. In response, PCKL has claimed privilege under Sections 126 and 129 of the Evidence Act on the ground that the report of Mr. Talwar is in the nature of professional legal advice and the same cannot be divulged. UPCL has contested the claim of PCKL stating that the report of Mr. Talwar is not covered under Section 129 of the Evidence Act.

40. We have considered the submissions of PCKL and UPCL. PCKL in para 49 of its reply to the Petition has submitted with regard to engagement of Shri V.J. Talwar as under:

“49.....A Technical Sub Committee of PCKL without coming to any final decision recommended that the opinion of an External Consultant may be sought regarding alleged discrepancies of declared capacity of UPCL’s generating station for the period from November 2010 to September 2014. Accordingly, Shri Talwar was requested to provide a report on the issue. Mr. Talwar’s report was placed before the Board of Directors of PCKL, who after considering the said report have reaffirmed that the position of PCKL/ESCOs as regards declared capacity is correct.....”

As per the above submissions, opinion of Shri V.J.Talwar as an External Consultant was sought with regard to the alleged discrepancies of declared capacity of UPCL’s generating station for the period from November 2010 to September 2014. It further emerges from the above submissions that the Board of Directors of PCKL,

after considering Mr. Talwar's report, reaffirmed the position of PCKL/ Karnataka ESCOMs with regard to declared capacity as correct. Therefore, the report of Mr. V.J.Talwar is a material document for the decision with regard to commercial dispute between PCKL and UPCL in so far as the declared capacity is concerned.

41. In reply to the IA, PCKL has taken the position that the said report is in the nature of a legal professional advice coming from Mr. Talwar who is a legal professional advisor and hence is protected from disclosure under Section 129 of the Evidence Act. UPCL has vehemently argued that the report of Mr. Talwar is not protected under Section 129 of the Evidence Act. Further, UPCL has submitted that in the absence of any definition of the term "legal professional advisor" in the Evidence Act, the meaning of the term may be restricted to legal advice given by practising lawyers only. PCKL has submitted that the interpretation of UPCL is contrary to the plain language of Section 129 of the Evidence Act as compared to Section 126 of the Evidence Act which uses the words "barrister, attorney, pleader or vakil" instead of legal professional advisor used in Section 129 of the Evidence Act. UPCL has submitted that the use of the words "legal professional advisor" in Section 129 as opposed to the language used in Section 126 clearly indicates that the protection under Section 129 of the Evidence Act applies in respect of persons who do not appear before the courts of law but are otherwise persons competent to give legal advice.

42. Sections 126 and 129 of the Evidence Act are extracted as under:-

"126. Professional communications:- No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure-

(1) any such communication made in furtherance of any illegal purpose;

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney, or vakil was or was not directed to such fact by or on behalf of his client.

Explanation:- The obligation stated in this section continues after the employment has ceased.

xxxx

129. *Confidential communications with legal advisers:- No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others."*

43. We have considered the submissions of UPCL and PCKL. The provisions of Section 126 of the Evidence Act reveals that it injuncts a lawyer (barrister, attorney, pleader or vakil) from disclosing without his client's express consent any communication made to him or any advice rendered by him in the course and for the purpose of his employment as such lawyer. The injunction contained in Section 126 of the Evidence Act against a lawyer is for the benefit of a client. Thus, a client is entitled to prohibit his lawyer from disclosing any communication made to such lawyer in the course and for the purpose of his employment as a lawyer. Section 129 has been enacted to protect the client from being forced to disclose any confidential communication made with the legal professional adviser. The term "legal professional adviser" has not been defined in the Evidence Act. Both UPCL and PCKL have given their own interpretation as to the exact connotation of the said term. While UPCL is of the view that the term "legal professional adviser" refers to only legal practitioners under the Advocates Act, PCKL is of the view that the term would include any person who has a legal qualification irrespective of whether he is a legal practitioner or not.

44. With regard to the interpretation of the provisions of the Evidence Act, Hon'ble Supreme Court in its judgement in the case of State of Punjab v. Sodhi Sukhdev Singh [(1961) 2 SCR 371] has observed as under:

"93.....It has been acknowledged generally, with some exceptions, that the Indian Evidence Act was intended to and did, in fact, consolidate the English Law of Evidence. It has also often been stated with justification that Sir James Stephen has attempted to crystallise the principles contained in Taylor's work into substantive propositions. In case of doubt or ambiguity over the interpretation of any of the sections of the Evidence Act, we can with profit look to the relevant English common law for ascertaining their true meaning."

45. In the light of the above principles, in case of doubt or ambiguity over the interpretation of any of the sections of the Evidence Act, relevant English common law can be looked into to ascertain their true meaning. UPCL has relied on the judgement of the UK Supreme Court in Regina (Prudential plc and another) V. Special Commissioner of Income Tax & Anr [(2013) 2 WLR 325] and has submitted that in the said judgement, the concept of Legal Advice Privilege has been discussed in detail and has been held that the application of Legal Advice Privilege has been held to be applicable to practicing lawyers. We have gone through the said judgement. The issue for consideration in that judgement was whether the advice obtained by a company from a firm of accountants on the tax law aspect of a proposed transaction was covered by Legal Advice Privilege. The UK Supreme Court in the majority judgement has held that at common law, Legal Advice Privilege was universally understood as applying only to communications between a client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice. Legal Advice Privilege would not be extended to communications in connection with advice given by professional persons other than lawyers, even where that advice was legal advice which the professional person was qualified to give, and accordingly, it was held that

advice from a firm of accountants on the tax law of a proposed transaction would not be covered under legal advice privilege.

46. Both UPCL and PCKL have relied upon the judgement of the High Court of Bombay in *Larsen & Toubro Limited V. Prime Displays Pvt. Ltd.* [(2002) SCC Online Bom 267]. UPCL has submitted that in the light of the said judgement, PCKL should be asked to furnish details with regard to enrolment of Mr. V. J. Talwar by any State Bar Council. PCKL has submitted that the ratio of the said decision does not require the person claiming privilege under Section 129 of the Evidence Act to demonstrate that his professional legal advisor is an advocate enrolled on the rolls of any State Bar Council. PCKL has submitted that the said judgement in fact to the contrary considers that the privilege under Section 129 of the Evidence Act can be claimed with respect to advice received from a person who is a member of the internal legal department subject to such person being qualified to give legal advice. We have gone through the said judgement. In the said judgement, Hon'ble High Court in the light of the pleadings of the parties dealt with two issues, namely, (1) whether the documents for which privilege was claimed had come into existence in anticipation of litigation for the purpose of seeking legal advice and therefore, the documents are privileged; (2) whether privilege attaches to the advice given by the legal department in view of the provisions of Section 129 of the Act. With regard to the first issue, the Court after analysing various English Laws came to the conclusion that "*in terms of the provisions of Section 126 and 129 of the Evidence Act, the legal professional privilege incorporated in those provisions attaches to a document coming into existence in anticipation of litigation*". With regard to the second issue, the Court came to the conclusion that "*what is contemplated by Section 129 is communication between a person and his legal professional advisor*" and in the absence of the details of the

qualifications of the persons working in the internal legal department, the question cannot be decided.

47. PCKL has also relied on the judgment of Hon'ble Allahabad High Court in Sunil Kumar v. Naresh Chandra Jain, (1985 SCC On Line 1118) and has submitted that as per the said judgment, the scope of protection under Section 129 of the Evidence Act is not restricted to advocates only and can be extended to the advice of the Law Officer/ Law Department. The relevant extract of the judgment is as under:-

“16.....Communications in the nature of the legal advice are dealt with in Sections 126 and 129 of the Evidence Act. Section 126 is inapplicable because a departmental Law Officer does not fall into any of the categories set forth there. The advice of the Law Officer/Law Department is certainly privileged to a limited extent under Section 129 of the Evidence Act and cannot be looked into as a piece of evidence. It is totally privileged if the person obtaining it does not intend to offer it as evidence. The intention to offer it as evidence may appear from his using it in his affidavit or appearing as a witness. That may be the position when he pleads bona fide action on the basis of legal advice. In such cases, Section 129 of the Evidence Act authorizes the Court to compel disclosure thereof in order to explain the evidence tendered. Where the person does not rely upon legal advice, there can be no compulsory disclosure; after all, the ultimate responsibility of taking the decision rests on the said person.”

As per the above judgment, advice of the Law Officer/ Law Department is a privileged document under Section 129 of the Evidence Act.

48. In the light of the above discussion, the legal propositions with regard to the privilege of the communication with the legal professional advisor as held in various judgments are briefly summarised as under:-

(a) As decided by the UK Supreme Court, “Legal Advice Privilege” at common law applies to communications between a client and its lawyers acting in their professional capacity in connection with the provision of legal advice and is not extended to communications in connection to advice given by professional persons other than lawyers such as the advice of firm of accountants on tax matters.

(b) In terms of provisions of Sections 126 and 129 of the Evidence Act, legal professional privilege incorporated in these Sections attaches to a document coming into existence in anticipation of litigation.

(c) Advice of the Law Officer/Law Department of an organization is a privileged document under Section 129 of the Evidence Act.

49. In the light of above legal propositions, we proceed to consider whether the reports submitted by Shri V.J. Talwar can be considered as privileged under Section 129 of the Evidence Act. PCKL has submitted that the letter dated 18.11.2017 from PCKL to Mr. Talwar requesting him to provide an opinion on issues related to UPCL's generating station, sought his opinion on the application of the 2014 Tariff Regulations, which are essentially law made under Section 178 of the Electricity Act, 2003. PCKL has further submitted that a legal opinion by a person (such as Mr. Talwar) who also holds a LLB degree, on the legal provisions is clearly prohibited from disclosure under Section 129 of the Evidence Act if the person obtaining it does not want to tender it as evidence. We now proceed to consider whether advice sought by PCKL from Mr. Talwar was a legal advice.

50. PCKL in response to our direction has placed on record the copy of the letter seeking the willingness of Shri V.J. Talwar to provide opinion on issues related to the generating station of UPCL. The said letter is extracted as under:-

"PCKL/DD(P)-2/AD(P) 8/113/2015-16/2475

Dated: 18.11.2017

*To
Shri Vishwa Jeet Talwar
Ex-Member (Technical)*

*.....
Sub: Request for providing willingness for considered opinion regarding issues related to 1200 MW Udupi Power Project*

Regarding the subject matter it is proposed to obtain your considered opinion in respect of certain issues related to 1200 MW Udupi Power Project.

A brief on the project and issues involved is as follows:

- 1) ESCOMs of Karnataka State have entered into a PPA with M/s UPCL Ltd. on 26.12.2005 for purchase of power from 1200 MW UPCL power project on MoU route basis. The Unit-1 of the project is commissioned on 11.11.2010 and Unit-2 is synchronized to grid on 7.3.2011 and commissioned on 19.8.2012.
- 2) The issues are related to declared capacity to be considered for payment of capacity charges during the period from March 2011 to March 2013 i.e., from the date of synchronization of Unit-2 to the grid to the date of commissioning of Unit 2 and upto the date of March 2013.
- 3) For resolving these issues related to declared capacity to be considered for payment of capacity charges the subjects were discussed in Technical Committee and Commercial Committee meetings of PCKL. The minutes of the Technical Committee meeting dated 4.4.2014 and Commercial Committee meetings dated 4.4.2014, 29.12.2015 & 11.2.2016 and 12.10.2017 are prepared.
- 4) It is requested to provide your kind considered opinion based on these minutes of meeting, CERC (Terms and Conditions of Tariff) Regulations, 2009, CERC (Terms and Conditions of Tariff) Regulations, 2014, CERC (Indian Electricity Grid Code) Regulations, 2010, CERC (Deviation Settlement Mechanism) Regulations, 2014 and the documents brought out in para supra.

The following documents are proposed to be provided towards the below mentioned subject wise issues:

1. Declared capacity of UPCL Unit-1 600 MW capacity during the period March 2011 to July 2011, January 2012 & August 2012 before Cod of Unit 2. (For 7 months)
 - a. Certified details of 15 minutes block-wise declared capacity provided by Karnataka SLDC for the period of said 7 months.
 - b. Revised declared capacity details submitted by UPCL.
 - c. Message recorded by Karnataka SLDC during the said 7 months period.
 - d. Correspondence between Government of Karnataka/KPTL/CPRI and UPCL.
 - e. SCADA details showing the actual generation from Unit-1 & Unit-2 during the above said period.
 - f. Regulatory provisions, implications and obligations on SLDC/ ESCOMs/ Generator.
2. Declared capacity of UPCL power plant during reduction in generation due to shortage of coal for the period January 2013 to March 2013.
 - a. Certified details of 15 minutes block-wise declared capacity provided by Karnataka SLDC for the period of said 3 months.
 - b. SLDC comments recorded in file no. CEE/SLDC/21 regarding the matter.
 - c. Regulatory provisions on this issue and obligation on SLDC/Generator.
3. Declared capacity during line fault for the period November 2010 to February 2012.
 - a. Certified details of 15 minutes block-wise declared capacity provided by Karnataka SLDC for the 18 cases and certified line fault details.
 - b. Supply contract documents of Udupi Power Project highlighting performance parameter guarantee of generator.

It is requested to give your opinion on the issues raised in technical committee report enclosed as Annexure-A and minutes of commercial committee enclosed as Annexure-B and any other issue found relevant by you on pursuance of report.

It is requested to kindly provide your willingness for taking up the above work along with the terms and conditions and fees structure for payment and time schedule for completing the study and submission of detailed report.”

51. Perusal of the above letter clearly reveals that the letter is addressed to Shri V.J. Talwar, Ex-Member (Technical). Further, nothing has been placed on record to show that Shri Talwar is a legal practitioner in terms of the Advocates Act or he is a Law Officer/internal legal advisor of PCKL. Perusal of the Para 4 of the letter as quoted above shows that considered opinion of Shri Talwar has been sought based on the minutes of the meeting, the 2014 Tariff Regulations, the Grid Code and the DSM Regulations of the Commission. The documents which have been provided are the data pertaining to the declared capacity of UPCL for different periods. In our view, the terms of reference clearly relates to seeking technical advice with regard to the declared capacity of the generating station in the light of the relevant regulations of the Commission. In view of the above reasons, we are not inclined to agree that the report of Shri V.J. Talwar is covered under confidential communication between PCKL and its legal professional adviser as envisaged under Section 129 of the Evidence Act.

52. In the light of the above discussion, we hold that no privilege can be claimed under the provisions of the Evidence Act for the reports of the Technical Committee, Commercial Committee, M/s Ramraj & Co. and Shri V.J. Talwar.

Issue No.4: Whether PCKL has deliberately not complied with the directions of the Commission in the RoP dated 23.7.2019 and is liable for action under Section 142 of the Act?

53. UPCL has submitted that the conduct of PCKL only points to its mala fide intentions to conceal material evidence which is necessary for proper adjudication of

the payment dispute pending between the parties. UPCL has submitted that PCKL has rendered itself liable for action under Order XI Rule 21(1) of the CPC and Section 142 of the Act. Accordingly, PCKL has prayed for initiation of action under Section 142 of the Act against PCKL for non-compliance of the directions of the Commission in RoP dated 23.7.2019. PCKL has submitted that there is no case for exercise of power under Section 142 of the Act.

54. We have considered the submissions of the parties. The Commission in its RoP dated 23.7.2019 had directed PCKL to share the copies of the reports with UPCL. However, UPCL has declined to share the copies on the ground that these reports have not been relied upon by PCKL while deciding the claims of UPCL and the reports are either in the nature of internal deliberations or privileged documents. Since PCKL had raised some legal issues and claimed privilege for production of the documents, we are of the view that the said issues needed to be decided first before taking cognizance of non-compliance of our directions in RoP dated 23.7.2019. The issues raised by PCKL have been decided in the present order. Therefore, we are not inclined to initiate any action under Section 142 of the Act against PCKL at this stage.

Issue No.5: Reliefs to be granted to the Petitioner?

55. UPCL has prayed for a direction to PCKL to place on record the copies of the reports of Technical Committee, Mr. V.J. Talwar and M/s Ramraj & Co. before the Commission. PCKL has submitted that these reports are not relevant since they have not been relied while deciding the claims of UPCL.

56. Section 162 of the Evidence Act provides as under:-

“162. Production of documents:- A witness summoned to produce a document shall, if it is in his possession or power, bring it to the Court, notwithstanding any objection

which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees, fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents:- If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and, if the interpreter disobeys such direction, he shall be held to have committed an offence under Section 166 of the Indian Penal Code (45 of 1860)."

As per the above provision, a person summoned to produce a document must bring it to the Court if it is in its possession or power and any objection with regard to its admissibility will be decided by the Court.

57. We have already decided that the documents are neither in nature of internal notings/deliberation nor are privileged in terms of Section 129 of the Evidence Act. As regards the admissibility of the documents on the ground of relevancy, the same will be decided on furnishing of such documents by PCKL to this Commission. Accordingly, we direct PCKL to submit these documents, namely, reports of Technical Committee and Commercial Committee of PCKL, final report of M/s Ramraj & Co., Chartered Accountant and report of Shri V.J. Talwar in a sealed envelope within 30 days of the issue of this order. The Commission will decide the admissibility of these reports and whether these reports can be shared with UPCL after perusal of the said reports.

58. IA No.79 of 2019 in Petition No.155/MP/2019 is disposed of in terms of the above.

**sd/-
(I.S. Jha)
Member**

**sd/-
(P.K. Pujari)
Chairperson**