Before the Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal Nos. 233 of 2014 and 266 of 2014

Dated : 31st March, 2016

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

In the Matter of:

Appeal No. 233 of 2014

Sasan Power Ltd.
1st Floor, H-Block,
North Wing, Dhirubhai Ambani Knowledge City,
Navi Mumbai-400 709,
Maharashtra **... Appellant(s)**

Versus

1. **Central Electricity Regulatory Commission**
   3rd and 4th Floor,
   Chanderlok Building,
   36, Janpath,
   New Delhi – 110 001.

2. **Western Regional Load Dispatch Centre**
   Power System Operation Corporation Ltd.,
   F3, MIDC Area, Marol,
   Andheri East,
   Mumbai – 400 093

3. **Lahmeyer International (India) Pvt. Ltd.**
   Corporate Office,
   Intec House, 37, Institutional Area,
   Sector – 44,
   Gurgaon – 122 002 (NCR).

4. **MP Power Management Company Ltd.**
   Through its Executive Director IPC,
   Shakti Bhawan,
   Block No. 11, 1st Floor Rampur,
   Jabalpur – 244 901,
   (Madhya Pradesh)

5. **Paschimanchal Vidyut Vitran Nigam Ltd.**
   Through its Managing Director,

Victoria Park,
Meerut – 250 001,U.P.

6. **Purvanchal Vidyut Vitran Nigam Ltd.**
Through its Managing Director
Hydel Colony,
Varanasi – 221 004,
Uttar Pradesh

7. **Madhayanchal Vidyut Vitran Nigam Ltd.**
Through its Managing Director,
4-A, Gokhale Nagar,
Lucknow – 226 001,
Uttar Pradesh

8. **Dakshinanchal Vidyut Vitran Nigam Ltd.**
Through its Managing Director,
220, KV Vidyut Substation,
Mathura – Agra Bypass Road,
Sikandara
Agra – 282 007

9. **Punjab State Power Corporation Ltd.**
Through its Chief Engineer (PP&R)
Shed C-3, Shakti Vihar,
Patiala – 147 001
Punjab

10. **Tata Power Distribution Ltd.**
(Earlier NDPL)
Through its Managing Director
Tata Power DDL House,
Hudson Lines,
New Delhi – 110 009

11. **BSES Rajdhani Power Ltd.**
Through its Chief Executive Officer,
BSES Bhawan,
Nehru Place,
New Delhi – 110 019

12. **BSES Yamuna Power Ltd.**
Through its Chief Executive Officer,
BSES Bhawan,
Nehru Place, New Delhi – 110 019

13. **Haryana Power Generation Corporation Ltd.**
Through its Chief Engineer,
Shakti Bhawan,

Panchkula – 134 109, Haryana.

14. Ajmer Vidyut Vitran Nigam Ltd.
Through its Chairman and Managing Director,
Hathi Bhata, Ajmer – 305 001
Rajasthan

15. Jaipur Vidyut Vitran Nigam Ltd.
Through its Chairman and Managing Director,
Vidyut Bhawan, Jaipur – 302 2005
Rajasthan

16. Jodhpur Vidyut Vitran Nigam Ltd.
Through its Chairman and Managing Director,
New Power House, Jodhpur – 342 003
Rajasthan

17. Uttarakhand Power Corporation Ltd. (UPCL)
Through its Chairman and Managing Director
Urja Bhawan, Dehradun – 248 001
Uttarakhand

18. Central Electricity Authority,
Through its Chairman
Sewa Bhawan, R.K. Puram,
New Delhi – 110 066 **... Respondent(s)**

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Appeal No. 266 of 2014

Lahmeyer International (India) Pvt. Ltd.
Intec House, Plot No. 37,
Sector – 44, Institutional Area,
Gurgaon – 122 002
Haryana **... Appellant(s)**

Versus

1. **Central Electricity Regulatory Commission**
   3rd & 4th Floor, Chanderlok Building,
   36, Janpath, New Delhi – 110 001

2. **Western Regional Load Despatch Centre, Mumbai**
   F-3, MIDC Area, Marol,
   Andheri (East)
   Mumbai – 400 093

3. **Sasan Power Ltd., Mumbai**
   H-Block, Dhirubhai Ambani Knowledge City,
   Thane Belapur Road, Koparkhairane,
   Navi Mumbai – 400 710

4. **MP Power Management Co. Ltd., Jabalpur**
   Shakti Bhawan,
   Jabalpur – 482 008
   Madhya Pradesh

5. **Paschimanchal Vidyut Vitran Nigam Ltd., Meerut**
   Victoria Park
   Meerut – 250 001
   Uttar Pradesh

6. **Purvanchal Vidyut Vitran Nigam Ltd., Varanasi,**
   Hydel Colony, Bhikaripur,
   Post-DLW, Varanasi – 221 004
   Uttar Pradesh

7. **Madhyanchal Vidyut Vitran Nigam Ltd., Lucknow**
   4-A, Gokhale Marg,
   Lucknow – 226 001
   Uttar Pradesh

8. **Dakshinchal Vidyuit Vitran Nigam Ltd., Agra**
   220 kV Vidyut Sub-Station,
   Mathura Agra By-pass Road,
   Sikandra, Agra – 282 007, UP
9. **Punjab State Power Corp. Ltd., Patiala**

The Mall, Patiala – 147 001
Punjab

10. Tata Power Distribution Ltd., New Delhi
Grid Sub-Station Building,
Hudson Lines, Kingsway Camp,
New Delhi – 110 009

11. BSES Rajdhani Power Ltd., New Delhi
BSES Bhawan,
Nehru Place, New Delhi – 110 019

12. BSES Yamuna Power Ltd., New Delhi
Shakti Kiran Building,
Karkardooma
Delhi – 110 096

13. Haryana Power Generation Corp. Ltd., Panchkula
Room No. 239, Shakti Bhawan,
Sector 6, Panchkula – 134 109
Haryana

14. Ajmer Vidyut Vitran Nigam Ltd., Ajmer
Hathi Bhata, City Power House,
Ajmer – 305 001
Rajasthan

15. Jaipur Vidyut Vitran Nigam Ltd., Jaipur
Vidyut Bhawan,
Jaipur – 302 005
Rajasthan

16. Jodhpur Vidyut Vitran Nigam Ltd., Jodhpur
Neew power House,
Industrial Area,
Jodhpur – 342 003
Rajasthan

17. Uttarakhand Power Corporation Ltd., Dehradun
Urja Bhawan, Kanwali Road,
Dehradun – 248 001
Uttarakhand

18. Central Electricity Authority, New Delhi
Sewa Bhawan,
R. K. Puram,
New Delhi – 110 066. … **Respondent(s)**

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J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUIDICIAL MEMBER

The instant appeal, being Appeal No. 233 of 2014, under section 111 of the Electricity Act, 2003, has been filed by the appellant, namely Sasan Power Limited (herein after referred to as '***Sasan Power***'), against the order dated 08.08.2014 (***Impugned Order***), passed by the learned Central Electricity Regulatory Commission (hereinafter referred to as '***Central Commission'***) in Petition No. 85/MP/2013, in the matter of *Western Regional Load Despatch Centre, Mumbai* (hereinafter referred to as '***WRLDC***') Versus Sasan Power Limited, Mumbai and Others whereby the said Petition, filed by WRLDC challenging the veracity of the Independent Engineer's Certificate has been disposed of/allowed, *inter alia*, holding the following :

(i) The Petition is maintainable and WRLDC has the jurisdiction to file Petition No. 85/MP/2013 (Impugned Petition)

(ii) The Certificate of the Independent Engineer dated 30.03.2013 declaring the Commercial Operation Date (COD) at a lower capacity is not in order, on the ground that it was not in conformity with the provisions of the Power Purchase Agreement entered into between Sasan Power and the Procurers.

(iii) The Unit has complied with the testing requirement as per the PPA and the Ld. Commission accepts the COD as 16.08.2013.

(iv) Power injected during the period 31.03.2013 to 15.08.2013 shall be treated as infirm power.

02) The Appeal No. 233 of 2014 has been filed by Sasan Power Ltd. against order dated 08.08.2014 passed by Central Commission quashing the certificate given by IE for declaration of COD for the first unit of the appellant's Ultra Mega Power Project and holding that the declared COD of the unit shall be 16.08.2013. Another Appeal No. 266 of 2014 has been filed by Lahmeyer International (I) Pvt. Ltd., the IE against certain remarks passed by Central Commission in the same Impugned Order. In these circumstances, both these appeals have been heard together and are now being decided by this common judgment.

03) In a nutshell, the entire case of the appellant relates to the declaration of the Commercial Operation Date of the first unit (Unit 3) of the Sasan Ultra Mega Power Project of the appellant. The case of the appellant is that the Commercial Operation Date (***COD***) of the first unit of Sasan Ultra Mega Power Project, commissioned at 00.00 hours on 31.03.2013 in terms of the certificate issued by the Independent Engineer (***IE***) on 30.03.2013 i.e. a day after the certificate was issued by the IE as per the Power Purchase Agreement (***PPA***) signed between the Procurers who are respondent Nos. 4 to 17 of this appeal and the appellant on 07.08.2007. All the 14 procurers, who entered into the PPA with appellant, had also consented in writing to the commissioning of the Unit at a de-rated capacity of 101.38 MW. However, WRLDC, which was not a party to the PPA and was not affected in any manner by the declaration of the COD had filed the Impugned Petition, being No. 85/MP/2013, before the Central Commission, *inter alia*, challenging the veracity of the IE Certificate.

04) At the outset, it is necessary to mention that WRLDC filed the Impugned Petition, being No. 85/MP/2013, on 25.04.2013 before the Central Commission with the following prayers:

> "(a) Look into the veracity of the certificate issued by the Independent Engineer in view of deliberate suppression and misrepresentation of the facts and issue suitable direction to Respondent No.2 to desist from such acts.

(b) Kindly look into the matter of Respondent No.1 indulging into intentional mis-declaration of parameters related to commercial mechanism in vogue and has purported to declare the part (de-rated) capacity of 101.38 MW as commercial on the grounds of load restriction by WRLDC and issue suitable directions in the matter.

(c) Issue specific guidelines with respect to declaration of COD of the generators who are not governed by the CERC (Terms and Conditions of Tariff) Regulations, 2009 to be in line with CERC regulations so that the same can be implemented in a dispute free manner and eliminate any possibility of gaming by generator.

(d) The Commission may give any further directions as deemed fit in the circumstances of the case."

05) The said Impugned Petition has been disposed of/allowed by the Impugned Order dated 08.08.2014 by the Central Commission on the aforesaid grounds, which is under challenge before us in the instant appeal.

06) The main grievances of the appellant in this appeal are hereby narrated as under:

A. <u>Maintainability:</u>

a) That the learned Central Commission has gone beyond the scope of the Impugned Petition and held that 16.08.2013 is the COD and the power injected during the period between 31.03.2013 up to 15.08.2013 shall be treated as infirm power.

b) That the said Impugned Petition, at the instance of WRLDC, is not maintainable on the following grounds, which the Central Commission failed to consider:

(i) as per the statutory functions, Regional Load Despatch Centre, like WRLDC, has no role to play in determining the COD, which is governed by the PPA and as such the matter is exclusively between the parties to the PPA

(ii) declaration of parameters, including COD are purely matters between the appellant Sasan Power and the procurers and are beyond the scope of statutory functions of an RLDC

(iii) as per Section 28 of the Electricity Act, 2003, dealing with functions of RLDC, read with Regulation 2.3 of the CERC, Indian Electricity Grid Code Regulations 2010 (***IEGC Regulations***), the functions of the Regional Load Despatch Centre (in the present case is WRLDC) are limited to :

- Scheduling and despatch of electricity
- Monitoring grid operations
- Maintaining account of quality of electricity
- Supervision and control over inter-State transmission systems and
- Real time operation for grid control and despatch

c) That besides, WRLDC did not, at any point, raise any dispute with reference to the quality of electricity for safe, secure and integrated operation of the regional grid. WRLDC, in its Impugned Petition, did not raise the issue of grid safety and security at all. Further, WRLDC, neither in its communication with Sasan Power nor in its Petition, had alleged that Sasan Power did not follow its directions. WRLDC had not pointed out any instances where Sasan Power had not obeyed WRLDC's directions. Hence, the question of invoking Section 29(5) of the Electricity Act, 2003 does not rise. On the contrary, WRLDC scheduled power and power was supplied during the period 14.04.2013 and 17.04.2013.

d) That neither Section 28 nor Section 29 of the Electricity Act 2003, dealing with functions of RLDC and compliance of directions of RLDC respectively or the IEGC Regulations even referred to commercial operation of a unit while laying down the scope of the functions of a RLDC.

e) That WRLDC had itself admitted that it has no role in determination of COD which is the prerogative of the parties to the PPA

f) That also the stand taken by WRLDC in another Petition No. 289 and 290 of 2010 (*suo motu*) before the Central Commission, titled in re. M/s Lanco Power Limited Gurgaon and Others and in Re. Madhya Pradesh Power Trading Co. Ltd. further substantiate this legal position. In the said cases, WRLDC had taken a stand that it is not concerned with the declaration of commercial operation of power stations.

g) That as per PPA, the acceptance of WRLDC is not required for commissioning of the unit and WRLDC has not been vested with the power to monitor the COD of the units under the Electricity Act, 2003 or IEGC Regulations 2010. In fact, in many cases, the WRLDC has no access to data/set up at all and COD is accepted based on declaration by generators.

h) That the Impugned Petition was filed by WRLDC: (a)questioning veracity of IE certificate, (b)raising issue on declaration of availability by Sasan Power and (c)seeking guidelines/regulations to address the possibility of accounting of infirm power injected by a unit simultaneously with Sasan Power.

i) That WRLDC had never questioned COD in its Impugned Petition. Having specified themselves after extensive deliberations, WRLDC allowed unit to be scheduled and subsequently wrote to Western Region Power Committee (***WRPC***) to prepare Revised Energy Accounts (***REA***). WRLDC itself has maintained that it has nothing to do with COD in the instant case as well as in earlier cases. WRLDC itself did not challenge the commissioning and is not aggrieved by commissioning of the unit at all. But WRLDC had raised a different question on the veracity of the IE certificate.

j) That the learned Central Commission failed to take into account that the procurers have not asked for declaration of COD to be 16.08.2013 and there was no hearing at all before the Central Commission as to what should be the commissioning date of the unit if IE certificate was to be found an acceptable. Hence, the effective date of the commissioning of the unit was not in issue for

consideration of the Central Commission under the Impugned Petition filed by WRLDC.

B. <u>Waiver:</u>

a) That Article 6.3.1 of the PPA provides the conditions for achieving the commissioning. It, *inter alia,* provides for a test certificate of an independent engineer providing for a tested capacity of not less than 95% of the contracted capacity. The contracted capacity is 620.4 MW for a Unit of Sasan. Clause 6.3.4 provides that a Unit's contracted capacity can be reduced to its tested capacity which is termed as 'de-rated capacity'. Clause 6.3.4 provides for a penalty for the difference between the contracted capacity and the reduced tested capacity. Article 18.3 provides that a party to the PPA can waive in writing the requirements of the PPA. A conjoint reading of Articles 6.3.1, 6.3.4 and 18.3 of the PPA establishes that the Procurers can waive the requirement of the full load testing of contracted capacity and can accept test certificate of the IE with a reduced tested capacity and such acceptance would constitute commissioning of the Unit with the tested capacity. In the present case Sasan had submitted a testing schedule for full load; however WRLDC did not permit testing at full load and restricted the generation from the Unit at a load lower than the contracted capacity.

b) That accordingly, Sasan Power achieved a tested capacity at 101.38 MW which was duly certified by the IE. This operation and test certificate of 101.38 MW has been expressly accepted in writing by all the Procurers vide their communications between 31.03.2013 and 15.04.2013. Even the WRLDC has acted in terms of this acceptance and scheduled the Unit at a capacity of 101.38 MW and the power was generated and supplied accordingly. Hence it is established that Sasan has achieved commissioning of Unit 3 on 31.03.2013 at a tested capacity of 101.38 MW in view of the written acceptance of the commissioning of the Unit by all the Procurers. The requirement of producing 95% of contacted capacity has thus been expressly waived and generation at 101.38 MW (ex-bus) (lowest load achieved during the performance test period of 72 hours) has been accepted as commissioning of the Unit.

c) That WRLDC itself accepted and acted upon the Commissioning of the unit as evidenced by the following:

(i) WRLDC scheduled power from first unit of Sasan which has also been published by WRLDC in its website. By Scheduling power, WRLDC has accepted the declaration of commissioning of the Unit, as scheduling of power can be done only after commissioning of the Unit has been achieved.

(ii) WRLDC charged system operation charges as per CERC Regulations 2009 from March 2013 onwards. Operation Charges can be levied only when Unit is operational and power is scheduled by WRLDC and is therefore now estopped from challenging the Commissioning of the unit or the veracity of the IE certificate.

d) The learned Commission failed to take note of Article 18.3 of the PPA. The learned Commission's observation that 'any amendment to the PPA can be carried out with the mutual agreement of the parties and after the approval of this Commission' is erroneous since no amendment of the PPA was intended nor had taken place. Waiver is not an amendment in law. It is precisely for this reason, Article 18.1 expressly requires approval of the learned Commission for amendment to PPA, whereas Article 18.3 envisages no role at all for the learned Commission with regard to waiver.

C. **Arbitrary and discriminatory treatment by WRLDC**: The learned Central Commission has erred by not taking into consideration the arbitrary and discriminatory treatment meted out by WRLDC to Sasan Power for the role of WRLDC in testing of a unit should be that of a 'facilitator' in this regard, following is pertinent to be noted:

(i) WRLDC should have extended full support and ensured grid availability for the test.

(ii) WRLDC was notified of the commissioning plans well in advance and was expected to maintain frequency in case of Holi/other holidays and even during monsoon in order to facilitate testing.

(iii) WRLDC had notice of the testing well in advance and as a Government body responsible for planning, effective and efficient grid operations, should have planned to provide grid availability for Sasan's unit's Performance Test. Unfortunately, WRLDC, prior to and during the entire test period, did not act in a planned responsible manner.

(iv) For example, during March 2014 (this current calendar year) 3-4 units of different projects (including one of the 660 MW units of Sasan UMPP) in the same region i.e. Western Region, were under testing simultaneously and measures were taken by WRLDC to ensure that all units undertake performance test simultaneously. The same approach could have been adopted during the testing of First Unit (i.e. Unit No.3) of Sasan UMPP during March 2013. In fact this was the lone unit which was under testing and commissioning during March 2013.

(v) WRLDC could have easily put some of the already commissioned units on reserve load.

(vi) As recorded in the learned Commission's order dated 22.02.2014 on Grid Disturbance of 30.7.2012 and 31.7.2012, as per Clause 6.5.20 of the Grid Code, WRLDC has the powers to revise schedule of the units on a suo-moto basis for better grid operations. WRLDC has all the powers vested in it and could have easily facilitated the grid for unit testing.

(vii) Analysis of Declared Availability vs. Implemented Schedule for all coal fired Inter-State Generating Stations (***ISGS***) in WR on 27th, 28th & 29th March 2013 indicate that WRLDC had falsely claimed, in its e-mail of 27th March, 2013, that all the plants were running on technical minimum. In some cases even

units were allowed to start generation after being shut down. In many cases injection equal to their respective Declared Capacities (***DC***s) were allowed. The claim of the WRLDC that all machines were running at technical minimum limits is factually wrong. The relevant data downloaded from WRLDC website proves that NTPC stations were allowed to operate at more than 85% of schedule most of the time and were backed down to 79% only for 4.5 hrs. (51 to 69 time blocks i.e. 12:30 PM to 5:00 PM) and thereafter were allowed to operate as high as 93% of their cumulative DC. Further, one unit of 500 MW at Vindhyachal II which was under shutdown since 02:00 hrs of 26.3.2013 was allowed to come on bar at 08:30 hrs of 27.3.2013 and the unit started generating nearly full load by 12:00 hrs. Similarly 210 MW unit at Vindhyachal IV, which was under shut down from 13:00 hrs of 25.3.2013 was allowed to come on bar at around 12:00 hrs of the same day and was allowed to generate full by 13:30 hrs of 27.03.2013. While Sasan was not allowed to increase the load, WRLDC website data further reveals that more than 1100 MW was allowed to be injected in to the grid by NTPC between 16:00 hrs to 24:00 hrs of 27.03.2013 and Coastal Gujarat Power Ltd. – CGPL (Mundra UMPP) was also allowed to inject additional 125 MW. This proves that WRLDC has acted in a partisan way w.r.t Sasan UMPP. It did not permit a unit which was under full load performance test to generate even one third of its capacity and on the other hand it allowed NTPC and CGPL to inject more than 1200 MW into the grid.

(viii) WRLDC ought not be permitted to single out Sasan especially since WRLDC was seeking clarifications regarding the commissioning and COD process for all generating stations whose tariff is not determined under Section 62 of the Electricity Act, 2003.

(ix) The action of the WRLDC with respect to the commissioning of the Sasan's Unit is also discriminatory as WRLDC did not raise any questions about the commissioning of various other projects (including COD of four out of five units of CGPL's Mundra UMPP) and declaration of COD despite the said units not meeting the respective PPA requirements.

(x) The conduct of WRLDC (and also some of the Procurers who are common to Mundra and Sasan UMPPS) becomes further questionable, as they chose to point a finger at commissioning of Sasan's Unit despite waiver in writing by all the Procures which was taken at WRLDC's insistence, while they continue to remain silent about declaration of COD by four non-compliant Mundra UMPP units. It is pertinent to note that there was no waiver in writing in the case of Mundra UMPP and the Ld. Commission should have appreciated this and concluded that Sasan's case was treated in a discriminatory manner. The Ld. Commission failed to refer to the contents of the IE certificate in the cases of Tata – Mundra UMPP.

(xi) WRLDC, being an instrumentality of State under Article 12 of the Constitution, its actions ought to be fair and non arbitrary.

D. **Non-achievement of full load:** That the finding of the Central commission that Sasan Power did not achieve full load despite having the opportunity to do so; is wholly and factually erroneous for the following reasons:

(i) That the Central Commission's findings that the machine repeatedly tripped, is factually incorrect because the unit did not trip at all during the test period and operated continuously for 72 hours testing period.

(ii) That the Sasan Power did not have the permission during the test period 20:00 hours on 27.03.2013 hours to 20:00 hours on 30.03.2013 i.e. during the entire test period to operate at full load.

(iii) That the Central Commission's finding that the unit was not ready to achieve 95% of the load is also factually incorrect.

(iv) That the Central Commission's finding that Sasan Power had the opportunity to achieve full load during performance test period is incorrect and misplaced as the said conclusion is mere *ipse dixit* and has been arrived at without

referring to the voluminous documents and materials available before the Central Commission.

E. <u>Non-consideration of IE Certificate:</u>

(i) That the learned Central Commission failed to consider the report of independent technical expert, submitted by Sasan Power.

(ii) That the unit had no short comings and was not ready for commissioning at the time of performance test. Even the Sasan Power's suggestion to appoint an independent Committee to look into the readiness of the unit at the time of performance test has not been even considered by the Central Commission.

(iii) That the learned Central Commission declined to appoint an independent Committee only on the following erroneous grounds:

- That load restriction was only on 27.03.2013 and thereafter Sasan Power had lost the opportunity to achieve full load as its machine repeatedly tripped.
- The readiness of the machine is not a relevant factor for declaration of COD for the PPA.

07) The appellant is Ultra Mega Power Project of the Sasan Power Generating company. The respondent No.1 is the Central Electricity Regulatory Commission, respondent No.2 WRLDC is the load despatch centre who was the petitioner before the Central Commission. Respondent No.3 is a company whose expert had issued the Independent Engineers Certificate. Respondent Nos.4 to 17 are the traders/distribution licensees (power procurers). Respondent No.18 is the CEA which is a statutory authority under the Electricity Act, 2003.

08) The relevant facts giving rise to the instant appeal are as under:

8.1) That the appellant, Sasan, has set up a power plant in the State of Madhya Pradesh. The appellant had also entered into a Power Purchase Agreement (PPA) dated 07.08.2007 with fourteen procurers, who are respondent Nos. 4 to

17 herein, for supply of power. Under the PPA, the Madhya Pradesh Power Trading Company Limited (MPPTCL) (later renamed as Madhya Pradesh Power Management Company Limited) is the lead procurer. Under Article 11 of the PPA, the procurers are required to pay the seller monthly tariff as per the schedule in the PPA, from the Commercial Operation Date (COD).

8.2) The relevant provisions of the PPA dated 07.08.2007 are reproduced below:

"6. ARTICLE

6: SYNCHRONISATION, COMMISSIONING AND COMMERCIAL OPERATION

6.1 The Seller shall give the Procurers and RLDC at least sixty (60) days advance preliminary written notice and at least thirty (30) days advance final written notice, of the date on which it intends to synchronise a Unit to the Grid System. Provided that no Unit shall be synchronized prior to 36 months from NTP.

6.1.2 Subject to Article 6.1.1 a Unit may be synchronized by the Seller to the Grid System when it meets all connection conditions prescribed in any Grid Code then in effect and otherwise meets all other Indian legal requirements for synchronization to the Grid System.

6.2 Commissioning …

6.3 Commercial Operation

6.3.1 A Unit shall be Commissioned on the day after the date when all the Procurers receive a Final Test Certificate of the Independent Engineer stating that:

a. The Commissioning Tests have been carried out in accordance with Schedule 5 and are acceptable to him; and

b. The results of the Performance Test show that the Unit's Tested Capacity, is not less than ninety five (95) percent of its Contracted Capacity as existing on the Effective Date.

6.3.2 If a Unit fails a Commissioning Test, the Seller may retake the relevant test, within a reasonable period after the end of the previous test, with three (3) day's prior written notice to the Procurers and the Independent Engineer, Provided however, the Procurers shall have a right to require deferment of any such re-tests for a period not

exceeding fifteen (15) days, without incurring any liability for such deferment, if the Procurers are unable to provide evacuation of power to be generated, due to reasons outside the reasonable control of the Procurers or due to inadequate demand in the Grid.

6.3.3 The Seller may retake the Performance Test by giving at least fifteen (15) days advance notice in writing to the Procurers, up to eight (8) times, during a period of one hundred and eighty (180) days ("Initial performance Retest period") from a Unit's COD in order to demonstrate an increased Tested Capacity over and above as provided in Article 6.3.1 (b). Provided however, the Procurers shall have a right to require deferment of any such re-tests for a period not exceeding fifteen (15) days, without incurring any liability for such deferment, if the Procurers are unable to provide evacuation of power to be generated, due to reasons outside the reasonable control of the Procurers or due to inadequate demand in the Grid.

6.3.4 (i) If a Unit's Tested Capacity after the most recent Performance Test mentioned in Article 6.3.3 has been conducted, is less than its Contracted Capacity as existing on the Effective Date, the Unit shall be de-rated with the following consequences in each cash with effect from the date of completion of such most recent test:

a) The Unit's Contracted Capacity shall be reduced to its Tested Capacity, as existing at the most recent performance test referred to in Article 6.3.3 and Quoted Capacity Charges shall be paid with respect to such reduced Contracted Capacity;

b) The Quoted Non Escalable Capacity Charge (in Rs./kwh) shall be reduced by the following, in the event Tested Capacity is less than ninety five (95%) per cent of its Contracted Capacity as existing of the Effective Date:

Rs.0.25/kwh x [{1 – {(Tested Capacity of all Commissioned Units + Contracted Capacity of all Units not Commissioned at the Effective Date)/Contracted Capacity of all units at the Effective Date}]

c) the Seller shall not be permitted to declare the Available Capacity of the Unit at a level greater than its Tested Capacity;

d) The Availability Factor of the derated Unit shall be calculated by reference to the reduced Contracted Capacity; and

e) The Capital Cost and each element of the Capital Structure Schedule shall be reduced in proportion to

reduction in the Contracted Capacity of any Unit which has yet to be commissioned).

(ii) If at the end of Initial Performance Retest Period or the date of the eight Performance Test mentioned in Article 6.3.3, whichever is earlier, the Tested Capacity is less than the Contracted Capacity (as existing on the date of this Agreement), the consequences mentioned in Article 8.2.2 shall apply for a period of one year.
Provided that such consequences shall apply with respect to the Tested Capacity existing at the end of Initial Performance Retest period or the date of the eighth Performance Test mentioned in Article 6.3.3, whichever is earlier."

18. ARTICLE 18: MISCELLANEOUS PROVISIONS

18.1 Amendment
This Agreement may only be amended or supplemented by a written agreement between the Parties and after duly obtaining the approval of the Appropriate Commission, where necessary.

18.2 Third Party Beneficiaries
This Agreement is solely for the benefit of the Parties and their respective successors and permitted assigns and shall not be construed as creating any duty, standard of care or any liability to, any person not a party to this Agreement.

18.3 No Waiver
A valid waiver by a Party shall be in writing and executed by an authorized representative of that Party. Neither the failure by any Party to insist on the performance of the terms, conditions, and provisions of this Agreement nor time or other indulgence granted by any Party to the other Parties shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right under this Agreement, which shall remain in full force and effect."

8.3) That a con-joint reading of Article 6.3.1 and Article 6.3.4 of the PPA makes it clear that the PPA contemplates a situation wherein Commissioning of a unit can be declared even at a de-rated capacity while imposing penalty as well as obligating the generating company of undertaking future tests to establish higher capacity of the unit. Clause 18 makes it clear that there can be a

waiver or relinquishment of performance of the terms, conditions and provisions of the PPA.

8.4) That on 01.03.2013 at 7:35am, Sasan wrote a letter to Western Regional Load Despatch Centre (WRLDC) intimating that it intended to synchronize the first unit (Unit No.3) of Sasan Ultra Mega Power Project within 7 to 10 days.

8.5) That on 06.03.2013, Sasan wrote a letter to the Lead Procurer giving the notice of commissioning test as required under Article 6.2.2 of the PPA.

8.6) That on 09.03.2013, the Unit was synchronized to the grid and tripped.

8.7) That on 25.03.2013 (at 12:30pm) Sasan wrote a letter to WRLDC informing them that Unit 3 would be synchronized at around 3 pm and that load will be slowly raised to 660 MW for performance test of COD.

8.8) **That on 25.03.2013 (at 1:22 pm) Sasan wrote an email to WRLDC providing the tentative load schedule. The same day, namely on 25.03.2013, at 3:40pm, Sasan wrote an email to WRLDC requesting for the Code and intimating that unit will be synchronized at 5pm. The same day, namely on 25.03.2013, at 5:47 pm, Sasan wrote an email to WRLDC providing the power injection schedule. The same day, on 25.03.2013, at 5:56 pm, WRLDC issued synchronization code (3/2108) at 5:56 pm and subsequently another code (3/2120) was given at 8:29 pm. The Unit tripped at 9.30 pm.**

8.9) That on 27.03.2013 (at 12:13 am) Sasan again submitted a testing programme to WRLDC. The same day, at 05:01 am, Sasan submitted a programme of increasing load from zero to 660 MW.

8.10) That on 27.03.2013 (at 3:31 pm) Sasan submitted another plan for achieving full load. The same day (at 3:35 pm) Sasan wrote to WRLDC communicating the test schedule for full load and requested approval for the said schedule.

8.11) That on 27.03.2013 (at 4:02 pm) WRLDC wrote to Sasan intimating *inter alia*:

"a) generation during commissioning test is treated as infirm power and the generation will be allowed as per real time grid conditions

b) demand was low on account of Holi and the low demand is expected to continue till 28.03.2013 morning

c) all generating stations in WR are running on technical minimum

d) permission granted for generation of 100 MW."

Therefore, unit was ready to operate at full load, 620.4 MW (ex-bus) but the WRLDC gave permission to operate at only 100 MW (ex-bus)

8.12) That on 27.03.2013 (at 4:06 pm) WRLDC vide its email dated 27.03.2013 stated that at present allowed infirm generation is only 100 MW and further increase in generation will be allowed as per real time conditions and if the system permits only and if there is a proposed increase, "Code" from WRLDC may be taken for the quantum of increase.

8.13) That on 27.03.2013 (at 4:47 pm) Sasan wrote to WRLDC requesting permission for increase of ex-bus generation up to 200 MW from 5:00 pm to 06:00 pm.

8.14) That on 27.03.2013 (at 5:36 pm) Sasan wrote to WRLDC intimating that generation is being restricted to 100 MW ex-bus as per the instructions of WRLDC on account of grid constraints and awaiting further instructions from WRLDC.

8.15) **That on 27.03.2013 the commissioning test for the first unit began in the presence of the Independent Engineer (IE) and the representatives of Procurers at 8pm. The details of grid frequency during the commissioning test i.e. from 27.03.2013 to 30.03.2013 demonstrate that problem in the grid restrained Sasan from achieving full load. The frequency chart shows that grid situation was more or less same on 27.03.2013 and 28.03.2013.**

8.16) Frequency remained more than 50 HZ for 87.3% (1254 Minutes) of the time on 27.03.2013 and it remained more than 50 HZ for 86.8% (1232 Minutes) of the time on 28.03.2013. Sasan had requested WRLDC on 27.03.2013 to permit increase in load as and when grid situation improves. Sasan contacted WRLDC telephonically on 28.03.2013 for permission to increase the load but was denied permission due to grid restriction. Frequency charts clearly show that grid parameters were same on both the days. If grid restrictions were there on 27.03.2013 due to high grid frequency, it remained on 28.03.2013 also.

8.17) That on 28.03.2013, Sasan and WRLDC had verbal communication on two occasions (01:02 pm and 08:09 pm) where generation levels were discussed and the Sasan was denied further increase in ex-bus injection by WRLDC due to high grid frequency.

8.18) That though all the oral communications (total 7 in number on 28.03.2013 and 29.03.2013) were not disclosed by WRLDC in its Petition but WRLDC admitted to these communications in its rejoinder dated 23.12.2013 filed before the Central Commission. **WRLDC had mentioned in its rejoinder that verbal communications are irrelevant to the present dispute and reliance or production thereof would be immaterial for the adjudication of the present dispute. However, code for increasing load on 29.03.2013 at 10:19 pm, by WRLDC were provided verbally.**

8.19) That on 29.03.2013 (at 8:10 am) WRLDC's shift in-charge asked the current generation of Sasan's unit. Sasan informed that it was around 145 MW as per WRLDC instructions.

8.20) That on 29.03.2013 (at 8:17 am) Sasan called WRLDC to confirm the message and furnished required data. On 29.03.2013 (at 8:25 am) WRLDC's shift in-charge also asked for current generation and instructed not to increase

generation without consent from WRLDC. Sasan confirmed that without WRLDC's instructions Sasan will not increase the generation.

8.21) On 29.03.2013 (at 9:34 pm) Sasan called WRLDC regarding increasing ex-bus injection and WRLDC conveyed to send a request mail to increase ex-bus injection. On 29.03.2013 (at 9:40 pm) Sasan referring to telecommunication again informed WRLDC that generation is being restricted to 100 MW as per WRLDC instructions and further instructions to increase generation are awaited.

8.22) That on 29.03.2013 (at 9:41 pm) Sasan called WRLDC seeking confirmation of request mail and WRLDC informed that they would inform Sasan after reviewing Sasan's e-mail. On 29.03.2013 (at 9:53 pm) WRLDC's shift incharge asked Sasan for generation increment scheduled and told that a mail regarding that was forwarded to Sasan. WRLDC told Sasan that WRLDC is in touch with its officials and will confirm to increase generation upon receiving confirmation from them. Sasan informed WRLDC that it would provide tentative generation increase schedule after receiving confirmation. That on 29.03.2013 (at 10:19pm) WRLDC gave code No. 2452 telephonically for increasing generation to 200 MW ex-bus, instructed not to increase load further without WRLDC's consent. Sasan was informed that transmission line in vicinity may take shutdown next day morning and Sasan may have to reduce generation subject to system demand.

8.23) That on 30.03.2013 (at 01:05 am) Sasan confirmed that generation had been increased. The same day (at 7:13am) WRLDC enquired about its plan of raising load and informed that the permission to increase load will be granted on real time situation and permission can be obtained over phone as usual.

8.24) That on 30.03.2013 (at 11.16 am) Sasan wrote to WRLDC:

(a) Commissioning test commenced on 27.03.2013 and the unit was operating at low load due to grid conditions.

(b) In order to increase capacity the boiler conditions need re-adjustment.

(c) Load increase profile would be intimated after evaluating boiler and auxiliary conditions.

8.25) That on 30.03.2013 (at 11:32 am) Sasan submitted by, e-mail, a Declared Capability (DC)_ of 620.4 MW and stated that 72 hour performance test would be completed by 30.03.2013. On the same day, on 30.03.2013 (at 2:18 pm) Sasan wrote to WRLDC intimating that generation would be ramped up from 08:00 pm progressively for which the permission was sought.

8.26) That on 30.03.2013, the commissioning test was concluded and the IE issued a test certificate which, *inter alia*, specifically stated "*in view of the above, the Unit 3 is certified to have achieved commercial operation with a tested capacity of 101.38 MW (ex-bus).*"

8.27) **That on 30.03.2013, communications were sent by Sasan to WRLDC intimating that 72 hour performance test of Sasan Unit 3 was completed and that Unit 3 was available for commercial operation from 00.00 hours on 31.03.2013.**

8.28) **That on 31.03.2013 at 00:39 am, WRLDC intimated Sasan that as per IE certificate and confirmation from lead procurers the tested capacity is only 101.38 MW and declared capacity given by Sasan for 220 to 620 MW is not in line with certificate of IE, WRLDC requested to sort out the matter with the lead procurer and other procurers and get the consent from them for declaration of commissioning of the unit as well as giving declared capacity up to 620 MW.**

8.29) That on 31.03.2013, the WRLDC gave a code No.3/2531 to increase generation to 300 MW and again at 1:42 am to increase generation to 400 MW but alleged that unit could not pick up the load and tripped at 1:45am.

8.30) **That on 31.03.2013 (at 09:19 pm) the WRLDC wrote to Sasan requesting it to obtain consent of procurers for scheduling of 620.4 MW as the IE had certified the test capacity of unit as 101.38 MW.**

8.31) **That on 31.03.2013, the lead procurer, MPPMCL, wrote to WRLDC about the same. Between 31.03.2013 and 15.04.2013, in line with the request of WRLDC, procurers accepted commissioning of unit as on 31.03.2013 with a tested capacity of 101.38 MW and requested WRLDC to schedule the power.**

8.32) **That on 02.04.2013 letter from lead procurer, MPPMCL, *inter alia*, stated that "*as lead procurer, the performance test, as certified by the Independent Engineer for a capacity of 101.38 MW (ex-bus) is acceptable to us under clause 6.3.4 of the PPA.*"**

8.33) That on 02.04.2013, letter from UP Power Corporation Ltd. giving concurrence for scheduling of the allocated quota from Sasan was issued.

8.34) That on 05.04.2013 letter from WRLDC to Sasan, *inter alia,* stating that since of unit No.3 was declared as per IE certificate for only 101.38 MW, it was not understood how a declared capacity for a higher capacity was given and consent of procurer should be taken.

8.35) That on 06.04.2013 Sasan declared zero as DC.

8.36) That on 07.04.2013, Sasan declared zero to 620 as DC.

8.37) That on 09.04.2013, Sasan declared zero to 300 as DC.

8.38) That on 09.04.2013 letter from WRDLC to Sasan and MP, *inter alia*, stating that lead procurer was agreeable to consider 101.38 MW as declared capacity for Sasan as de-rated capacity of the unit and for scheduling power on the said basis till the next performance test.

8.39) That on 10.04.2013 since a declaration for 10.04.2013 was made on the previous day i.e. 09.04.2013 prior to the receipt of the letter, Sasan declared a

capacity of 170 to 620 MW. Subsequently, on 09.04.2013 itself it was revised to zero.

8.40) That on 10.04.2013, Rajasthan's Discoms Power procurement centre wrote to Sasan accepting IE certificate pertaining to performance test for commissioning of Sasan UMPP's unit for capacity of 101.38 MW under clause 6.3.4 of the PPA.

8.41) That on 11.04.2013 Sasan declared zero as DC.

8.42) That on 12.04.2013, Haryana Power Purchase Centre wrote to Sasan accepting the commissioning of the unit at the tested capacity of 101.38 MW under clause 6.3.4 of the PPA.

8.43) That on 12.04.2013, Punjab State Power Corporation Ltd. wrote to Sasan stating that it had no objection to schedule the power from Sasan in accordance with the stand of the lead procurer. In view of the directions given by WRLDC, on 12.04.2013, Sasan restricted declared capacity to 101.38 MW only.

8.44) That on 13.04.2013, Tata Power Ltd. wrote to Sasan similarly accepting commissioning of the unit as other procurers in respect of 101.38 MW.

8.45) **That on 13.04.2013 (at 11:44am) Sasan wrote to WRLDC requesting scheduling of power on the basis of declared capacity, highlighting that acceptance of 13 out of 14 procurers had been obtained. The same day i.e. on 13.04.2013 (at 5:38pm) WRLDC wrote to Sasan intimating that either Sasan can generate full load for testing or generation up to 101.38 MW by submitting mutually agreed schedule.**

8.46) That on 13.04.2013 (at 07:08 pm) Sasan requested WRLDC to schedule up to 101.38 MW and submitted letters from procurers except one intimating the acceptance of commissioning of the unit for 101.38 MW and scheduling accordingly.

8.47) That on 14.04.2013 (at 01:39 am) a communication from WRLDC to Sasan directing Sasan to inject only scheduled power based on its declared capacity was made.

8.48) That on 14.04.2013, Sasan started generation at 101.38 MW which was scheduled based on the consent received from procurers.

8.49) That on 14.04.2013, WRLDC scheduled power. On 14.04.2013 and 17.04.2013 scheduled generation data showing that WRLDC scheduled power from first unit of Sasan which has been published by WRLDC.

8.50) That on 15.04.2013, Uttarakhand Power Corporation Limited wrote to Sasan stating that they had no objection to scheduling of power from Sasan's unit.

8.51) **That on 15.04.2013, WRLDC wrote to procurers stating that the tested/ achieved capacity of unit 3 was only 101.38 MW against the rated capacity of 660 MW and directed generator to restrict generation to 101.38 MW which is the declared capacity.**

8.52) **That on 15.04.2013, WRLDC wrote to Central Electricity Authority (CEA), *inter alia*, confirming that procurers had given a commissioning of unit for a de-rated capacity of 101.38 MW as per various clauses of PPA and only power of 101.38 MW was being scheduled.**

8.53) That on 17.04.2013, the unit was taken out at 09.52 am and scheduling was discontinued for the purpose of retesting of the unit. Sasan submitted a fresh plan for full load testing from 02:00 pm of 17.04.2013 to 01:00 am of 18.04.2013.

8.54) That on 17.04.2013 (at 09:37 am) an e-mail was sent by Sasan to WRLDC stating that the exact time for de-synchronization and subsequent synchronization would be intimated. On 17.04.2013 itself at 12:13 pm an e-

mail was sent to Sasan by WRLDC requesting for clearance on the full load plan.

8.55) That on 18.04.2013, (at 09:04 am), WRLDC wrote to Sasan stating that it is ready to give assistance for successful completion of testing.

8.56) That on 18.04.2013, 19.04.2013 and 20.04.2013 the WRLDC sought details for not generating 125 MW on 18 & 19th April, 2013 and 260 MW on 20.04.2013.

8.57) That on 20.04.2013 (at 01:38 am) Sasan replied to WRLDC stating that the present injection is 263.6 MW and the reason for delay in increase of ex-bus injection is: (a) auto loops tuning, (b) milling system problem and (c) coal handling plant maintenance and informed WRLDC that in view of the reasons Sasan shall be maintaining 300 MW.

8.58) That on 22.04.2013, WRLDC wrote a letter to WRPC on long term entitlement and scheduling of Sasan from 14.04.2013 stating that scheduling of Sasan had started from 14.04.2013 and data for Regional Energy Accounting (REA) and Unscheduled Interchange (**UI**) accounting. WRLDC code for Sasan is LL.

8.59) **That WRLDC charged system operation charge as per CERC Regulations 2009 from March 2013 onwards, which could be charged only after commissioning of the unit.**

8.60) That WRLDC filed the Impugned Petition, being Petition No.85/MP/2013, before the Central Commission, *inter* alia, with the aforesaid prayers.

9) According to the appellant, the WRLDC in its Impugned Petition had neither raised the issue of grid security nor claimed that Sasan had violated any of its directions. The said Petition has been disposed of/allowed by the Central Commission, by Impugned Order dated 08.08.2014 as stated above.

10) **Now we are reproducing below the subsequent development that took place after the filing of the Impugned Petition by WRLDC before the Central Commission on 25.04.2013:**

10.1) That WRLDC had charged system operation charges as per CERC Regulations 2009 for the period from March 2013 to May 2013, by sending the bills dated March to May 2013.

10.2) On 10.06.2013, (at 09:08 am) Sasan informed WRLDC that it had achieved the full load and would be maintained for re-take of performance test period.

10.3) On 10.06.2013 (at 04:00pm) at the time of commencement of re-test, the unit was operating at net generation of 594.14 MW (more than 95%)

10.4) On 12.06.2013 (at 11:03 pm) WRLDC thanked Sasan for backing down generation and helping in saving grid and further directed the generation to be limited to 400 MW till further instructions.

10.5) On 13.06.2013 (at 04:00 pm) re-take of performance test was completed when the unit was operative above 95% of the contracted capacity.

10.6) On 15.06.2013, correspondence was exchanged between Sasan and WRLDC when Sasan sought permission to increase generation which was refused by WRLDC.

10.7) On 17.06.2013 IE issued test certificate for re-take of performance test.

10.8) On 19.06.2013, WRLDC telephonically requested Sasan to seek consent of the procurers to schedule power. Sasan sent a letter to lead procurers on 19.06.2013 seeking consent to schedule power from unit 3.

10.9) On 15.08.2013, IE issued test certificate.

10.10) On 24.09.2013, when the Impugned Petition, being Petition No.85/MP/2013, was listed before the Central Commission, issue regarding maintainability of the same was raised. However, the Central Commission admitted the Petition.

10.11) On 24.12.2013, Sasan submitted the Affidavit along with copy of the Independent Technical Expert Report (Mr. R. K. Jain) on assessment of readiness of Unit 3 to generate power at full load during performance test during March 2013.

10.12) On 17.01.2014, IE filed an application to place on record a note on change over from wet mode to dry mode highlighting that it was not possible to operate unit at 200 MW (ex-bus) generation as this falls into an unstable operating mode and accordingly load was raised to 150 MW (ex-bus).

10.13) **On 27.05.2014, Sasan submitted comparative chart of various IE certificates highlighting that there is no specified format of IE certificate and Sasan's IE certificate was factual, detailed and transparent.**

11) We have heard the learned counsel for the rival parties in both these appeals and we have also gone through the respective written submissions and other material on record and the Impugned Order.

12) The following issues arise for our consideration:

(i) Whether WRLDC has acted in an arbitrary manner in restricting generation during the trial run of Unit 3 of Sasan UMPP from 27.03.2013 to 30.03.2013?

(ii) Whether the Central Commission has gone beyond the scope of the prayers made before it in the Impugned Petition?

(iii) Whether declaration of COD at 101.38 MW has violated any provision of the Act or Rules and Regulations made thereunder?

(iv) Whether the Independent Engineer has given the performance certificate as per the provisions of the PPA?

(v) Whether the procurers have provided the waiver as per the provision of PPA for accepting Sasan project's de-rated capacity at 101.38 MW?

12.1) **Issue No.(i) :** Regarding action of WRLDC in restricting generation during the trial run of Sasan Unit-3, on this issue, following contentions have been made on behalf of the appellant:

a) That WRLDC acted against the appellant by not permitting its unit under the Performance Test to generate the contracted capacity on the pretext of low system demand and grid restriction. At the same time, WRLDC had permitted two units of NTPC which were under planned shutdown to come on bar and allowed NTPC to inject more than 1100 MW into the grid. NTPC was also allowed to generate 80-90% of their schedule.

b) That WRLDC, vide e-mail dated 31.03.2013 wrote to Sasan directing it to obtain consent from procurers for scheduling 620.4 MW as the IE has certified the capacity at 101.38 MW and did not at any time contest COD. WRLDC had made a prayer to look into the veracity of IE's certificate, intentional misrepresentation of parameters relating to commercial mechanism in vogue and issuance of guidelines for COD. However, Central Commission went beyond the scope of the Petition and decided the COD as 16.08.2013 treating the power injected between 30.03.2013 to 15.08.2013 as infirm power.

c) That having satisfied themselves after extensive deliberations with the procurers, WRLDC allowed the Unit of Sasan Power to be scheduled and subsequently informed in writing to WRPC to prepare REA, essentially meaning that WRLDC had unquestionably accepted COD and acted upon it by scheduling the unit.

d) That it is an accepted fact that power from the commissioned generating unit can only be scheduled. Thus by scheduling power, the WRLDC and all

procurers of Sasan Power have unquestionably accepted COD at tested capacity of 101.38 MW on 31.03.2013.

e) That WRLDC has no role to play in declaration of COD. The functions of WRLDC, as per the Electricity Act, are restricted to ensure integrated operation of the regional grid and optimum scheduling and dispatch of electricity within the region.

f) That the installed capacity of Northern, Eastern and Western (NEW) grid is about 167000 MW. The unit operating at 101.38 MW would not cause any instability in the grid. The procurers have imposed penalty on Sasan UMPP by levying applicable reduction in capacity charges due to de-rated capacity of 101.38 MW.

g) That unit's testing close to the year end is not by Sasan's designs or action but due to delays attributable to procurers in meeting their obligation under the PPA. As per the bidding, the contract year was to start from 27.11.2012 i.e. first contract year was of four months. However, this was further pushed back towards the end of March, 2013 due to delays by procurers in meeting their obligation. In the meeting with procurers on 27.02.2013, the procurers agreed to the revised commissioning date of the unit as 31.03.2013.

h) According to the appellant Sasan, the WRLDC failed to act as a facilitator during the performance test of the unit from 27.03.2013 to 30.03.2013. The Sasan's unit was not allowed to achieve full load whereas a number of generating units were allowed to operate at more than 85% of the schedule. Some large machines were allowed to be synchronized while asking Sasan to maintain low generation.

i) That WRLDC acted against the appellant by not permitting its unit under the performance test to generate the contracted capacity on the pretext of low system demand and grid restriction.

12.2) **Per contra,** on this issue No.(i), the contention of the learned counsel for the respondent, WRLDC is as under:

(a) That the onus to submit a testing plan and avail the code for increase in generation lies on the generator and in the present case the appellant did not approach WRLDC for increase in generation even at first instance. Subsequently, even on specifically being asked by WRLDC to enhance the generation to a higher level, the appellant failed to achieve the load even up to 200 MW.

(b) That on 27.03.2013 by allowing infirm generation of 100 MW, WRLDC had informed that due to Holi festival, demand of Western Region was low which was likely to prevail till morning hours of 28.03.2013 and asked the appellant to approach it whenever they proposed to increase the load. However, the appellant did not approach WRLDC with a testing plan until late evening of 29.03.2013.

c) That the generator, namely the appellant, was not debarred from requesting WRLDC for enhancement of generation subsequent to the morning of 28.03.2013. The learned Central Commission has also held that restriction was only on 27.03.2013.

d) That on 29.03.2013, WRLDC permitted the appellant to raise load to 200 MW. However, this has been suppressed in the test certificate, which indicates that WRLDC had permitted injection on only 150 MW.

e) That WRLDC was ready to permit higher generation on 30.03.2013 morning, however, the appellant chose not to increase generation during testing period. The appellant had, in its reply, e-mail dated 30.03.2013, indicated that they will revert with load increase profile by 12:00 PM but they never approached WRLDC.

f) That in case, there is grid restriction then in such a situation the generator will have to wait till the grid conditions are suitably available considering the grid security and that the unit is ready to pick up load.

g) That even after declaration of COD at 22:34 hours of 30.03.2013, the appellant tried to increase the generation up to 300 MW first and further to 400 MW but the unit could not pick up the load and tripped at 01:43 hours of 31.03.2013.

12.3) **Our consideration on Issue No.(i):**

We have cited above the sequence of events, particularly from 27.03.2013 to 31.03.2013. The following emerges from the information furnished by the parties:

a) On 27.03.2013 due to Holi festival the demand in the system was low. Sasan was allowed to inject only 100 MW against the injection plan of 100 to 620 MW submitted by the appellant Sasan Power.

b) On 28.03.2013, according to Sasan Power they wanted to increase load but the same was not permitted. According to the appellant, Sasan Power they had sought power verbally. However, WRLDC has denied to have received any such request from Sasan. Verification is not possible as voice recorder of WRLDC was not working at the relevant time. However, the frequency profile of the grid for 28.03.2013 shows that the frequency was more or less the same level as the previous day.

c) According to WRLDC no written message was received from morning hours of 28.03.2013 to evening of 29.03.2013.

d) On 29.03.2013 at 21.36 hours, Sasan Power informed RLDC that they were maintaining the load of 100 MW as per WRLDC's instructions and await further instructions from WRLDC. WRLDC in mail dated 29.03.2013 at 21:41 hours asked Sasan Power to give tentative generation schedule programme.

e) On 29.03.2013 at 10:19 PM, WRLDC issued code No.2452 telephonically for increasing generation to 200 MW ex-bus. According to the appellant for generating 200 MW ex-bus, they have to maintain gross generation of around 240 MW and in this zone boiler changes from wet mode to dry mode and is unstable. Therefore, Sasan Power increased generation to 160 MW to comply with WRLDC's direction to limit generation to 200 MW.

f) On 30.03.2013 (at 01:05 am) Sasan confirmed that generation had been increased. The same day at 07:13am, WRLDC enquired about their plan of raising load and informed that the permission to increase the load will be granted on real time situation and permission can be obtained over phone.

g) However, Sasan Power informed at 11:16am on 30.03.2013 that load increase profile will be informed after evaluating boiler and auxiliary conditions. Immediately, thereafter, Sasan Power again informed WRLDC that they would be completing the performance test of unit 3 by evening of 30.03.2013 and it will be available for commercial operation. Sasan also gave a schedule varying from 210 to 620.4 MW with declared capacity of 620.4 MW.

h) Four large regional grids viz. Northern, Eastern, North-Eastern and Western grids of the country are operating in synchronization and the combined system is called NEW grid with an installed generation capacity of 1,67,000 MW. It is beyond our understanding or comprehension that a unit of 620 MW capacity could not be given a clear schedule for testing a unit in the large inter-connected NEW grid. We understand that on 27.03.2013, due to Holi festival, the grid demand was running low. However, we find from the contentions of the appellant that generating stations of NTPC at Korba, Vindhyachal and Sipat were operating at more than 85% of the schedule most of the time and were asked to back down to 79% only for 4.5 hours. One unit of 500 MW at Vindhyacal which was under shut down from 26.03.2013 was allowed to come on bar at 08:30am on 27.03.2013 and unit started generating full load by 12:00 hours. Similarly, another unit of 250 MW at Vindhyachal which was under shut down from 25.03.2013 was allowed to come on bar at about 12:00

hours on 27.03.2013 and the unit started generating full load by 01:30 pm of 27.03.2013. On the other hand, Sasan was restricted at 100 MW on 27.03.2013 which fact has not been denied by WRLDC.

i) It has been hotly argued by the learned counsel for WRLDC that WRLDC could have provided load to Sasan as grid conditions improved from morning hours of 28.03.2013, had Sasan made a request for the same on 28.03.2013. On the other hand, appellant claimed that they had repeatedly made verbal requests to WRLDC on 28th and 29th March, 2013 to allow them to increase generation. We are not able to validate the contention of the appellant that verbal requests were made to WRLDC by the appellant on 28.03.2013 to raise generation level as it has been reported that the voice recorder of WRLDC was not in working order. However, we find from the frequency chart furnished by the appellant that frequency conditions on 28.03.2013 were nearly identical to that prevailing on 27.03.2013. Grid frequency remained for 87.3% and 86.8% of the total time higher than 50 HZ. on 27.03.2013 and 28.03.2013 respectively. Therefore, system conditions on 28.03.2013 were similar to those prevailing on 27.03.2013.

j) According to WRLDC, the system conditions on 28.03.2013 had improved. However, contrary to the claim of WRLDC, we find from the frequency chart presented by the appellant Sasan that the system conditions were similar to those prevailing on the previous day i.e. on 27.03.2013. The learned Central Commission also did not go into the aspect of grid operation on 28.03.2013 and accepted the contention of WRLDC (petitioner before the Central Commission) before observing that the appellant did not approach WRLDC on 28.03.2013 for increasing load when the system conditions had improved. We feel that WRLDC could have granted generation schedule for testing the unit at full load as there was provision for backing down of generation. WRLDC could have also requested the procurers of appellant, Sasan project to back down at other generating stations from whom they were procuring power to permit performance test of the unit at Sasan UMPP unit. WRLDC, being the apex body in real time operation of the inter-connected grid, facilitating trial run

operation of 620 MW was not something or such a big thing which could not have been arranged or managed by WRLDC.

12.4) From the above analysis and discussion, and the material on record, and having considered rival contentions of the parties, we find and observe that WRLDC has acted in an arbitrary manner in restricting generation during trial run of unit 3 of Sasan UMPP from 27.03.2013 to 30.03.2013. We hereby decide this issue No.(i) in favour of the appellant.

12.5) **Issue No.(ii) :** Relating to scope of petition. On this issue, following are the contentions made on behalf of the appellant:

a) That the WRLDC vide its e-mail dated 31.03.2013 wrote to Sasan directing it to obtain consent of procurers for scheduling of 620.4 MW as the IE had certified the tested capacity of unit as 101.38 MW and did not at any time contest the COD.

b) That in fat, the WRLDC (petitioner) never contested COD of the unit at the tested capacity of 101.38 MW, even in its Impugned Petition and even during the hearing before this Appellate Tribunal. WRLDC requested to limit the scope of its submissions to the prayers made in the Impugned Petition.

c) That WRLDC, petitioner made only following prayers to the learned Central Commission in its Impugned Petition.

> *"(a) Look into the veracity of the certificate issued by the Independent Engineer in view of deliberate suppression and misrepresentation of the facts and issue suitable direction to Respondent No.2 to desist from such acts.*
> *(b) Kindly look into the matter of Respondent No.1 indulging into intentional mis-declaration of parameters related to commercial mechanism in vogue and has purported to declare the part (de-rated) capacity of 101.38 MW as commercial on the grounds of load restriction by WRLDC and issue suitable directions in the matter.*

(c) Issue specific guidelines with respect to declaration of COD of the generators who are not governed by the CERC (Terms and Conditions of Tariff) Regulations, 2009 to be in line with CERC regulations so that the same can be implemented in a dispute free manner and eliminate any possibility of gaming by generator.

(d) The Commission may give any further directions as deemed fit in the circumstances of the case."

d) That no other prayer, in the Impugned Petition was made by the petitioner, WRLDC. The Central Commission went beyond the scope of the Impugned Petition illegally and erroneously while passing the Impugned Petition.

e) That after being satisfied as a result of extensive deliberations with the procurers as well as other agencies of the Government of India, WRLDC allowed the unit to be scheduled and subsequently informed in writing to WRPC to prepare REA. It means that WRLDC had unquestionably accepted the COD of the unit of the appellant and acted upon it by scheduling the unit. Any generating unit cannot be scheduled unless it is commissioned. Thus this sequence i.e. "COD followed by scheduling of firm power" has been accepted even by the learned Central Commission in the Impugned Order wherein it has held that power injected between 31.03.201 3to 15.08.2013 shall be treated as infirm power. The Central Commission has taken this view as it has held that Sasan's unit got commissioned on 16.08.2013 and hence, there could not have been any firm power before 16.08.2013. It is thus clear that by scheduling power, WRLDC and all the procurers of Sasan had unquestionably accepted the unit commissioning at the tested capacity of 101.38 MW on 31.03.2013.

f) That WRLDC itself had maintained that it has nothing to do with COD and it is a matter between the procurers and the seller (Sasan in the instant case) as well as in separate petitions of Sasan and other generators.

g) That WRLDC had raised a different question on certain findings of the IE certificate but COD on the basis of findings of the IE's certificate was never an issue and WRLDC also scheduled the unit. Therefore, WRLDC itself did not

challenge commissioning and WRLDC is not aggrieved by the Commissioning of the unit at all.

h) **That the learned Central commission failed to take into account the fact that <u>WRLDC did not ask for declaration of COD to be 16.08.2013</u> and there was no prayer at all in the Impugned Petition as to what should be the commissioning date of the unit of the appellant. Thus the issue as to what should be the effective commissioning date of the unit was never an issue at all for consideration before the Central commission in the Impugned Petition as the commissioning of the unit was not questioned in the Impugned Petition and the COD of the unit was accepted by WRLDC.**

i) That it is well settled law that a party cannot be granted a relief which is not claimed by it and the Courts are not entitled to grant the relief not asked for or for which no prayer has been made as held by Hon'ble Supreme Court in the matter of ***M/s Trojan & Co. Vs. RM. N. N. Nagappa Chettiar****, reported at AIR 1953 SC 235* and in ***Krishna Priya Ganguly etc. Vs. University of Lucknow & Ors.*** *etc. reported at AIR 1984 SC 186.* Thus the law laid down by Hon'ble Supreme Court of India is binding and the impugned findings and directions of the Central Commission, beyond the prayers of the Impugned Petition, are clearly erroneous and illegal.

12.6) **Per contra,** on this Issue No.(ii), the contentions of the learned counsel for the respondent, WRLDC are in support of the Impugned Order. They have only maintained the reasons cited in the Impugned Order on this issue.

13) **<u>Our consideration and conclusion on issue No.(ii)</u>** : We have gone through the four prayers made in the impugned Petition by the Petitioner, WRLDC, which prayers we have mentioned above.

13.1) The prayer of the WRLDC before the Central Commission was regarding veracity of certificate issued by IE, intentional misdeclaration related to

commercial mechanism by Sasan and issuing of specific guidelines for declaration of COD in respect of generators not governed by Central Tariff Regulations. However, Central Commission went beyond the scope of the petition to hold the COD of unit-3 as 16.08.2013 and treating injection during the period 30.03.2013 to 15.08.2013 as infirm power. The acceptance for COD of the power plant is an issue between the procurers and the generator and the same was not referred by any procurers to the Central Commission for adjudication. The learned counsel for WRLDC has also submitted that WRLDC is not in any manner concerned with the dues or payments payable by procurers to the appellant/Sasan Power. The grievance of WRLDC before the Central Commission was that the COD was declared by the appellant without full load testing by achieving only 15% of the installed capacity against the requirement of achieving at least 95% under the PPA and such declaration of COD was based on "test certificate" of the IE issued under Article 6.3.1 of the PPA which was factually incorrect and against the expressed terms of the PPA.

13.2) Therefore, Central Commission should not have gone beyond the veracity of the IE Certificate and intentional mis-representation by Sasan Power.

13.3) The Hon'ble Supreme Court in the matter of ***M/s. Trojan & Co. Vs. RM. N. N. Nagappa Chettiar*** *AIR 1953 SC 235* held as under:

> *"It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case."*

13.4) A similar view had also been taken by the Hon'ble Supreme Court in the matter of ***Krishna Priya Ganguly etc. Vs. University of Lucknow & Ors*** *AIR 1984 SC 186* that a party cannot be granted a relief which is not claimed. The relevant extracts are reproduced below:

"26. The High Court could not devise its own criterion for admission. Since the academic body has made the marks obtained in MBBS examination the criterion, admission had to be made by such a criterion. The High Court could not have introduced its own notions in such an academic matter. The High Court was not competent to do so and had no jurisdiction to import its own ideology.

27. The High Court further observed that the respondent appears to be a very dedicated worker having acquired a diploma and would have proved an invaluable asset to the Institution. We do not see any proper material for this conclusion to which the High Court has suddenly jumped apart from the fact that admissions were not to be given by the High Court according to its own notions. Finally, in his own petition in the high Court, the respondent had merely prayed for a writ directing the State or the college to consider his case for admission yet the High Court went a step further and straightaway issued a writ of mandamus directing the college to admit him to the M.S. course and thus granted a relief to the respondent which he himself never prayed for and could not have prayed for such a gross discrimination made in the case of a person who had obtained lowest aggregate and lowest position seems to us to be extremely shocking. Although much could be said against the view taken by the High Court yet we would not like to say more than this that the High Court had made a very arbitrary, casual and laconic approach to the case and based its judgment purely on speculation and conjectures swept away by the consideration that Dr. Sinha possessed a diploma when in fact other candidates also had obtained diploma but that could not be taken into consideration, because the rules did not so provide."

13.5) In view of the above discussion and case law laid down by the Hon'ble Supreme Court, we clearly hold and observe that the Central commission has gone beyond the scope of prayers made in the impugned Petition while passing the Impugned Order. Hence, all the findings and observations made by the learned Central Commission in the Impugned Order beyond the scope of the payers of the Impugned petition are liable to be set aside or quashed as suffering from perversity or illegality and based on improper appreciation of the material

available before the Central Commission as regards to the prayers made in the impugned Petition. This issue is also decided in favour of the appellant.

14) **Issue No.(iii) & (iv)**: Relating to declaration of COD at 101.38 MW and IE certificate. On these issues, following are the contentions made on behalf of the appellant:

a) That WRLDC has no role in the declaration of COD hence, the impugned Petition was not maintainable before the Central Commission.

b) That Sasan had at the first instance objected to the maintainability of the impugned Petition filed by WRLDC. WRLDC who filed the Petition before the Central Commission is not a party to the PPA and is not affected in any manner by the declaration of the commissioning of the unit with a tested capacity of 101.38 MW.

c) That WRLDC has no role in the declaration of COD. WRLDC has attempted to justify its role on the basis of the following :

(i) after declaration, seller wanted to increase generation,

(ii) procurers requested that whatever was generated above 101.38 MW should be deposited with them. Further even Under Section 28(3)(a) of the Electricity Act, 2003, the responsibilities of RLDC (WRLDC in this case) are only in respect of optimum scheduling and despatch of electricity within its region.

(iii) that there was no clarity in the beginning with respect to quantum of power to be scheduled and the same has also been accepted in writing by WRLDC in its letter dated 09.04.2013 and rejoinder dated 23.12.2013 filed before the Central commission.

WRLDC did not give Sasan any directions to restrict declared capacity to 101.38 MW, it only directed Sasan on 31.03.2013 to get consent from all these procurers for declaration of COD as well as giving declared capacity up to 620

MW. Sasan complied with the instructions of RLDC and sought approval of procurers, though this is not required under the PPA.

d) That subsequently from 31.03.2013 to 14.04.2013 procurers not only accepted in writing COD of the unit but also requested scheduling of additional power of 101.38 MW. On 09.04.2013, WRLDC wrote to Sasan and MPPMCL (lead procurer) that infirm power above 101.38 MW cannot be scheduled as per Central Commission's Regulations. These were the first instructions of the WRLDC with regard to restrictions of declaration of 101.38 MW and the same was complied with and thereafter Sasan never submitted declaration capacity beyond 101.38 MW.

e) That WRLDC had directed Sasan to take procurers' consent for scheduling power beyond 101.38 MW, hence, there was no question with respect to unit commissioning at 101.38 MW. This was purely due to "no clarity' situation which prevailed at that point of time and was never intentional mis-declaration.

f) That the learned Central commission in its Impugned Order has held that there was no intentional misrepresentation and WRLDC has not challenged the said findings recorded in the Impugned Order.

g) Regarding the procurers requesting for power generated over and above 101.38 MW, this could not in any manner be a ground for challenging COD and that too by the WRLDC. WRLDC could have simply refused the request of the procurers seeking power generated over and above 101.38 MW but the same could not be held against the Sasan Power in any manner.

h) That PPA is a contract between the seller and the procurer which provides the requirements for COD of Sasan unit. The PPA contains waiver clause 18.3 dealing with waiver. A conjoint reading of Articles 6.3.1, 6.3.4 and 18.3 of the PPA establishes that the procurer can waive the requirement of the full load contracted capacity and can accept test certificate of IE with a de-rated or reduced tested capacity and such capacity would constitute commissioning of

the unit with the tested capacity. Written waivers were provided by all the 14 procurers.

i) That the contention of WRLDC that 95% capacity requirement could not be waived because it is a statutory requirement is incorrect and baseless. There is no statutory requirement of 95% capacity generation for declaration of COD of the unit. Fallacy of WRLDC's contention is highlighted from the prayer number three of the Impugned Petition filed by WRLDC before the Central Commission wherein WRLDC had prayed to issue specific guidelines with respect to declaration of COD of generators who are not governed by the Central Tariff Regulations 2009 to be in line with Central Regulations so that the same can be implemented in a dispute free manner and eliminate any possibility of gaming by the generator.

j) Prayer number three made in the Impugned Petition of the WRLDC clearly establishes that there were no specific guidelines with regard to declaration of COD of unit of projects such as Sasan UMPP, which were not governed by Central Tariff Regulations 2009. Even there is no such requirement in Indian Electricity Grid Code Regulations (IEGC Regulations) 2010.

k) That COD is a contractual issue, WRLDC the petitioner has no role to play and no statutory requirements were waived off by the procurers.

l) That WRLDC cannot act as a self appointed umpire on contractual basis without any statute or regulation to support it. This is not a case where any rules of the game has been changed or abrogated hence WRLDC's contention is erroneous and misconceived. The procurers and the seller had a contract and the contract provided that the terms thereof can be waived in writing and the procurers waived a term, nobody, least of all a third party, WRLDC, who is not a party to the contract, can claim that this amounts to changing rule of the game.

m) That as per Section 29(5) of the Electricity Act, 2003, RLDC can approach the Commission for any dispute related to quality of electricity or safe, secure and

integrated operation of the regional grid or in relation to direction given by RLDC.

n) That there was no evidence whatsoever that the scheduling of power from the unit at 101.38 MW (or even full load) had in any manner affected the safety or security of the grid and in fact, WRLDC had never raised a dispute with Sasan on the issue of safety or security of the grind and the same was not raised in the Impugned Petition of WRLDC.

o) That installed capacity of synchronous NEW Grid comprising of Northern, Western, Eastern and North Eastern regional grids was 1,67,408 MW. Therefore, power number of NEW Grid which is around 3-4% of the capacity was well above 3000 MW (Power Number essentially signifies the quantum of power that if suddenly injected or withdrawn results into a corresponding change in frequency of the grid by 1 Hz). Hence sudden withdrawal, if any, of Sasan unit would have dipped grid frequency by less than 0.03 Hz only, which is insignificant.

p) Thus tripping of 101.38 MW (only 0.06% of NEW Grid) would not have caused any impact and there is no case of grid safety and security being threatened.

q) That at no stage WRLDC had claimed that Sasan did not follow its directions. Essentially, WRLDC had no locus to file any petition or representation.

r) That as per statutory functions, role of a RLDC like WRLDC, it has no role to play in determining the COD, which is governed by the PPA and as such is a matter exclusively between the parties to the PPA.

s) That as per Section 28 of the Electricity Act, 2003, read with Regulation 2.3 of IEGC Regulations 2010, the functions of RLDC (which in the present case is the WRLDC) is limited to scheduling and dispatch of electricity, monitoring grid operations, maintaining accounts of quantity of electricity, supervision and control over inter-state transmission system and real time operations for grid control and dispatch.

t) That neither Section 28 nor 29 of the Electricity Act, 2003 or the IEGC Regulations 2010 even refer to commercial operations of a unit while laying down the scope of a RLDC's functions.

u) That WRLDC never raised any dispute with reference to the quality of electricity or safe, secure and integrated operations of the regional grid.

v) That WRLDC upon satisfying itself and obtaining the waiver from all the 14 procurers, scheduled power and power was supplied between 14.04.2013 and 17.04.2013.

w) That WRLDC also communicated to Western Regional Power Committee (WRPC) vide its letter dated 22.04.2013 to prepare REA, such activities are followed upon scheduling the commissioned unit to enable monthly billing.

x) That WRLDC has itself admitted in its submissions in Sasan Petitions, being No. 6/MP/2013, 14/MP/2013, 21/MP/2013 and 75/MP/2013, it has no role in the determination of COD which is the prerogative of the parties to the PPA.

y) That the contention of the WRLDC that Regulation 6.4.14 of the IEGC Regulations 2010 provides statutory responsibility of WRLDC to monitor commissioning of a generating station is erroneous. This Regulation provides as under:

> *"The regional entities shall enter into separate joint/bilateral agreement(s) to identify the beneficiary's Shares in ISGS (based on the allocations by the Govt. of India, where applicable), scheduled drawal pattern, tariffs, payment terms etc. **All such agreements shall be filed with the concerned RLDC(s) and RPC, Secretariat, for being considered in scheduling and regional energy accounting."***

z) That Regulation 6.4.14 of IEGS Regulations 2010 also makes it amply clear that role of WRLDC is limited to scheduling and REA.

aa) That the contention of the WRLDC regarding Office Memorandum (OM) dated 03.09.2009 of Ministry of Power (MoP) that Thermal Unit is to be considered as commissioned when the construction and commissioning of all plants and equipments required for operation of the unit at rated capacity are complete and the unit achieves full rated load on the designated fuel is misplaced and erroneous because the Office Memorandum issued by MoP is for the purpose of "capacity addition" and has nothing to do with declaration of COD. The Office Memorandum goes on to say that if the unit is unable to achieve name plate rating for any constraint, reason, the capacity acceptable as per stipulations in the contract shall be taken as deemed name plate rating. Hence, WRLDC is selectively interpreting the OM whereas the same OM recognizes the situation of declaring name plate capacity in case of any 'constraint', which in the instant case is grid constraint prevailed during the 72 hours testing period.

bb) That the PPA does not address the situation in case commissioning test could not be accomplished due to grid restriction and consequent treatment. Accordingly, both the parties, Sasan and the procurers, have acted as per the OM dated 03.09.2009 issued by MoP with subject as "Revised definition of commissioning of generation power projects", issued specifically for the purpose of deciding commissioning of the generation power projects.

cc) That Article 6.3.4. of the PPA also provides solution in the PPA as described in the OM of the MoP. Article 6.3.4 of the PPA envisages a situation if a unit is not able to achieve full rated capacity and provides treatment for the same.

dd) That in order to understand the rational of providing Article 6.3.4 in the PPA, a situation needs to be considered wherein due to any reason whatsoever, a unit cannot achieve its full rated capacity any time during its life time and complete performance test as per PPA. In such a situation it would not be prudent to allow an investment of thousands of millions rupees to go waste or it would be prudent to retrieve by accepting COD of such a unit at de-rated capacity. By accepting COD at de-rated capacity seller would get fixed charges only in proportion to de-rated capacity and would accordingly be penalized.

ee) That as per the PPA WRLDC's acceptance is not required for commissioning of the unit. Hence, the contention of WRLDC that Sasan UMPP did not even meet or satisfy the parameters for achieving connectivity is misplaced. The respondents have failed to point out which of the parameters, if any, were not satisfied. The appellant had applied for connectivity under CERC (Grant of Connectivity, Long-term Access and Medium term Open Access in inter-State Transmission and related matters) Regulations 2009 (hereinafter referred to as the '***Connectivity Regulations***') much before the commissioning of the test and PGCIL had signed connectivity agreement on 20.06.2012. Hence, WRLDC cannot at this stage be allowed to argue that the connectivity was wrongly granted. More so when the same very unit without any change has been declared under commercial operation w.e.f. 16.08.2013 in the Impugned Order.

ff) That unit commissioning and connectivity are separate issues. Without connectivity to the grid unit could not have even started generation leave alone thought of operating unit at full rated capacity.

gg) That it is pertinent that WRLDC not only accepted the testing schedule but gave "codes" for increasing generation during testing and also scheduled power from the appellant's unit. Further, WRLDC also wrote to WRPC on 22.04.2013 to prepare REA.

15) **Per contra**, on this issue No.(iii) and (iv), the contentions of the learned counsel for the respondent, WRLDC are as under:

a) That the COD was declared by the appellant without full load testing by achieving only 15% of the installed capacity, against the requirement of achieving, in fact, at least 95% under the PPA and such declaration of COD was based on the "Test Certificate" of the IE issued under Article 6.3.1 of the PPA, which besides being factually incorrect and against the express terms of the PPA, imputed grid restriction/WRLDC for such testing by the appellant.

b) That the declaration of the COD is in violation of terms of the PPA. Under the PPA between appellant and the procurers, the clauses pertaining to COD are set out in Article 6 read with Schedule 5. COD is defined in the PPA as 'means, in relation to a Unit, the date one day after the date when each of the procurers receives a final test certificate of the IE as per the provisions of Article 6.3.1 and in relation to the power station shall mean the date by which such final test certificate as per Article 6.3.1 are received by the procurers for all the units.

c) That under Article 6.1.2, a unit can be synchronized to the grid system when it means all connection conditions prescribed in the Grid Code and otherwise meets all other Indian legal requirements for synchronization to the grid system. Under Article 6.2.5, the IE is required to provide his findings from the evaluation of the Commissioning Test results, either in form of "Final Test Certificate" certifying the matters specified in Article 6.3.1 or the reasons for non-issuance of final test certificate. Thus, there are only two options available to the IE in terms of the PPA, either to issue a final test certificate or the reasons for non-issuance of final test certificate. There is no other option, such as to issue a 'test certificate' as issued by the IE in the present case on 30.03.2013. Under Article 6.2.5 of the PPA, the IE was required to monitor and witness the commissioning process and provide his findings from the evaluation of the test results.

d) That both the requirements i.e. of being in accordance with Schedule 5 and in fact achieving at least 95% were necessary for the issuance of a final test certificate and commissioning in terms of Article 6.3.1 of the PPA. Further, the IE was required to apply his mind to see that the testing was in accordance with parameters set out in Schedule 5 and the same was acceptable to him.

e) In the test certificate dated 30.03.2013, the IE has stated that since the unit was operating below 50% of the rated load due to grid restriction, the unit could not demonstrate the ramping rate above 50% in accordance with Schedule 4. It further states that as per the certificate provided by Original

Equipment Manufacturer (OEM) of boiler, turbine and generator, the minimum ramp rate can be achieved. Since the unit did not achieve the ramp rate requirement specified in the PPA and the grid code it could not have been certified to have achieved COD under Article 6.3.1 of the PPA.

f) That Article 6.3.2 provides the mechanism for retaking the relevant test in case a unit fails a commissioning test. Article 6.3.3 pertains to retaking the Performance Test (up to 8 times) during a period of 180 days in order to demonstrate an increased tested capacity over and above as provided in Article 6.3.1 (b) i.e. at least 95%. Thus, Article 6.3.3 relates to demonstration of higher capacity post COD between at least 95% of contracted capacity to 100% of the Contracted Capacity. It is provided in Article 6.3.4 that if the unit's tested capacity after the most recent Performance Test is less than its contracted capacity, the unit shall be de-rated with certain consequences therein including the seller shall not be permitted to declare the available capacity of the unit at a level greater than its tested capacity and that the consequences of de-rating shall apply for a period of one year.

g) That the plant had to achieve at least 95% of contracted capacity for COD and operation below 92% of contracted capacity was an event of default under the PPA. Thus, given that the PPA was terminable at below 92% demonstrates beyond question that there cannot be any COD below 92% or even a de-rated capacity below 92%. Any declaration of COD, such as in the present case, below 92% would itself be an event of default under the PPA and PPA was terminable since the first day, and therefore cannot be sustained in terms of the express provisions of the PPA.

h) That in the light of the provisions given in the PPA, the purported COD, at the tested capacity of 101.38 MW, was blatantly against the clauses of the PPA on COD and the Grid Code.

i) That the Central Commission in the Impugned Order had rightly held:

"In our view, the certificate of the Independent Engineer is not in conformity with Article 6.3.1 read with Schedule-5 of the PPA as only after the unit was tested for 95% of its contracted capacity, it could be certified for declaration of COD. Moreover, Para 1.1(iv) of Schedule-5 clearly provides that as a part of the performance test the unit shall be tested for compliance with parameters of supercritical technology. The certification by the Independent Engineer for COD without testing the capacity on the parameters of supercritical technology is not in keeping with the professional ethics expected of the Independent Engineer."

j) That the certificate of the IE is not in conformity with Article 6.3.1 read with Schedule 5 of the PPA as only after the unit was tested for 95% of its contracted capacity, it could be certified for declaration of COD. Moreover, Para 1.1(iv) of Schedule 5 clearly provides that as a part of the performance test the unit shall be tested for compliance with parameters of supercritical technology. The certification by IE for COD without testing the capacity on the parameters of supercritical technology is not in keeping with the professional ethics of the IE hence COD declaration on the basis of the IE certificate dated 30.03.2013 was not as per the provisions of PPA. In addition to that, even for declaring a de-rated capacity, the concurrence of all the procurers is essential. The generating company, SPL, and the procurers both stand to benefit from it, but such declaration of COD against the established norms and PPA provisions cannot legally be allowed, therefore, certificate issued by IE on 30.03.2013 declaring COD at a lower capacity of 101.38 MW is not in order and cannot be sustained.

k) That the PPA is a statutory contract as held by this Appellate Tribunal in Appeal No. 82 of 2011 in the case of Essar Power Limited Vs. UPERC when the Tribunal was dealing with the issue pursuant to the competitive bidding process under section 63 of the Electricity Act, 2003. The clauses of the PPA being part of the statutory regime under Electricity Act, 2003 require strict compliance and any failure to comply with the provisions of the PPA or the Electricity Act, 2003 has the effect of altering the terms of the PPA and may

attract directions from the appropriate Commission under section 129 or 142 of the Electricity Act, 2003.

l) That the said contention of the appellant that the party to the PPA i.e. generator and the procurers had waived the PPA requirement of achieving 95% of the contracted capacity hence, the test certificate dated 30.03.2013 and declaration of COD is proper is misconceived because the intent of the procurers as examined by Central Commission in the Impugned Order was that they stood to benefit from the declaration of COD from 31.03.2013 but such declaration being against established norms and the PPA provisions cannot be allowed.

m) That the Tariff Regulations 2009 define the commercial operation date or COD under Regulation 3(12), as the date declared by the generation company after demonstrating the maximum continuous rating or the installed capacity through a successful trial run. COD means : (a) in relation to a unit or block of the thermal generating station, the date declared by the generating company after demonstrating the Maximum Continuous Rating (MCR)or the Installed Capacity (IC) through a successful trial run after notice to the beneficiaries from 0000hour of which scheduling process as per the Indian Electricity Grid Code is fully implemented. That as per Section 4 of the CEA (Technical Standards for Connectivity to the Grid) Regulations, 2007, the aim of such regulations is to ensure safe operation, integrity and reliability of the grid, and to ensure that the new connection does not cause any adverse effect on the grid. Under CEA Regulations, the units and the generating station proposed to be connected to the grid are required to comply with certain requirements provided in Part I and part II of the Schedule.

n) That the grid restrictions cannot be an excuse for declaration of COD against the extant regulations and the provisions of the PPA. Grid unavailability and the resultant load restriction by the grid operator cannot be an excuse for declaration of COD without following the extant regulations and the statutory PPA.

o) That Regulation 8(7) of the CERC (Grant of Connectivity, Long term Access and Medium term Open Access in inter-State Transmission and related matters) Regulations, 2009 (herein after referred to as "***Connectivity Regulations 2009"***) provides that (i) infirm power can only be injected during testing including full load testing until COD for a period not exceeding 6 months from the date of first synchronization after obtaining prior permission of the concerned RLDC. (ii) While granting such permission the concerned RLDC shall keep grid security in view (iii) onus of proving that the injection of infirm power is for the purpose of testing and commissioning lies with the generating company who is obligated to provide sufficient testing, commissioning activity, its duration and intended injection to the RLDC. (iv) Infirm power so injected shall be treated as unscheduled power of the unit.

p) That onus of testing plan and avail the code for increase in generation lies on the generator. In the present case, the appellant did not approach WRLDC for increase in generation even at the first instance. Subsequently, even on specifically being asked by WRLDC to enhance the generation to a higher level, the appellant failed to achieve the load, even up to 200 MW. Further, the test certificates was issued by IE based on incorrect facts and documents placed on record by WRLDC.

q) That on 27.03.2013 while allowing infirm generation of 100 MW, WRLDC informed that due to Holi festival the demand of Western Region constituents was low, which was likely to prevail till morning hours of 28.03.2013 and asked the appellant to approach it whenever they propose to increase load. The appellant did not approach the WRLDC with a testing plan until late evening on 29.03.2013.

r) That as per para 2 of the test certificate issued by IE, the WRLDC did not permit the seller to operate the unit beyond 100 MW till the morning of 28.03.2013. However, the fact that the generator was not debarred from

requesting WRLDC for enhancement of subsequent generation to the morning of 28.03.2013 has been deliberately suppressed in the test certificate.

s) That on 29.03.2013 WRLDC permitted the generator to raise load to 200 MW which fact has been suppressed in the test certificate indicating that WRLDC had permitted injection of only 150 MW.

t) That test certificate also suppresses the fact that the plant was unable to achieve the level of even 200 MW which was clearly permitted by WRLDC.

u) That IE has also made contradictory statements in para 4 of the test certificate. It acknowledges the fact that at 7.13 am of 30.03.2013, WRLDC asked the seller to submit its revised power injection schedule for raising the load. However, in the last sentence of the certificate it is stated the load of around 150 MW was maintained for remaining 22 hours as per the WRLDC's instructions and grid conditions.

v) That the appellant responded to the message of WRLDC after several hours and even at that time the target period of 72 hours was not complete. The appellant did not raise the generation level during the target period. This fact has been ignored and overlooked by the IE as the test certificate has been issued citing the reason for restricting the load to a level of about 100 MW for 50 hours and about 150 MW for 22 hours attributable to WRLDC's instructions and grid conditions.

w) That in a large grid like NEW grid, unexpected constraints can occur at any point of time and it is because of this reason that Regulation 8(7) provides that RLDC shall keep grid security in view while granting permission for injection of infirm power for the purpose of testing. In case there are grid restrictions, in such a situation the generator will have to wait till the grid conditions are suitably available and the unit is ready to pick up the load.

x) That even after declaration of COD at 2234 hours of 30.03.2013, the appellant tried to increase the generation up to 300 MW first and further to 400 MW, but the unit could not pick up the load and tripped at 0143 hours on 31.03.2013. On 30.03.2013, the appellant intimated that they are planning to synchronize the unit at 1000 hours of 31.03.2013. It is clear that even though the appellant had declared DC for 31.03.2013 and informed that they are available for commercial operation w.e.f 0000 hours on 31.03.2013, they tried to increase generation (infirm) for testing, which is against Regulation 8(7) of the Connectivity Regulations, 2009.

16) Mr. G. Umapathy, learned counsel appearing for the respondent No.4 (lead procurer) has additionally contended as under :

a) That admittedly the appellant conducted the performance test of unit 3 from 27.03.2013 to 30.03.2013 and it could be conducted for maximum capacity of only 161.01 MW. However, the IE issued certificate indicating that unit 3 is certified to have achieved commercial operation with a tested capacity of 101.38 MW (ex-bus) for the stated reason of grid restriction, vide letter dated 30.03.2013. It has been the consistent stand of the respondent No.4 that COD can be taken only on the basis of provisions of the PPA. According to the IE certificate unit 3 of the appellant operated at a level of 101.38 MW for the duration of the performance test, which is only 17% of the minimum required level of 589.38 MW and therefore not in accordance with the provisions of the PPA. The respondent No.4 (lead procurer) through its e-mail dated 31.03.2013 intimated to WRLDC as under:

> ***"it is to inform that as per clause 6.3.1 (a) and (b) of the PPA, the Commissioning Test should have been carried out in accordance with Schedule 5 of the PPA and that the result of the test should not have been less than ninety five (95) percent of its Contracted Capacity. The test result is not as per the aforesaid clause and, therefore, is not acceptable to us. If the Seller is agreeable to consider the performance test under clause 6.3.4 for a de-rated capacity of 101.38 MW, the same could be agreed by us.***

Further, on account of the mentioned reason of insufficient demand in the grid, the Seller may retake the relevant Performance Test by giving advance notice in writing to the procurers, as per clause 6.3.3 of PPA."

b) That in the PPA, there is a provision (clause 6.3.4) that the plant can be operated and power can be availed even when the tested capacity is less than 95% of the contracted capacity. Especially, clause (b) of the said Article 6.3.4 makes specific provision of the tested capacity being less than 95% of the contracted capacity which reads as under:

"Clause 6.3.4(b): the Quoted Non Escalable Capacity Charge (in Rs./kwh) shall be reduced by the following, ***in the event Tested Capacity is less than ninety five (95%) per cent of its Contracted Capacity*** *as existing on the Effective Date:*

Rs.0.25/kwh x [1 – {(Tested Capacity of all Commissioned Units + Contracted Capacity of all Units not Commissioned at the Effective Date)/Contracted Capacity of all Units at the Effective Date}"

c) That in view of the tested capacity being 101.38 MW, the respondent No.4 would have got power at Rs.0.69 Per Unit, which is an extremely low rate. It is on this basis and the mentioned provision of Article 6.3.4 of the PPA that the performance test, as certified by the IE, while accepted for a capacity of 101.38 MW in the mail dated 31.03.2013 to the appellant and also in the letter dated 02.04.2013 of respondent No.4 which mentions as under:

"the Performance Test, as certified by the Independent Engineer for a capacity of 101.38 MW (ex-bus), is acceptable to us under Clause 6.3.4 of the PPA. You may kindly go for Performance Test under notice to us for increasing the capacity beyond certification by the Independent Engineer in accordance with Clause 6.3.3 of the PPA.

As provided in Article 6.3.4 of the PPA, in the period between this performance test and the next Performance Test, the unit's contracted capacity and available capacity would be considered as 101.38 MW (ex-bus) and

its availability factor shall be calculated by reference to 101.38 MW. The charges payable for power shall be as laid down in Article 6.3.4 of the PPA. In case the unit is in a position to produce beyond 101.38 MW, the additional quantity would be scheduled in favour of the Procurers under proviso to Article 11.1 of the PPA, until the next performance Test is conducted under Article 6.3.3."

d) That a cumulative reading of the letters dated 31.03.2013 and 02.04.3013 reveals that the test results were not in accordance with Schedule 5 of the PPA and therefore there was no COD as on 31.03.2013 by the lead procurer. The lead procurer in the said communications stated that lead procurer is agreeable to consider the test under Article 6.3.4 of the PPA for a de-rated capacity of 101.38 MW. The appellant in fact conducted two further tests for fulfilling the conditions stipulated in Schedule 5 of the PPA and all the procurers accepted the IE certificate for COD as on 16.08.2013 when the unit had complied with the mandatory requirements of the PPA.

17) **Our consideration and discussion on Issue Nos. (iii) (iv): relating to declaration of COD at 101.38 MW and test certificate issued by IE.**

a) The main question for our consideration is whether the declaration of COD at 101.38 MW has violated any provisions of the Act or Rule or Regulations made therein. We have cited above the chronological events, detailed facts and other circumstances of this matter and the rival contentions of the parties on these two issues. Now we proceed towards our consideration and conclusion directly without any repetition.

b) According to the learned counsel for the WRLDC, the declaration of COD at part load or de-rated capacity of 101.38 MW by the appellant, Sasan Power, has flouted the following provisions of mandatory regulations framed by the CERC and the CEA:

(i) Tariff Regulations 2009 of CERC define date of commercial operation as the date declared by the generating company after demonstrating the

maximum continuous rating or the installed capacity through a successful trial run.

(ii) Section 4 of the CEA (Technical Standards for Connectivity to the Grid) Regulations, 2007 provides that the units at the generating station proposed to be connected to the grid are required to comply with certain requirements provided in Part I and part II of the Schedule. Part II provides that coal based thermal generating units are required to be capable of generation up to 105% of maximum continuous loading for short duration to provide frequency response.

(iii) Under Regulation 5.2(h) of Grid Code, all Thermal Generating Units above 200 MW operating at or up to 100% of their maximum continuous rating are required to be capable of instantaneously picking up to 105% of their maximum continuous rating when the frequency falls suddenly. After the said increase in generation, the generating unit may ramp back to original level at a rate of about 1% per minute, in case continued operation at the increase level is not sustainable. Any generating unit not complying with the said requirement is required to be kept in operation only after obtaining permission of the RLDC.

c) To the said contentions, raised by WRLDC, the learned Senior Counsel appearing for the appellant vehemently opposes the said contentions and submitted that these issues were never raised before the Central Commission and are after thoughts.

d) **After considering these contentions, we find and observe that these issues have not been raised before the Central Commission and hence, not dealt with in the Impugned order and are being raised in this appeal at a appellate stage for the first time**.

e) Regarding the performance certificate given by the IE, the learned counsel for the WRLDC had referred to the above stated various provisions of the PPA to

emphasize that the certificate issued by the IE was in violation of the terms of the PPA.

f) The learned Senior Counsel, appearing for IE in the connected appeal has submitted that the IE has been appointed jointly by the appellant, Sasan and procurers to witness commissioning test, reviewing the test report and certifying the result in terms of the PPA. We see that the said certificate was issued certifying the commissioning of the unit at the tested capacity of 101.38 MW after discussing the findings with representatives of the lead procurers. This certificate was accepted by the appellant, Sasan, the procurers and WRLDC who was petitioner before the Central Commission. The procurers accepted the performance test under clause 6.3.4 of the PPA. Thus we find and note that there is no suppression or mis-representation of facts by the IE in issuing the said test certificate.

g) We examined the performance test certificate of the IE. The relevant portions of the certificate are reproduced below:

> *"5. The commissioning Test has been carried out in accordance with Schedule 5 of PPA and the results of the Performance Test are acceptable to IE. The result of the Performance Test show that the Units Tested Capacity is not less than 101.38 MW (ex-bus), ...*
> *6. Since the Unit was operating below 50% of the rated load due to grid restriction, the Unit could not demonstrate the Ramping Rate above 50% of the rated load in accordance with schedule 4 of the PPA. However, as per the certificate provided ...*
> *7. The unit could not be tested for the following parameters of Supercritical Technology at the steam turbine inlet as defined in PPA due to grid restriction ...*
> ***9. In view of the above, the Unit-3 is certified to have achieved Commercial Operation, with a tested capacity of 101.38 MW (ex bus), since:***
> ***(a) Commissioning Test was carried out in accordance with Article 6 and Schedule 5 of the PPA.***
> ***(b) Results of the test show that Unit-3 has met functional specifications stipulated in schedule 4 of the PPA."***

h) According to Article 6.3.1 of the PPA, a unit shall be commissioned on the day after date when all procurers receive a final certificate of the IE stating that :

(i) Commissioning tests have been carried out in accordance with Schedule 5 and are acceptable to him, and

(ii) The result of performance test show that the unit's tested capacity is not less than 95% of its contracted capacity as existing on the effective date.

i) Thus, both these requirements viz. testing in accordance with Schedule 5 and achieving not less than 95% of contracted capacity have to be met for the issuance of the final test certificate.

j) Schedule 5 of the PPA provides that the seller shall perform in respect of each unit a performance test which such unit shall be deemed to have passed if it operates continuously for 72 consecutive hours at or above 95% of its contracted capacity as existing on the effective date and within the electrical system limits and the functional specifications. As part of performance test, the seller has to demonstrate that the unit meets the functional specifications for ramping rate as mentioned in Schedule 4. Further, the unit shall be tested for compliance with parameters of supercritical technology. Schedule 4 provides that the unit shall be capable of increasing or decreasing their output by not less than 1% per minute. Such capacity has to be demonstrated during the unit load of more than 50%.

k) We find that the test certificate provided by IE in the present case to the appellant, Sasan and the procurers sets out in detail the events that transpired up to and during the test and at the end of the test giving reasons why the certificate cannot cover the entire extent of 95% of the contracted capacity. The IE certificate provides that the unit has been tested for the capacity of 101.38 MW (ex-bus) and there is nothing factually incorrect in the said conclusion. The IE has provided its findings in writing for the evacuation of the commissioning test results and has recorded its reasons as to why he cannot give the certificate certifying the tested capacity of not less than 95%. Thus the

IE has not violated any of the provisions of the PPA and has set out the factual position therein.

l) The main contention of the appellant is that not only the certificate of IE factual but in fact the WRLDC never raised objections to the certificate and in fact led the appellant to act upon the said certificate by requiring Sasan to obtain consent from the procurers to accept the test result and scheduling power to the extent of 101.38 MW (ex-bus).

m) That the contesting respondents on the one hand contend that the IE was bound to give a certificate certifying that commissioning test was carried out in accordance with Schedule 5 and result was acceptable to him and result of performance test showed that the unit's tested capacity was not less than 95% of its capacity. Any certificate otherwise, in terms of Article 6.3.1 of the PPA, would not be acceptable to WRLDC and WRLDC had not accepted such a certificate. Article 6 of the PPA provides for the manner in which commissioning test can be carried out and the parameters of such a test. From perusal of the aforesaid provisions, it is clear that said provision relates to the manner in which commercial operation of unit is stated to have been achieved. If the parameters set out therein are satisfied, it could be concluded by IE that the unit has achieved COD to the full extent. The IE is required, as per Article 6.2.5 of the PPA that on observation of the results the IE may give a final certificate or give his reasons for non-issuance of the final test certificate.

n) In the present case, the parameters contained in Article 6 the PPA are though not satisfied. However, the IE has given what according to him are the reasons for achieving a lower capacity and for him to certify the commercial operation with a tested capacity of 101.83 MW (ex-bus). The test certificate insofar as it is factual clearly discloses the state of affairs that emerged during the testing operations. It was entirely for the WRLDC and other respondents to act upon the said certificate or to refuse to do so.

o) The IE certificate does not certify that the commissioning test shows that the unit's tested capacity is not less than 95% of its contracted capacity

as existing on the effective date. On the contrary, it shows that the unit's tested capacity is certified to the extent of 101.38 MW. Hence, it cannot be held that the IE certificate is illegal or invalid as it is a mere factual narration as to what has happened during the commissioning test.

p) The learned Central Commission in its Impugned Order, particularly in paragraph 32 thereof, observes that COD declaration on the basis of the certificate of IE issued on 30.03.2013 was not as per the provisions of PPA, even for declaring a de-rated capacity, the concurrence of all the procurers was essential. Admittedly, the generating company (appellant herein) and the procurers both stood to benefit from it but declaration of COD at a de-rated capacity or lower capacity of 101.38 MW being against the established norms and PPA provisions cannot be allowed because it makes mockery of the established system and therefore, the certificate issued by IE on 31.03.2013 declaring COD at a lower capacity of 101.38 MW is not in order and cannot be sustained.

q) The learned Central Commission in paragraph 33 & 34 of the Impugned Order deals with mis-declaration by the appellant namely, Sasan Power. In paragraph 33 it has been observed that WRLDC has accepted COD of the unit for a de-rated capacity namely 101.38 MW based on the IE's certificate. In the opinion of the Central Commission, since WRLDC is required to schedule the power in accordance with the PPA, WRLDC is expected to have satisfied itself about the COD of the generating station as per the provisions of the PPA. The lead procurer, respondent No.4 herein, also expressed its agreement to schedule 101.38 MW as Declarable Capacity (DC) knowing fully well that the unit of the appellant has not been declared under the commercial operation in accordance with the PPA. The appellant had given declaration for 600 MW consecutively for 4 days and the appellant, after being pointed out by WRLDC, decreased the schedule to the declared capacity. The appellant has subsequently given the correct schedule because earlier on account of lack of clarity the appellant had given declaration of 600 MW.

Discussing all these facts and the terms of the PPA, the Central Commission in paragraph 34 of the Impugned Order has concluded as under:

> *"34. SPL had given the declaration for 600 MW consecutively for 4 days. However, after being pointed out by WRLDC, it decreased the schedule to the declared capacity. It was admitted by the learned senior counsel for SPL that on account of lack of clarity, SPL had given declaration of 600 MW. However, it has subsequently given the correct schedule and hence, there is no intention of mis-declaration of capacity. Considering the submission of the learned senior counsel for SPL, we presume that there is no intentional mis-declaration of capacity by SPL."*

r) Thus the above quoted paragraph of the Impugned Order clearly concludes that since the appellant, though in the beginning on account of lack of clarity had given declaration of 600 MW, but subsequently had given correct schedule and therefore there was no intention of mis-declaration of capacity by the appellant. The Central Commission further presumed in the Impugned Order that there is no intentional mis-declaration of capacity by Sasan Power.

s) We cannot lose sight of the fact here that the IE who issued the certificate namely Lahmeyer International (I) Pvt. Ltd. has challenged the Impugned Order seeking expunction/removal of the adverse remarks made by the Central Commission against the IE by challenging the Impugned Order through a separate appeal, being Appeal No. 266 of 2014. Mr. Sanjay Sen, learned Senior Advocate, appearing for the IE in Appeal No. 266 of 2014, has submitted that the IE was appointed for ultra Mega Power Project at Sasan and in terms of the PPA, the IE was required to witness the Commissioning test, review the test report submitted by the seller (Sasan) and certify the results after commissioning test to the parties. Accordingly, the IE, in the presence of a representative of the lead procurer witnessed the performance test of

the unit of Sasan Power from 27.03.2013 to 30.03.2013 and pursuant to such performance test and review of the results provided in the performance test report, submitted a test certificate dated 30.03.2013. The results of the performance test show that the unit tested capacity is not less than 101.38 MW (ex-bus) the maximum permitted load by WRLDC for injection into the grid. This report mentions that the unit was operating below 50% of the load due to grid restrictions. The unit could not demonstrate the ramping rate above 50% of the rated load in accordance with schedule 4 of the PPA and unit could not be tested for parameters of supercritical technology at the steam turbine inlet, that is defined in PPA, due to grid restrictions. The report further testifies that the unit was found to operate with the following parameters at the steam turbine in let during 1 hour operation from 1200 hours to 1300 hours on 29.03.2013. It further states that all the equipments and systems have been commissioned and are operational with two coal mills which were taken into service and the balance mills could not be taken into service due to restrictions imposed by the grid. The furnace was found to operate stably even at lower load of 101.38 MW (ex-bus) and the parameters of the turbine shaft vibrations generator slot temperature and generator core temperature were found to be well within the equipment recommended by OEM. The certificate further says that unit-3 is certified to have achieved commercial operation with a tested capacity of 101.38 MW (ex-bus) since (a) commissioning test was carried out in accordance with Article 6 and Schedule 5 of the PPA (b) the results of the performance test show that unit 3 has met functional specifications stipulated in schedule 4 of the PPA. This test certificate was issued by IE after discussing all the findings and observations of the performance test with the representatives of the lead procurers. Accordingly, the lead procurer, respondent No.4 herein, vide its letter dated 31.03.2013 confirmed its acceptance of the test certificate dated 30.03.2013 to WRLDC under clause 6.3.4 of the PPA for a de-rated capacity of 101.38 MW. The lead procurer by another letter dated 02.04.2013 confirmed the acceptance of the test certificate dated

30.03.2013 and further confirmed that in the period between this performance test and next performance test, the unit's contracted capacity and available capacity would be considered as 101.38 MW. Similar letters confirming acceptance of test certificate were also issued by the other respondents also.

t) We may mention here that one important fact, which happened in the present matter, was that after the filing of the Impugned Petition before the Central Commission by the WRLDC, *inter alia,* praying to look into the veracity of the certificate issued by IE in view of deliberate suppression and mis-representation of the facts, the learned Central Commission without affording any opportunity of hearing to the respondents, by an order dated 20.06.2013 summarily disposed of the Petition holding that the certificate given by IE for declaration of COD for 101.38 MW cannot be sustained. When the appeal was filed before this Appellate Tribunal, being Appeal No. 149 of 2015, by the generator against order dated 20.06.2013 of the Central Commission, this Appellate Tribunal remanded the matter to the Central Commission for passing order after hearing and giving opportunity to the parties. It was after the remand that the Central Commission after hearing the parties at length has passed the Impugned Order dated 08.08.2014, again reiterating its earlier stand noting that the certificate issued by IE is not in conformity with Article 6.3.1 read with schedule 5 of the PPA. The Central Commission in the Impugned Order has given adverse remarks to the IE observing that the certification by the IE is not in keeping with professional ethics expected of the IE. The IE, in the appeal No.266 of 2014 filed on behalf of Lahmeyer International (India) Pvt. Ltd. which is a company engaged in the business of providing engineering services to the Indian and International power and infrastructure sectors, who is recognized as a reputed independent consulting firm by various national and international institutions, has sought deletion or expunction of following adverse remarks made by the Central Commission in the Impugned Order:

"29. In our view, …We take strong exception to this action of the Independent Engineer and are constrained to make known our deep disappointment in the Independent Engineer in this regard"

u) It has been argued by Mr. Sanjay Sen, learned Sr. Advocate appearing for the IE in Appeal No. 266 of 2014 that the certificate issued by IE on 30.03.2013 contains a correct and precise statement of the observations recorded during the performance test. Nothing was concealed or suppressed by him. The adverse remarks recorded in the Impugned Order against the IE are arbitrary and unjust. As the unit, as any other supercritical unit, starts with supercritical parameters and as the load is increased the steam parameters are increased and above the sufficient load only the unit achieves supercritical parameters. In the present case, the unit was operated far below the load and beyond which it cannot achieve supercritical parameters on account of grid restrictions, the unit has to run on supercritical parameters. The IE in its performance test certificate dated 30.03.2013 clearly stated that the unit could not be tested for the parameters of supercritical technology. Thus there was no suppression or misrepresentation of any facts by the IE with regard to the testing of supercritical parameters. The other submission of Mr. Sanjay Sen is that the Central Commission actually acceded its jurisdiction and proceeded to pass adverse remarks or observations against the IE quoting its professional ethics without appreciating the facts and submissions and the documents on record.

v) In view of the above discussions and analysis of the material on record there is merit in the contentions of the appellant on both these issues. All the contentions raised by the respondents are not acceptable being devoid of merits. We clearly observe and find that the declaration of COD at a de-rated capacity or lower capacity at 101.38 MW (ex-bus) has not violated any provisions of the Act or Rules or Regulations made there

under. The findings recorded by the Central Commission in the Impugned Order, in paragraph 33 & 34, have not been challenged by filing any cross appeal or cross objections hence, the finding of the Central Commission in paragraph 33 & 34 of the Impugned Order holding that there is no intentional or mis-declaration of capacity by Sasan Power Ltd. assumes great significance as it has attained finality. We further observe that the IE has given the performance test certificate dated 30.03.2013 as per the relevant provision of the PPA where such test certificate can be issued for de-rated capacity under certain circumstances. Thus in the facts and circumstances of the present matter, we do not find any violation of the provisions of the Act or Rules or Regulations on declaration of COD, at de-rated capacity of 101.38 MW (ex-bus) and further the IE is fully and legally justified to issue the performance test certificate dated 30.03.2013 which records certain happenings during the testing of the said unit. Consequently, both these issues (iii) & (iv) are decided in favour of the appellant.

18) **Our consideration on Issue No.(v):** Relating to waiver. On this issue, following contentions are made on behalf of the appellant:

a) That based on the instructions of the WRLDC, Sasan sought approval of all the procurers. The lead procurer (MPPMCL) issued letter dated 02.04.2013 accepting COD, imposing penalty on Sasan requesting scheduling of additional power beyond 101.38 MW. This letter indicates that the lead procurer had accepted the said certificate for a capacity of 101.38 MW (ex-bus) under clause 6.3.4 of the PPA, clearly a green signal to go for performance test under notice for increasing the capacity beyond certification by the IE in accordance with clause 6.3.3 of the PPA.

b) That a conjoint reading of lead procurer's letter dated 02.04.3013 along with Article 6.3.4 of the PPA would establish that the lead procurer had waived the requirement of performance test at 95% of the contracted capacity and has accepted a tested capacity of 101.38 MW for the

purpose of COD. Else there was no question of payment of capacity charges even at the reduced rates proportional to de-rated capacity and calculating availability factor for the purpose of incentive/disincentives. Similar letters were provided by all the procurers who are respondents in this instant appeal.

c) That it was held by the Hon'ble Supreme Court in ***Jagad Bandhu Chatterjee Vs. Nilima Rani*** reported at (1969) 3 SCC 445 that *in India a general principle with regard to waiver of contractual obligation is to be found in Section 63 of Indian Contract Act. Under which section it has option to a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it any satisfaction which he thinks fit. Under the Indian law neither consideration nor an agreement would be necessary to constitute waiver.*

d) That the Hon'ble Supreme Court in ***Bank of India vs. O. P. Swarankar*** reported at (2003) 2 SCC 721 observed as under:

"115. The Scheme is contractual in nature. The contractual right derived by the employees concerned, therefore, could be waived. The employees concerned having accepted a part of the benefit could not be permitted to approbate and reprobate nor can they be permitted to resile from their earlier stand."

e) In *Sri Siddeshwara Cooperative Bank Limited Vs. Ikbal reported at (2013) 10 SCC 83,* the Hon'ble Supreme Court held as under:

"19. There is no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower. Similarly, Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor (or in any case for the benefit of the borrower). It is settled position in law that even if a

provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made…"

f) That there were no specific guidelines with respect to declaration of COD for section 63 of the Electricity Act, 2003 projects and the parties which are entitled to declare and accept COD by the contract. Moreover, no regulations have been presented by respondents to show that COD of the unit can be declared only after achieving 95% load with regard to Section 63 projects such as Sasan UMPP.

g) That the stipulation in Article 6.3.1 of the PPA regarding tested capacity not less than 95% of the contracted capacity is entirely contractual and there existed no prohibition in law on the parties to waive the strict performance of such requirement. Further there is no detriment to the public interest by the waiver.

h) That the PPA does not explicitly deal with regard to the grid restrictions which prevailed during 72 hours commissioning test leading to the generating unit under commissioning test not meeting PPA criteria of 95% of the contracted capacity. Under these circumstances in order to commence receiving supply of ultra competitively priced power from Sasan UMPP, all the 14 procurers to the PPA waived contractual requirement contained in Article 6.3.1 of the PPA and consented in writing to the commissioning of the unit at a de-rated capacity of 101.38 MW.

i) That Article 6.3.4 of the PPA provides that a unit's contracted capacity can be reduced to its tested capacity which is termed as 'de-rated capacity' in which event a penalty for the difference between the contracted capacity and the reduced tested capacity is also imposed on the seller. Sub clause (b) of Article 6.3.4 of the PPA specifically contemplates the event where the tested capacity is less than 95% of the contracted capacity.

j) That further Article 18.3 of the PPA allows parties to the PPA to waive off the requirements of the PPA. The consents and acceptance by the procurers constitute valid and binding waiver of the requirements of Article 6.3.1 of the PPA.

k) That a conjoint reading of Article 6.3.1, 6.3.4 and 18.3 of the PPA establishes that the procurers can waive the requirement of the full load contracted capacity and can accept test certificate of the IE with the reduced tested capacity and such acceptance would constitute valid commissioning of the unit with the tested capacity. The provision of the COD of a unit in any event is for the benefit of the procurers by virtue of their contract (PPA) with the seller and the same can be waived pursuant to the said provisions of Article 18.3.

l) That the procurers in clear knowledge and understanding of the consequences, stipulated the tariff applicable for infirm power under proviso to Article 11.1 of the PPA only for additional energy produced by the unit beyond 101.38 MW, the tested capacity of the unit which clearly establishes that generation of power up to 101.38 MW was accepted as firm power which is possible only after commissioning of the unit at 101.38 MW.

m) That if procurers do not intend to accept commissioning test of Sasan's unit between 27.03.2013 to 30.03.2013, they could have simply refused to accept the same stating that the provisions of the PPA as per Article 6.3.1 have not been met. However, procurers thoroughly understanding the provisions of the PPA chose to accept unit's commissioning under Article 6.3.4 and penalizing Sasan for lower tested capacity (though for no fault of Sasan) and further directed Sasan to undertake further test as per Article 6.3.3 of the PPA to increase capacity beyond tested capacity.

n) That the procurers further requested Sasan Power and WRLDC that in case the unit is in a position to produce beyond 101.38 MW, the

additional quantity would be scheduled in favour of the procurers under proviso to Article 11.1 of the PPA. Had the procurers not been in acceptance with commissioning the unit at 101.38 MW, they could have simply directed Sasan to undertake fresh performance test instead of issuing the referred letters. Preceding developments establish in no uncertain terms that all the procurers waived Article 6.3.1 of the PPA and accordingly the unit was accepted to be commissioned at the tested capacity of 101.38 MW as on 31.03.2013.

o) The Hon'ble Supreme Court in the case of ***Commissioner of Income Tax Vs. Virgo Steels*** (2002) 4 SCC 316 held that "*even though a provision of law is mandatory in its operation if such provision is one which deals with a individual rights of person concerned and is for his benefit, the said person can always waive such a right*".

p) That in case it is assumed that requirements of the schedule 5 of the PPA are mandatory, the provision of Article 6.3.4 of the PPA would become otiose. The Hon'ble Supreme Court in ***Aphali Pharmaceuticals Vs. State of Maharashtra*** 1989 (4) SCC 378 held that "*in case of conflict between the body of the act and the schedule, the former must prevail.*" Accordingly, if requirement of schedule 5 are mandatory, there would be conflict between schedule and enactment in such a case the main enactment Article 6.3.4 of the PPA would prevail.

q) That the procurers have erroneously raised a contention that the consent letters did not constitute a waiver because the word "waiver" has not been used. This contention is legally unsustainable. It is trite law that waiver is not restricted to waiver by words and can also be by conduct. Therefore, there is no question of there being a requirement of the use of the word 'waiver'. In ***Ramdev Food Products (P) Ltd. vs. Arvindbhai Rambhai Patel*** *(2006) 8 SCC 726* the word 'waiver' has been discussed at length. In ***Indu Shekhar Singh Vs. State of UP*** (2006) 8 SCC 129 it was observed that "*They, therefore, exercised their right of option. Once they obtained entry on the basis of election, they*

cannot be allowed to turn round and contend that the conditions are illegal…"

r) Waiver may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel. (See Halsbury's Laws of England)

s) As per Halsbury's Laws of England, the term 'waiver' has been described as "*waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted and is either express or implied from conduct. A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision do not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration*". Further Halsbury's Law of England 4th Edition Volume 16 paragraph 1471 reads "*…then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration.*"

t) That the contention of Haryana Procurer that the consent given by Haryana (all the procurers constitute 11.25% of the total power allocation) was 'without prejudice' has no bearing.

u) The Hon'ble Supreme Court in ***NTPCL Vs. Reshmi Constructions*** (2004) 2 SCC 663 held that '*even correspondence marked "without prejudice" may have to be interpreted differently in different situations.*

Parties are not entitled to approbate or reprobate under the guise of 'without prejudice'.

v) That the WRLDC itself accepted and acted upon the commissioning of the unit and WRLDC on 31.03.2013 wrote to Sasan accepting COD of unit at tested capacity of 101.38 MW. WRLDC directed Sasan to obtain consent of procurers for scheduling power beyond 101.38 MW as the IE had certified the tested capacity of unit as 101.38 MW. Further WRLDC wrote to Sasan directing it to obtain consent of procurers for scheduling of 620.4 MW as the IE had certified the tested capacity of unit as 101.38 MW. Thus WRLDC accepted the COD of unit at the tested capacity of 101.38 MW and it only asked the consent of all the procurers to schedule power beyond 101.38 MW. WRLDC also scheduled power between 14.04.2013 and 17.04.2013 from first unit of Sasan which was also published by WRLDC in its website. During that period and by scheduling power, WRLDC had accepted the declaration of commissioning of unit, as scheduling of power can only be done after commissioning of the unit has been achieved.

w) That WRLDC vide its letter dated 22.04.2013 to WRPC asked WRPC to prepare Regional Energy Accounting (REA) which substantiate that WRLDC accepted unit commissioning as REA is prepared only after commissioning of the unit.

x) That WRLDC charged system operation charge as per Commission's Regulations 2009 from March 2013 onwards. Bills raised by WRLDC for the relevant period have been annexed with the appeal. Operation charges can only be levied when unit is operational and power is scheduled by WRLDC. Hence, now WRLDC is estopped from challenging the Commissioning of the unit.

y) That the learned Central Commission failed to take into account Article 18.3 of the PPA and its observations that 'any amendment to the PPA can be carried out with the mutual agreement of the parties and after

approval of the Commission" is erroneous since no amendment of the PPA was intended nor had taken place. Waiver is not an amendment in law. It is precisely for this reason Article 18.1 of the PPA, which relates to amendment expressly requires approval of the Commission for amendment to PPA, whereas Article 18.3 of the PPA relating to waiver does not envisage approval of the respondent Commission thus waiver and amendment are distinct and separate from each other. The expression waiver was provided by the procurers at the relevant time.

19) **Per contra**, the following are the contentions raised on the point of waiver by the various respondents.

a) That as per the settled law there cannot be a waiver of a statutory requirement. Agreements which seek to waive an illegality are void on grounds of public policy, unless the waiver is of a right made for the special benefit of the individual, provided the same is not in public interest so as to be in mischief of public policy, as observed in ***Waman Shriniwas Kini Vs Ratilal Bhagwandas & Co.,*** AIR 1959 SC 689 and ***Krishan Lal Vs. State of J&K*** (1994) 4 SCC 422.

b) That in the present case, the declaration of COD at 101.38 MW is against the extant regulations and the statutory contract (PPA).

c) That by any technical standards a power plant which seeks to operate at 15% of the installed capacity for an extended period of time, or for that matter provides its varying declared schedule from 101.38 MW to 620.4 MW from time to time, would cause serious operational concerns for grid security. Sasan, being an UMPP, with an aggregate capacity of 3960 MW must comply with the provisions of the PPA and technical standards laid down by the CEA and the CERC regarding COD, which is also necessary for safe and secure operation of the grid, in public interest, and such regulatory requirements cannot be waived by the procurers as the same would be against public policy.

d) That the appellant contends that through WRLDC's letters dated 05.04.2013, 09.04.2013 and 15.04.2013, the respondent No.2/WRLDC had accepted commissioning and declaration of COD by the appellant/Sasan Power. In this regard the respondents' contention is that the WRLDC had only expressed its concern regarding declared capacity of 620 MW against the tested capacity of 101.38 MW and WRLDC requested Sasan to get consent from the lead procurers, which cannot be, in any manner, construed as an acceptance on part of WRLDC to declaration of COD. The WRLDC in its letter dated 05.04.2013 stated that even though the generator is certified for COD of 101.38 MW by the IE and consented by lead procurers, the declarable capacity above this i.e. 220 MW to 620 MW implies that generator is trying to schedule above the tested and certified level. By this letter WRLDC asked Sasan to take up the matter with lead procurers to consent for scheduling up to full load DC (620 MW).

e) That the WRLDC in its letter dated 09.04.2013 again reiterated that there is lack and clarity of opinion and mutual consent on the issue of COD. Accordingly, WRLDC asked the appellant not to submit declared capacity to them and submit only the mutually agreed schedule with each of the procurers in order to ensure dispute free scheduling and operation. Further WRLDC in letter dated 15.04.2013 wrote to Member (Thermal) CEA to apprise him that the insistence of the appellant/Sasan that generation of above 101.38 MW be considered as infirm generation for retaking performance test simultaneously was against the CERC Regulations. Under the CERC Regulations it is not possible to allow the same unit to operate under scheduled firm generation as well as infirm generation for testing any unscheduled generation. Accordingly, WRLDC did not accept the commissioning and declaration of COD in any of the said letters.

(f) That the lead procurer is only authorised to act to procedural matters on behalf of the procurers and cannot amend or alter the substantive rates of the other procurers. PPA has a specific clause namely, 18.3 dealing with 'waiver'.

(g) That the communication of respondent Nos. 13 to 16 referred to by the appellant do not constitute a waiver for the reason that Article 18.3 of the PPA dealing with waiver states, that *'a valid waiver by a party shall be in writing and executed by an authorised representative of that party. Neither the failure by any party to insist on the performance of the terms, conditions and provisions of this Agreement nor time or other indulgence granted by any party to the other parties shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right under this Agreement, which shall remain in full force and effect*".

(h) That it is well settled that to constitute a waiver, there has to be a voluntary and intentional relinquishment or abandonment of a right or claim i.e. where the person is fully informed of his rights and with full knowledge of such right, he intentionally abandons them. That in case of any mis-representation or mistake of underlying facts, there cannot be any waiver as held in ***Motilal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh & Ors.*** AIR 1979 SC 621 and in ***P Dasa Muni Reddy Vs. P Appa Rao*** AIR 1974 SC 2089.

(i) That IE ought not to have certified the COD because IE was appointed to ensure that it acts independently, verifies the performance test in accordance with law and the PPA and issues appropriate certificates. The IE has unilaterally proceeded to favour the appellant to the detriment of the procurers.

(j) That in any event, in the communication dated 12.04.2013, the Haryana Utilities had specifically stated that the acceptance is 'without prejudice' to the rights available to the procurers in the PPA. The Haryana Utilities referred to the IE's certificate to establish that the communication was based on what the IE had stated. If the IE had wrongly proceeded and on that basis the Haryana Utilities had given the consent letter, the same cannot constitute a waiver. Hence, the communication sent by the procurers cannot be treated as waiver particularly within the meaning of Article 18.3 of the PPA.

(k) That the other procurer namely, Rajasthan utilities vide communication dated 10.04.2013, BSES distribution companies and communication sent by respondent Nos. 13 to 16 were for getting electricity generated at the power plant as per the stipulation contained in Article 4.3 and 4.4 of the PPA. The entire electricity generated at the power plant is for the procurers and if the procurer do not take the power, the appellant can seek the right to sell the power to third party. In the circumstances, the procurer had proceeded to accept the power generated by adopting scheduling and dispatch procedure provided in law which cannot constitute a waiver with regard to the requirement for declaring COD of the unit.

(l) That the subsequent conduct of the procurer establishes that the procurer had not waived the requirement of the performance test to be conducted as per the provisions of the PPA establishing 95% of the contracted capacity for 72 hours of sustained operation. The electricity generated and supplied by the appellant from 01.04.2013 onwards, the appellant had been paid by procurers, particularly respondent Nos. 13 to 16 only at the tariff applicable to the first year and not at the tariff applicable to the second year. Had the procurers accepted the COD as on 31.03.2013 for the generating unit to be in accordance with PPA, the consequences would be that for the electricity generated from 01.04.2013

onwards, the tariff would be higher i.e. the second year tariff and not the first year tariff.

(m) That the appellant is seeking to take undue advantage by claiming the COD on 31.03.2013 and further seeking to exhaust low tariff by treating one day i.e. 31.03.2013 as the first year for such low tariff. If the COD is on or after 01.04.2013, the entire period up to 31.03.2014 would be the first year with the low tariff.

(n) That the relevant generating units of the appellant did not function at any time before August 2013 and the plant load factor anywhere near 95% of the contracted capacity. The appellant purported to declare the availability of 620.4 MW on 31.03.2013 and during the period 07.04.2013 to 11.04.2013 to unlawfully claim the capacity charges.

20) **Our consideration and discussion on the issue of Waiver**: We have discussed above the rival contentions of the parties along with law laid down on the relevant aspects, hence we do not feel any need to repeat here the same. We directly proceed to the issue of waiver for our consideration.

a) In the present case Article 6.3.1, read with 6.2.5 of the PPA are the provisions for the benefit of the procurers to assure the procurers that the unit has achieved COD and if they schedule power in accordance with the said COD, they would be supplied the power that has been agreed to be supplied to them under the PPA. Article 18.3 of the PPA specifically provides for the parties to be able to waive specifically in writing through an authorised representative the rights/provisions of the PPA. It is for the procurer to decide to act upon the certificate issued by the IE which certifies a lesser quantity as a procurer would be waiving the provision or the right which is for their benefit. PPA is neither a statutory provision nor is there any mandatory statutory provision in the Act or Rules relating to the manner in which COD of a project set up as a

result of process of competitive bidding under Section 63 of the Electricity Act 2003 can be certified.

b) In the present case the material on record shows that the parties had agreed to the first year being a very short period and in fact had agreed to 31.03.2013 being the date of commissioning of the unit. After the performance test was carried out, the IE certificate dated 30.03.2013 was handed over to WRLDC and the WRLDC, at the outset did not reject the IE certificate but directed Sasan to obtain consent/concurrence/ acceptance from the procurers to the effect of the said IE certificate and scheduling of power on the basis that the said unit has achieved tested capacity of 101.38 MW and the same was acceptable or agreeable to the procurers. If for a while it is assumed that there are statutory provisions in the form of regulations providing for the manner in which COD can be certified by IE, even such provisions can be waived by a party for whose benefit the said provisions have been made. In the present case, the procurers for whose benefit the said provisions in the PPA under Article 6 have been made, clearly have categorically and unequivocally waived their right to obtain the IE Certificate in accordance with Article 6.3.1 and to compel COD to be achieved in accordance therewith. Since the procurers have waived such a right and consequently they, now, cannot be allowed to contend that COD and IE certificate are not in accordance with the PPA.

c) We have considered the said contentions of the respondents that the provisions contained in Article 6, read with schedule 5 of the PPA are mandatory and cannot be waived and have in fact not been waived. According to the respondents, PPA is a statutory contract and the same has been entered into by a bidding process under section 63 of the Electricity Act 2003 and is a part of the statutory regime and any failure to comply with the provisions of PPA or Electricity Act 2003 has the effect of altering the terms of the PPA. There cannot be a waiver of statutory requirements. Additional contention of the respondents is that in view of

the extant regulations COD at the tested capacity of 101.38 MW could not have been declared and further an IE certificate makes mockery of the established system and the effect being on the public at large, the claim of waiver cannot be sustained.

d) After considering the main contention of the respondents, we find that after the IE certificate was given on 30.03.2013, the appellant declared the availability of the said unit and at that stage it was open to WRLDC and procurers not to accept the IE certificate and to straight away refuse to schedule/accept power on the basis that commissioning test was not in accordance with PPA provisions (as now being sought to be claimed by WRLDC) and regulations to be applicable to such commissioning test. Scheduling of a unit can happen only after COD is accepted. It is an admitted position that scheduling of power was in fact done post IE certificate and for which scheduling WRLDC specifically required the consent of the procurers which consents were duly given by the procurers. WRLDC reject the certificate and the said commissioning itself outright but showed its willingness to schedule power on the basis of IE certificate to the extent of 101.38 MW (ex-bus) if procurer gave their consent/approval/concurrence or acceptance to the IE certificate and the commissioning test and scheduling of power. Acting on the said directive of the WRLDC, the appellant approached all the procurers at the relevant time who gave their consent/approval to scheduling of power on the basis that the unit had achieved the COD on the tested capacity of 101.38 MW. On the strength of the directions and actions of the WRLDC and the various consent letters of the procurers, the appellant declared the capacity of 101.38 MW w.e.f 14.04.2013 as there was admittedly lack of clarity prior thereto on the part of all including WRLDC as to what was the capacity that should be declared by the appellant. WRLDC apprised CEA in detail of the said situation by letter dated 15.04.2013, thus there is absolutely no doubt about the actions of all the concerned namely, appellant, WRLDC and the procurers. The appellant and the lead procurers were given the certificate by IE

certifying the capacity of 101.38 MW (ex-bus) and being aware of the provisions of the PPA, they did not reject the certificate outright but expressed their unequivocal willingness to act upon the certificate if the procurers, who were parties to the PPA entered into between the procurers and Sasan, agreed to such a course of action. The procurers being aware of being party to the PPA and after understanding the implications of the PPA and the IE certificate they clearly and unequivocally agreed to scheduling of power and thereafter the appellant scheduled the power and the procurers accepted the same.

e) We have carefully gone through the ratio of the law laid down by Hon'ble Supreme Court in ***Waman Shriniwas*** and in ***Krishan Lal***'s case, wherein in the latter case the Hon'ble Supreme Court cited an illustration in paragraph 21 thereof. The words of the Hon'ble Supreme Court are *"to illustrate this principle, it has been stated that if the statutory condition be imposed simply for the security or the benefit of the parties to the action themselves, such condition will not be considered as indispensable and either party may waive it."* In the present case, the requirement of achieving 95% of the contracted capacity for declaration of COD was not one for the private benefit of the seller and procurers. The said requirement and the appointment of an independent expert to oversee the commissioning process was built into the statutory contract i.e. PPA itself for a specific purpose, as a requirement of general policy, to ensure that generators do not declare their units to be commercially available without even demonstrating the capability of such units to achieve at least 95% of the contracted capacity.

f) After giving our thoughtful considerations to the rival contentions and the provisions of the Electricity Act 2003 and on our query during arguments before us as to under what circumstances the procurers had given their consent and acceptance of the COD of the Unit with a de-rated capacity of 101.38 MW, the respondents did not give any

satisfactory answer except stating that if the procurers had not chosen to take power from the unit of the appellant, the appellant could seek sale of power to third party. On our query to WRLDC, as to whether there was an issue of quality of electricity or safe, secured and integrated operation of the grid if the supply was started on the basis of the tested capacity of 101.38 MW, the learned counsel for WRLDC clearly answered in the negative. If the WRLDC was in any doubt, regarding the IE certificate that was issued by the IE on 30.03.2013 on a de-rated capacity of 101.38 MW, the WRLDC could have rejected the said IE certificate after going through various provisions of the PPA. WRLDC did not reject the IE certificate but directed or asked Sasan Power to obtain consent or acceptance of the procurers (who are respondents) with regard to the IE certificate and for scheduling of power.

g) On a perusal of Article 6, read with Schedule 5 of the PPA, we find that the said provisions are meant to assure the procurers that the unit of Sasan Power was ready for continuous supply to the extent certified which under that Article was required to be certified to the extent of 95% of its contracted capacity. The said Article appears to be clearly for the benefit of the procurers and it binds the generator to certain particular parameters under the contract. Waiver is a matter of intention and can be either express or implied but it must be deliberate in the sense that a party giving the right should apply its mind in the matter to decide the abandonment or waive the right. In order to hand over the waiver some positive act of the party which is supposed to have waived such a right is further required. Waiver is an intentional relinquishment of known right or advantage abandonment claim or privilege which except for such waiver the party would have enjoyed. Thus waiver is a voluntary surrender of a right which implies the meeting of a mind and the same is a matter of mutual intention. Thus the waiver must be made voluntarily and there should be intentional relinquishment of right. Waiver actually requires two parties, one party waiving and other party receiving the benefit of the waiver. There can be waiver so intended by one party and

sought by the other party. Thus the waiver is voluntary and conscious act which must be affirmative on its part. The mere omission to assert its right or insist upon its right cannot amount to a waiver or dispensation within the meaning of Section 63 of the Indian Contract Act. Further, a person cannot be said to have waived his right unless it is established that his conduct was such as to enable the Court or Tribunal to arrive at a conclusion that he did so with the knowledge that he had a right but despite the same acted in such a manner which would imply that he has waived his right. These elements of waiver have been held in ***Waman Shriniwas Kini Vs Ratilal Bhagwandas & Co.*** (supra), ***Reddy Vs. P Appa Rao*** *(supra),* ***Krishna Bahadur Vs. Puna Theatre and others*** (2004) 8 SCC 229, ***Jagan Bandhu Chatterjee Vs. Smt Nilima Rani & Ors*** *(supra)* and ***Punjab & Sing Bank and Ors. Vs. Mohinder Pal Singh and Ors.*** *AIR (2006) SC 533.* The same view has been repeatedly held in various judgments namely in ***Bank of India Vs. OP Savrankar*** *(2003) 2 SCC 721*, ***Sidheshwar Cooperative bank Ltd. Vs. Ikbal*** *(2013) 10 SCC 83,* ***Commissioner of Income-tax Vs. Virgo Steels*** *(supra)* and in ***Krishan Lal Vs State of J&K*** (supra). We further find that in the present case, there is no question of any public interest or public policy or morals or statutory regulations being violated. The WRLDC, who was a petitioner before the Central Commission, in its Petition clearly and equivocally states that there are no guidelines in respect of declaration of COD of the generators who are not governed by CERF (Tariff Regulations) 2009 and in the Petition, WRLDC prays to the Central Commission for issuing regulations and guidelines in that behalf.

h) The case of the Appellant is based on provisions of Article 6.3.4 read with Article 18 of the PPA. As per the Appellant, Procurers have waived off the requirement of Schedule 5 i.e. running the unit at 95% of the contracted capacity and had accepted commissioning at 101.38 MW under Article 6.3.4 of the PPA. Per contra Respondents have contended acceptance of generation from the unit as per Article 6.3.4 of the PPA could not be

considered as waiver of the mandatory conditions of the provisions of Schedule-5 for COD.

i) We find that this issue was not the part of the prayer of the WRLDC before the Central Commission and has not been fully dealt with by the Central Commission. The impugned order notes the submission of lead procurer that as per Article 6.3.4 of the PPA, a plant can be operated and power can be availed even when the tested capacity is less than 95% of the Contracted Capacity and Article 11 of PPA provides for availing power before COD. According to the Procurers, power was available at very low rates to the procurers and hence the lead Procurer through mail dated 30.03.2013 and letter dated 02.07.2013 agreed scheduling of power at 101.38 MW. However, the Commission without considering Article 6.3.4 of the PPA and while admitting that both the procurer and the generator stand to gain from it, held that such declaration of COD is against the established norms and PPA provisions.

j) Article 6.3.4 of the PPA provides that if a Unit Tested Capacity after most recent Performance Test mentioned in Article 6.3.3 is less than its Contracted Capacity, the unit shall be de-rated with the consequences of reduction in capacity charges as described under Article 6.3.4(b). The lead Procurer and other Procurers accepted the de-rated capacity of 101.38 MW under Article 6.3.4 from 31.03.2013 by giving consent letters. Waiver is an issue between the buyers and seller and has to be dealt with by the concerned parties as per the terms of the PPA. This was not an issue raised in the petition by WRLDC. Waiver and de-ration of capacity is to be settled between the Generator and the Procurers and is not of concern to WRLDC.

k) The Appellant and the Procurers had not filed any petition regarding waiver and acceptance of de-rated capacity at 101.38 MW on 31.03.2013. We also find from the letters submitted by the Procurers that they had accepted commissioning of unit at 101.38 MW under

Article 6.3.4 of the PPA. The letter of lead procurer dated 02.04.2013 states that the Performance Test Certificate is acceptable to them as per Clause 6.3.4 of the PPA. SPL was also asked by the lead procurer to go for Performance Test under notice for increasing capacity beyond certification by the Independent Engineer in accordance with Clause 6.3.3 of PPA. Similar letters were issued by other procurers too. Central Commission has also accepted that the lead procurer has expressed its agreement to schedule 101.38 MW as Declared Capacity knowing fully well that the unit has not been declared under commercial operation in accordance with the PPA. CERC has also held that there was no intentional mis-declaration of capacity by SPL. Thus, declaration of de-rated capacity at 101.38 MW on 31.03.2013 and the consequences of the same have to be settled between the Procurers and the Appellant. As stated above, the Procurers had accepted the commissioning at 101.38 MW. The Performance Certificate of Independent Engineer was not the Final Test Certificate as per PPA but it gave the factual position of testing the unit at partial load of 101.38 MW. Procurers knowing fully well that the Performance Test has not been completed as per Article 6.3.3 of the PPA and still accepted the commissioning of unit at 101.38 MW. They also acted on the same and penalized SPL by paying Capacity Charges at de-rated capacity as per the terms of the PPA. The Procurers cannot claim now go back on accepting the de-rated capacity of the plant at 101.38 MW on 31.03.2013 when they had accepted the same and acted on the same.

21) In view of the above discussion, we decide this issue of waiver in favour of the appellant.

22) In view of the aforesaid findings/observations made by us in issue-wise consideration and conclusion, the instant appeals succeed and the Impugned Order is liable to be set aside or quashed. We have, in the above part of the judgment, considered all the issues and we find that the impugned petition filed by WRLDC merits dismissal.

O R D E R

Both these appeals, being Appeal Nos. 233 of 2014 and 266 of 2014, are hereby allowed and the Impugned Order passed there under is here by set aside/quashed. The Impugned Petition, being No. 85/MP/2013, filed by the WRLDC, before the Central commission is hereby dismissed.

No order as to costs.

Pronounced in the open court on this **31st day of *March, 2016***

(I. J. KAPOOR)
Technical Member

(Justice Surendra Kumar)
Judicial Member

✔ **REPORTABLE / ~~NON-REPORTABLE~~**