

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**APPEAL No.115 OF 2011**

**Dated:23<sup>rd</sup> March, 2012**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson**  
**Hon'ble Mr. V J Talwar, Technical Member**

**In the Matter Of**

Reliance Infrastructure Limited  
1<sup>st</sup> Floor,  
Dhirubhai Ambani Knowledge City  
Navi Mumbai-400 710

..... Appellant(s)

Versus

1. The Maharashtra Electricity Regulatory Commission,  
World Trade Centre No.1,  
13<sup>th</sup> Floor, Cuffe Parade,  
Colaba,  
Mumbai-400 001
2. M/s. Wardha Power Company Ltd  
8-2-293/82/A/431/A,  
Road No.22, Jubilee Hills,  
Hyderabad-500 033

..... Respondent(s)

Counsel for the Appellant

:Mr.Ramji Srinivasan,Senior Advocate  
Mr. Hasan Murtaza  
Mr. Vivek P. Oriel

Counsel for the Respondent : Mr. Jayant Bhushan, Sr.Adv. for R-1  
Mr. Buddy A. Ranganadhan for R-1  
Ms. Richa Bhardwaj for R-1  
Mr. Sugam Seth for R-1  
Mr. Arijit Maitra for R-1  
Mr. M G Ramachandran for R-2  
Mr. Hemant Singh for R-2  
Mr. Anurag Sharma  
Mr. Sanjay Sen for R-2  
Ms. Sikha Ohri for R-2  
Ms. Surbhi Sharma for R-2

## **JUDGMENT**

### **PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON**

1. "Whether the termination notice dated 7.3.2011 issued by Reliance Infrastructure terminating the PPA dated 4.6.2010 entered into with Wardha Power is legally justified or not?". This is the question raised in this Appeal.
2. Reliance Infrastructure Limited is the Appellant herein. M/s. Wardha Power Company Limited is the Second Respondent.
3. The Reliance Infrastructure Limited , the Appellant entered into the PPA with the Wardha Power Company Limited (R-2) for the supply of Power.
4. On 7.3.2011, the Appellant terminated the said PPA on the ground that Wardha Power Company Limited (R-2) had failed to comply with the conditions subsequent in terms of PPA. This termination notice dated 7.3.2011 was challenged before the State Commission. After

hearing the parties, the State Commission through its impugned order dated 31.5.2011 set aside the termination notice as illegal and directed the Appellant to purchase power from Wardha Power (R-2) as per the PPA.

5. Aggrieved over this, the Reliance Infrastructure Limited has filed this Appeal. The short facts are as follows:

- (a) The Reliance Infrastructure Limited, the Appellant is a Procurer of Power. The Wardha Power Company Limited (R-2) is the Seller.
- (b) On 21.7.2009, on the application filed by the Reliance Infrastructure Limited, the State Commission approved the quantum of power to be procured by the Appellant through competitive bidding process under Section 63 of the Act, 2003 for the different supply period.
- (c) Accordingly on 30.7.2009, the Appellant invited the bids for supply of power to the Appellant as per Section 63 of the Electricity Act,2003 as approved by the State Commission. The Wardha Power Company Limited (R-2) and other submitted the bids. The Bid of Wardha Power Company was for 270 MW at Rs.5.248 per kWh. However, they subsequently reduced it to Rs.4.850 per kWh.
- (d) On 9.4.2010, Western Coal Fields, the Fuel Supplier issued the Letter of Assurance to Wardha Power for the supply of power.

- (e) The Letter of Intent was issued on 10.5.2010 by the Appellant. The same was accepted by the Wardha Power Company Limited (R-2) on 12.5.2010.
- (f) On 4.6.2010, the Reliance Infrastructure Limited, the Appellant executed a Power Purchase Agreement with the Wardha Power Company Limited (R-2) for the above quantum at the levelized tariff of Rs.4.85 per kWh for a period of three years from 1.4.2011 to 31.3.2014.
- (g) Under the terms of the PPA, Wardha Company was to satisfy the conditions subsequent prescribed in the PPA. One of the conditions is for execution of Fuel Supply Agreement to be entered by the Seller with Fuel Supplier within a period of six months from the date of PPA i.e. 4.6.2010.
- (h) On 16.6.2010, the Appellant executed PPA with the Vidharbha, its sister Company for the purchase of 134 MW of the levelized tariff @ Rs.4.80 per unit.
- (i) On 29.11.2010, the Western Coal Field confirmed that Wardha Power Company Limited had achieved all milestones and the only issue left was the correction of the name of Wardha from Private Limited to Public Limited.
- (j) On 2.12.2010 Global Energy, a trader of electricity wrote a letter to Reliance Infrastructure, the Appellant offering to supply 300 MW from Jindal Power Limited on a firm basis from 1.4.2011 to 31.3.2014. On the same date, i.e on 2.12.2010,

Wardha Power Company Limited (R-2) wrote to the Appellant seeking confirmation from Reliance Infrastructure regarding the approval of the State Commission for adoption of tariff under Section 63 of the Act, 2003 as per the terms of PPA dated 4.6.2010.

(k) However, on 10.12.2010, the Appellant in response to the letter of Wardha Power Limited dated 2.12.2010 sought to terminate the PPA on the following grounds:

(aa) The Fuel Supply Agreement had not been executed by the Wardha Power with Western Coal Field in accordance with Article 3.1.1 of the PPA.

(ab) Under Article 8.4.11 of the PPA which pertains to collateral agreement, M/s. Wardha Power has sought deviations in the Draft Default Escrow Agreement and Draft Deed of Hypothecation. Such deviation would require approval from the State Commission.

(ac) The State Commission has invited an expression of interest for distribution license in respect to Rlnfra's licensed area by public notice dated 06.10.2010 published in leading news papers. As such, the status of the Appellant as Licensee is not certain.

(l) In view of the above grounds, the Appellant stated in the letter dated 10.12.2010 that they would not be able to proceed further with the PPA as the conditions subsequent have not been

satisfied by the Appellant in a manner stipulated under Article 3.1 of the PPA.

- (m) In response to the above letter, the Wardha Power Company on 15.12.2010, gave a detailed response to the letter dated 10.12.2010 assuring that the conditions subsequent which are to be satisfied by the Wardha Power Company will be complied with within the time frame and there need be no concern on the Appellant's part and requested the Appellant to go ahead and satisfy the conditions subsequent on the Appellant's part by obtaining approval from the State Commission for the tariff as per the PPA.
- (n) In response to the letter dated 15.12.2010, the Appellant sent a reply on 21.12.2010 stating that since the Appellant perceived an uncertainty in availability of fuel in view of the status of FSA, the Appellant was unable to proceed further in the matter.
- (o) In response to this letter, the Wardha power Company on 27.12.2010 called upon the Appellant to immediately take further steps as required under the PPA and asked the Appellant to file an application before the State Commission for adoption of tariff.
- (p) At that stage, on 13.1.2011, the Vidarbha a sister Company of the Appellant offered to supply the Appellant 404 MW (134 MW+270 MW) at a tariff of Rs.4.24 Kwh from 1.4.2012. On this basis there was an addendum to the PPA executed between the Appellant and Sister Company Vidarbha on 21.1.2011.

- (q) On coming to know of this, the Wardha Power Company (R-2) on 24.1.2011, filed a petition before the State Commission seeking for a direction to the Appellant to file Petition for adoption of tariff as per the PPA entered into between Appellant and Wardha Power Company (R-2).
- (r) At that stage, on 28.1.2011, the Appellant filed a petition for adoption of tariff for Vidarbha for 404 MW even though the letter of intent was issued in favour of the Vidarbha in pursuance of the competitive bidding process only for the quantum of 134 MW.
- (s) The State Commission admitted the said Petition filed by Wardha Power Company (R-2) and gave an interim direction to the Appellant.
- (t) In the meantime, on 24.2.2011, the Wardha Power Company (R-2) entered into the Fuel Supply Agreement with the Videsh Coal Limited without affecting its rights under the Letter of Assurance given by the Western Coal Field.
- (u) At that stage, the Appellant issued a termination notice on 7.3.2011 to the Wardha Power Company on the ground that their conditions subsequent had not been complied with by the Seller Wardha Power Company (R-2).
- (v) On 11.3.2011, the Wardha Power Company wrote a letter to the Appellant disputing the termination notice and pointing out

the existence of the Fuel Supply Agreement with Videsh. There was no response from the Appellant.

- (w) Under such circumstances, on 15.3.2011, the Appellant filed an application before the State Commission for bringing on record subsequent facts relating to illegal issuance of the termination notice dated 7.3.2011 and sought for direction. At that stage, in response to the letter dated 11.3.2011, sent by Wardha Power (R-2) the Appellant, on 16.3.2011 by disregarding the letter of Wardha Company Limited reiterated its stand to terminate the PPA. When this was brought to the notice of the State Commission on 17.3.2011, the State Commission directed the Appellant not to give effect to the termination notice dated 7.3.2011 till the disposal of the main application and directed the parties to have negotiations and settle the matter.
- (x) Despite the directions issued by the State Commission for the negotiations between the parties, no settlement was arrived at. Therefore, by the order dated 15.4.2011, the State Commission granted interim relief in favour of the Wardha Power Company (R-2) thereby directing the Appellant to buy power from the Wardha Power Company as per the PPA dated 4.6.2010.
- (y) Besides that, the State Commission directed the Appellant to file appropriate petition u/s 63 of the Electricity Act, 2003 for adoption of tariff on the basis of the PPA entered between the parties dated 4.6.2010.



- (z) Against the said order of interim direction dated 15.4.2011, the Appellant filed the Appeal before this Tribunal in Appeal No.53 of 2011. However, this Tribunal by the order dated 9.5.2011 having declined to interfere with the order of the State Commission, disposed of the Appeal directing the parties to approach the State Commission and directing the State Commission to pass final order on the main petition on merits.
  - (aa) Thereafter, on 16.5.2011 and 17.5.2011, the State Commission heard the parties. After considering their submissions, on 31.5.2011, the State Commission passed the impugned order holding that the termination notice was illegal and consequently directed the Appellant to purchase the power from Wardha Power Company as per the PPA dated 4.6.2010.
  - (bb) As against this order dated 31.5.2011, the Appellant Reliance Infrastructure has filed this Appeal.
6. The Appellant has urged the following grounds in this Appeal:
- (a) The State Commission was not justified in ignoring the Appellant's right to terminate its PPA with Wardha Power Company Limited on the valid ground that Wardha Power Company Limited had not signed the Fuel Supply Agreement with Western Coal Fields Limited within the time frame thereby resulting in non fulfilment of the conditions subsequent under the PPA.

- (b) The State Commission was not justified in directing the Appellant to purchase costly power from Wardha Power Company Limited when Appellant has access to cheaper power available from other sources. As a result of the directions given by the State Commission, the Appellant is constrained to purchase costly power from Wardha power Company. In the result, the burden of such costly power will ultimately have to be borne by the consumers of the Appellant. This is against the consumer's interest
- (c) The State Commission has failed to consider the adverse financial impact on the consumers on account of purchase of costly power by Appellant from Wardha power. The State Commission being a regulatory body had all the powers not only to re-open the PPA between the Appellant and Wardha Power but also to issue appropriate directions for procurement of power by the Appellant from other available sources for cheaper prices to serve the consumer's interests.
- (d) The State Commission choose to mechanically direct the Appellant for specific performance of the PPA without considering the fact that it is against the law.
- (e) The State Commission was not justified in directing specific performance of the PPA between the Appellant and Wardha power, as monetary damages would have been a just relief in the circumstances of the present case.

7. In reply to the above grounds, the Learned Senior Counsel for the Commission as well as the Learned Counsel for Wardha Power have made the following submissions:
- (a) The right to terminate the Power Purchase Agreement dated 4.6.2010 did not accrue to the Appellant as on 7.3.2011 the date of termination, and as such the purported termination is premature and not a valid one.
  - (b) The notice of termination dated 7.3.2011 was sent to Wardha Power Company while the proceedings were pending before the Commission to pre-empt pending judicial and regulatory proceedings.
  - (c) As a matter of fact, Wardha Power Company had duly fulfilled the conditions subsequent by execution of FSA with the 3<sup>rd</sup> party and by furnishing the copy thereof to the Appellant as per the terms of the PPA and as such there was no cause for the Appellant to terminate the PPA.
  - (d) The Appellant has been in breach of performing its reciprocal promises under the PPA and therefore defaulting party cannot enforce the performance of the PPA or terminate the agreement.
  - (e) The purported termination of the PPA is for unlawful and collateral purpose of favouring its sister concern Vidharba Power and as such the conduct of the Appellant is blameworthy.

- (f) The State Commission has got the powers to direct specific performance in the PPA on the part of the Appellant consequent to the impugned order setting aside the termination notice which is correct and valid in law.
8. In the light of the rival contentions urged by both the parties, the following comprehensive question would arise for consideration in this Appeal:
- “ Whether in the facts and circumstances of the case, the Appellant was legally justified to terminate the Power Purchase Agreement entered into between the Appellant and the Wardha Power (R-2) pursuant to the competitive bidding under Section 63 of the Electricity Act, 2003 on the ground of non execution and non delivery of the Fuel Supply Agreement by the Wardha Power in terms of the PPA dated 4.6.2010 ?
9. For consideration of above question, the following aspect have got to be considered:
- (a)The nature of the Fuel Supply Agreement to be entered into namely with whom i.e. whether the Seller was under obligation to arrange fuel from the same fuel supplier which had been indicated in RFP documents while submitting the bids?
- (b)The time period within which the Conditions Subsequent was required to be fulfilled;

(c) The conduct of the Wardha Power (R-2) in not executing the Fuel Supply Agreement in time and its delivery in time and the conduct of the Appellant in its failure of fulfilling the reciprocal promise of apply before the State Commission for adoption of tariff; the attempt made by the Appellant to procure additional quantum from its sister concern without competitive bidding and the issuance of the termination notice by the Appellant when the State Commission had already seized of the matter.

10. Let us now go into the issues raised by the Appellant one by one.
11. The first issue is in regard to nature of Fuel Supply Agreement to be entered. The issue is whether the seller was under any obligation to arrange fuel from the same Fuel Supplier which has been indicated in the RFP documents while submitting the bid.
12. According to the Appellant, the Wardha Power (R-2) had not duly fulfilled the conditions subsequent for the execution of Fuel Supply Agreement with the Western Coal Field as indicated in the RFP document furnished by the Appellant as a part of its bid and furnishing the copy thereof to the Appellant as per the PPA and as such there is a valid reason for the Appellant for terminating the PPA.
13. On the other hand, the Wardha Power has stated that it had duly fulfilled the conditions subsequent by executing the Fuel Supply Agreement with Videsh Coal Services Pvt Ltd. and furnished a copy to the Appellant in terms of the PPA.

14. It is true that under Clause 3.1.1, the Seller has to give an undertaking to perform and complete the following activities at the Seller's own cost and risk within 6 months from the effective date and one of the activities is that the Seller shall have to execute the Fuel Supply Agreement and to provide a copy of the same to the Procurer. In terms of the PPA, the Wardha Power was to have the Fuel Supply Agreement covering the period of the PPA. In so far as the Appellant is concerned, the Fuel Supply Agreement is relevant for availability of the coal only. The Appellant is not concerned in any manner on the aspect of the price and other terms of the Agreement between the Fuel Supplier and the 2<sup>nd</sup> Respondent (Wardha Power). Similarly, the Appellant is not concerned as to the question from whom the Appellant was to purchase the fuel. As per the PPA, the Appellant is liable to pay tariff to the Wardha Power at the bids price of Rs.4.85 per unit irrespective of the price at which the fuel is supplied by the Fuel Supplier.
  
15. According to the Appellant, the Wardha Power has not arranged for execution of the Fuel Supply Agreement with Western Coal Field as it had indicated in the RFP document. In dealing with this submission, the following undisputed facts to be taken note of to consider whether the Wardha Power had duly fulfilled the conditions subsequent of having a Fuel Supply Agreement with the Fuel Supplier and furnishing the copy thereof to the Appellant. Those facts are as follows:
  - (a) Wardha Power (R-2) had submitted Letter of Assurance dated 9.4.2010 from Western Coal Fields to the Appellant. The said

Letter of Assurance was pursuant to the previous Letter of Assurance dated 2.12.2009 issued by M/s. Western Coalfields Limited. The said Letter of Assurance also was submitted to the Appellant by the Wardha Power.

- (b) Wardha Power (R-2) has furnished the letter of M/S. Western Coalfield Limited dated 29.11.2010 which confirmed that against the Letter of Assurance given by the Western Coalfields Limited issued to the Wardha Power that all major milestones had been achieved except for a minor requirement for providing ratification of MIDC for change of name of the R-2 (Wardha Power) from being a Private Company to a Public Company. This was submitted to the Appellant and the same was received by it. The Wardha Power also complied with the said requirement through letter dated 6.1.2011.
  - (c) M/s. Coal India had not executed any formal Fuel Supply Agreement with any power generating entity since 31.3.2009. This was on account of the matter relating to finalisation of the terms and conditions of the fuel supply being pending with the Government of India. However, the Letter of Assurance together with confirmation of fulfilment given issued by the Western Coal Fields was handed over to the Appellant and this clearly confirmed the existence of the Fuel Supply Agreement with Western Coal Fields in so far as the PPA is concerned.
16. As indicated above, the Appellant is not concerned with the terms and conditions including the price on which the coal is to be procured.

17. The above factors would indicate that all the arrangements have been made by the Wardha Power to make Fuel Supply agreement with the Western Coal Fields Limited.
18. It is true that formal Fuel Supply Agreement was not executed. But there was an arrangement for firm supply of coal between the Wardha Power and the Western Coalfields as per the requirement of the PPA even without the formal Fuel Supply Agreement is executed. The following aspects would reveal the above factors:
  - (a) Wardha Power as a matter of fact, submitted the minutes of the meeting of the Standing Linkage Committee of Ministry of Coal on 16.5.2011 giving the details about the status of the execution of the FSAs for the projects commissioned after 31.3.2009. In that meeting, it was found that no execution of FSA has been done for those projects highlighted. The standing Linkage Committee was also pleased to confirm release of coal supplies to the Wardha Power from alternate sources pending implementation of coal supply from the cost plus mines under a Memorandum of Undertaking for one year.
  - (b) Admittedly, the Wardha Power has already executed the said **Memorandum of Understanding** with M/s. Western Coal Fields Limited on 21.7.2011 itself.
  - (c) Interestingly, The Appellant had proceeded to propose procurement of 134 Mws of Power from its sister Company Vidharba Power even when the Vidharbha Power had not furnished any formal Fuel Supply Agreement to the Appellant



and had filed a petition before the State Commission for adoption of Tariff. Further the Appellant had proceeded to procure additional 270 MWs of Power from Vidharbha Power. The reason for adopting different yard sticks for Wardha Power and Vidharbha Power is not understandable.

19. The above facts would indicate that all the arrangements have been made by the Wardha Power to execute Fuel Supply Agreement with Western Coal Fields Limited and also the efforts to get the supply from other sources as promised by the Standing Linkage Committee. These are all undisputed facts.
20. Taking into consideration these factors, we are bound to look into other facts wherein the Wardha Power has also entered into an Agreement with M/s. Videsh Coal Services Private Limited on 24.2.2011 itself for supply of 15 lakh tonnes of coal per annum. According to the Wardha Power, the existence of the said agreement was duly intimated to the Appellant on 11.3.2011 and the copy of the said agreement was also made available to the Appellant on 15.3.2011.
21. Even in support of the facts, the Appellant has now contended that the Wardha Power was under obligation to furnish it the copy of the Fuel Supply Agreement for fuel supply with M/s. Videsh Coal Services immediately but it did not furnish copy of the same to the Appellant. This submission does not merit consideration.
22. As a matter of fact, even before the issuance of the termination notice on 7.3.2011, the Wardha Power filed an application before the State

Commission for direction to the Appellant to file the application for adoption of tariff under Section 63 of the act in terms of the PPA entered into between them. As such, the matter was pending adjudication before the State Commission. Therefore, the Wardha Power thought it fit to inform the State Commission about the execution of this agreement to Videsh Coal Services Limited and also filed a copy of the same before the Commission.

23. According to the Wardha Power the reason for not furnishing to the Appellant the copy of the said back up arrangements with M/s. Videsh Coal Services Limited was on account of the pendency of the judicial proceedings before the State Commission as well as on the reason that the Wardha Power was expecting the formal fuel supply agreement to be entered into with Western Coal Fields Limited.
24. Admittedly, the notice of termination of PPA dated 7.3.2011 was sent by the Appellant to the Wardha Power. The Wardha Power sent immediate reply on 11.3.2011 giving information with regard to execution of the Fuel Supply Agreement with the Videsh Coal Services for supply of coal. Only thereafter, the Respondent-2, Wardha Power filed an application before the State Commission on 15.3.2011 informing about the execution of arrangements with Videsh Coal Services and furnishing the copy of the agreement to the Appellant.
25. The Appellant has contended that in terms of the PPA and also the bidding documents, the satisfaction of the conditions subsequent of Fuel Supply Agreement could be only when the Wardha Power

executes the FSA with the Western Coal Fields and not with any other entity.

26. This contention also does not merit acceptance. As a matter of fact, the PPA does not provide for any mandate for FSA need to be signed only with the Western Coal Fields. This is clear that the FSA can be executed with any person who is willing to supply the Fuel Supply to the Wardha Power.
27. In the PPA, the definition of the Fuel and FSA has been referred. According to the definition, the FSA shall mean that the agreement entered into between the seller and the fuel supplier for the purchase, transportation and handling of the Fuel, required for the operation of the Power Station. This definition did not deal with the specified person. In other words, the Fuel Supplier can be any person with whom the FSA can be entered into by the seller with that person. When a question arose in a case in Appeal No.184 of 2010, Adani Power Limited vs. Gujarat Electricity Regulatory Commission & Ors, dealing with similar issue, this Tribunal has held that the FSA can be entered into with any other person available. The relevant portion of the finding given by the Tribunal is as follows:

*“(iii) PPA dated 2.2.2007 was not based on the premise of availability of coal from Gujarat Mineral Corporation only. It was for the Appellant to arrange the coal from any source. It was Adani Enterprises Limited which had represented that it had tied up with Gujarat Mineral Corporation for supply of coal. It was also represented that it had tied up for supply of imported coal with various companies in Germany and Japan as source of fuel supply. Therefore, it is for the Appellant to make arrangements for fuel from any source. The conditions*

*subsequent as specified in Article 3.1.2 (ii) dealing with Fuel Supply Agreement was duly satisfied with firming up of coal supply from Adani Enterprises/Indonesian Mines as per the admissions of the Appellant itself through various documents. Since subsequent were duly satisfied as per Article 3.1.2 (iii), there was no basis for invoking Article 3.4.2 of the PPA to terminate the PPA in as much as Article 3.4.2 has no obligation. Hence, the termination notice is not a valid one and as such the PPA has not been validly terminated”.*

28. The above decision rendered in Appeal No.184 of 2010 directly applies to the facts of the present case. Accordingly, it has to be held that the agreement dated 24.2.2011 entered into between the Wardha Power and Videsh Coal Services Limited is in due satisfaction and conditions subsequent of the PPA dated 4.6.2010. As such, there is a due fulfillment of the conditions subsequent relating to the Fuel Supply Agreement on the part of the Wardha Power as per the term of the PPA.
29. The second issue for our consideration is in regard to the time period for issuance of termination notice. The Learned Counsel for the parties made the elaborate arguments. According to the Appellant, as per the clause 3.4.1 of the PPA, if the Wardha Power (R-2) has failed to execute the Fuel Supply Agreement within 6 months and failed to furnish the additional contract performance guarantee during the period of 3 months, the Procurer, the Appellant shall have a right to terminate the said agreement by giving a termination notice to the Seller in writing of at least 7 days and in the present case, the Fuel Supply Agreement has not been executed with Western Coal Field as indicated in the RFP documents and the same was not delivered to

the Appellant and therefore, the Procurer's right to terminate the agreement by giving termination notice cannot be questioned.

30. Per contra, the Learned Counsel for the Respondent submits that the right to terminate the Power Purchase Agreement dated 4.6.2010 did not accrue to the procurer on 7.3.2011 and as such the purported termination notice is premature and invalid as correctly held by the State Commission.
31. Let us now discuss this issue in detail.
32. To deal with this issue we have to refer to the relevant Clauses of the PPA dated 4.6.2010 for adjudication. They are as follows:

*“3. CONDITIONS SUBSEQUENT TO BE SATISFIED BY SELLER/PROCURER*

*3.1 Satisfaction of conditions subsequent by the Seller.*

*3.1.1 The Seller agrees and undertakes to duly perform and complete the following activities at the Seller's own cost and risk within six (6) Months from the Effective date, unless such completion is affected by any Force Majeure event or due to the Procurer's failure to comply with its obligations under article 3.2.1 of this Agreement, or if any of the activities is specifically waived in writing by the Procurer.*

*a. The Seller shall have executed the Fuel Supply Agreement and have provided a copy of the same to the Procurer.*

.....

*3.2 Satisfaction of conditions subsequent by the Procurer*

*3.2.1 The Procurer agrees and undertakes to duly perform and complete the following activities at the procurer's own cost and*

*risk within six (6) months from the effective date, unless such completion is affected by any Force Majeure event or due to the Seller's failure to comply with its obligations under Article 3.1.1 of this Agreement or if any of the activities is specifically waived in writing by the Seller.*

.....

*b) The Procurer shall have obtained necessary transmission linkage for open access for transmission system from the Power Station switchyard up to the Delivery Point and shall have executed the Transmission Service Agreement with the STU for transmission of power from the Power Station switchyard up to the Delivery Point and provided a copy of the same to the Seller. Further, the Procurer shall indicate in writing to the Seller, the voltage level at which supply of power is to be made to the Procurer.*

*c) The Procurer shall have obtained the order of the Maharashtra Electricity Regulatory Commission for adoption of the tariff under Section 63 of the Electricity Act 2 and give a copy of the same to the Seller”.*

.....

*3.4. Consequences of non-fulfillment of conditions subsequent.*

*3.4.1 If any one or more of the conditions specified in Article 3.1 is not duly fulfilled by the Seller, even within three (3) Months after the time specified under Article 3.1, otherwise than for the reasons directly attributable to the Procurer or Force Majeure event in terms of Article 3.4.3, then on and from the expiry of such period and until the Seller has satisfied all the conditions specified in Article 3.1, the Seller shall, on weekly basis, be liable to furnish to the Procurer additional Contract Performance Guarantee from any of the banks listed in Schedule 11 of this Agreement of Rupees Three Crores Ninety Lakhs only (Rs.3,90,00,000), which has been provided to the Procurer, within two (2) Business Days of expiry of every such Week. Such additional Contract Performance Guarantee shall initially*

*be valid till the Scheduled Delivery Date, and the Procurer shall be entitled to hold and/ or invoke the Contract Performance Guarantee, in accordance with the provisions of this Agreement. However, upon satisfaction of the conditions subsequent by the Seller, the additional Contract Performance Guarantee shall be returned by the Procurer.*

.....

*“3.4.2 Subject to Article 3.4.3, if:*

- (i) fulfilment of any one or more of the conditions specified in Article 3.1 is delayed beyond the period of three (3) months after the date specified in Article 3.1 above, and the Seller fails to furnish the additional Contract Performance Guarantee to the Procurer in accordance with Article 3.4.1 hereof; or*
- (ii) the Seller furnishes additional Contract Performance Guarantee to the procurer in accordance with Article 3.4.1 hereof, but fails to fulfil the conditions specified in Article 3.1 for a period of three (3) months beyond the period specified in Article 3.1 above,*

*The Procurer shall have the right to terminate this Agreement by giving a Termination Notice to the other Party in writing of at least seven (7) days. The termination of Agreement shall take effect upon the expiry of the last date of the said notice period (“Termination Date”).*

33. The reading of the above terms would indicate the following aspects:

- (a) Clause 3 of the PPA deals with the Conditions subsequent to be satisfied by Seller (R-2)/the Procurer (the Appellant). Clause 3.1 of the PPA deals with the conditions subsequent to be satisfied by the Seller. As per clause 3.1.1, the Seller (Wardha Power) has to execute the Fuel Supply Agreement within a period of 6 months from the effective date with the Fuel supplier

and to provide a copy of the same to the Procurer unless such completion is affected by any Force Majeure event or due to the Procurer's failure to comply with its obligations or if these activities are waived by the Procurer.

- (b) Clause 3.2 deals with the conditions subsequent to be satisfied by the Procurer. As per the Term 3.2.1, the Procurer, the Appellant should undertake to duly perform and complete the various activities at the Procurer's own cost including the duty of obtaining necessary transmission linkage for open access, execution of Transmission Service Agreement with the STU and the procurer shall obtain the order of the State Commission for adoption of tariff under Section 63 of the Electricity Act 2003 and give a copy of the same to the Seller (R-2), Wardha Power.
- (c) Clause 3.4 deals with the consequences of non-fulfilment of conditions subsequent. As per clause 3.4.1, if the Seller has not fulfilled the conditions specified in the Article 3.1 within six months, the Seller shall, within 3 months after the time specified in Article 3.1, on weekly basis be liable to furnish the Procurer, the additional Contract Performance Guarantee from any bank for Rs.3,90,00,000/-. Such additional Performance Guarantee shall be available till the stipulated delivery date. Upon satisfaction of the conditions subsequent by the Wardha Power, the additional Performance Guarantee shall be returned to the Seller by the Procurer. Clause 3.4.2 gives right to procurer to terminate if the seller did not fulfil the conditions subsequent within certain time frame and/or did not furnish the additional



performance guarantee. As per sub-clause 3.4.2 (i), if the Seller fails to satisfy the conditions subsequent as provided in Article 3.1 beyond a period of 3 months after the date specified in Article 3.1, and the Seller fails to furnish the additional Contract Performance Guarantee to the Procurer for a period of 3 months beyond the period specified in term 3.1, the Procurer shall have a right to terminate the said agreement by giving a termination notice to and the termination notice of the said agreement shall take effect on the 7<sup>th</sup> day of the termination of said notice. Sub-clause 3.4.2 (ii) provide that in case the seller has provided the additional performance guarantee as per clause 3.4.1 but failed to fulfil any of the the conditions subsequent even after expiry of 3 months from the date specified in Article 3.1, the procurer would have right to terminate the contract after giving 7 days notice.

34. According to the Appellant the total period of fulfillments of the conditions subsequent event with additional Contract Performance Guarantee is only 9 months. But, according to the Respondent, the total period for fulfillment of the conditions subsequent is 12 months and since the termination notice was sent before the expiry of the timeframe, the said notice is illegal.
35. In our view the period of fulfillment of condition subsequent, whether it is 9 months or 12 months, is immaterial in the present case. As already discussed above, the seller Wardha Power (R-2) had fulfilled the condition subsequent of execution of FSA with Videsh Coal on 24.2.2011 itself i.e. within 9 months.

36. Let us assume for the time being that contention of the Appellant the provision of additional bank guarantee for 3 months would have started after expiry of initial 6 months i.e. after 3.12.2010 and additional 3 months as per clause 3.4.1 had expired on 3.6.2011. is correct. Even then, the Wardha Power (R-2) had fulfilled the condition subsequent by entering into Fuel Supply Agreement with Vidhesh Coal Ltd on 24.2.2011 i.e. prior to 3.3.2011 when right of termination accrued upon the Appellant. It is contended by the Appellant that the copy of the said agreement with Vidhesh Coal had not been supplied before 3.3.2011 and also additional performance guarantee in accordance with clause 3.4.1 had not been furnished and therefore, the right to terminate the contract had accrued to him on 3.3.2011 in terms of clause 3.4.2. This contention of the Appellant is also not tenable.
37. Bare reading of clause 3.4.2 would reveal that right to terminate the contract would occur when the fulfillment of the condition subsequent is delayed beyond 3.3.2011 and the seller has not furnished additional performance guarantee. Both the conditions viz., continued delay beyond 9 months and non-furnishing additional performance guarantee would have to be satisfied for giving termination notice. Admittedly, in this case the seller has not furnished the additional contract performance guarantee but had fulfilled the conditions subsequent of entering in to fuel supply agreement with Vidhesh Coal on 24.2.2011. Thus clause 3.4.2(i) would not be applicable in this case. The contention of the Appellant that the copy of FSA had not been furnished upon him with in stipulated period of 9 months and

therefore condition subsequent had not been fulfilled is not also tenable being too technical. In the Appellant's own submissions, the seller Wardha Power had permissible time to execute FSA upto 3.3.2011. Supply of copy of FSA naturally would take place after 3.3.2011. The delay in supplying copy of FSA has already been dealt with in the foregoing paragraphs. It is important to note that the contracts are entered in to by the parties to be executed in good faith and for mutual benefits and not for terminating them on one or the other grounds. The fact that the Seller had entered into fuel supply agreement with Fuel Supplier within the stipulated time of 9 months and has been able to supply power to the Appellant with effect from the schedule date of delivery i.e. 1.4.2011 would itself be testimony for the Seller's intention to perform the contract.

38. Therefore, we are to conclude that, the termination notice dated 7.3.2011 sent by the Appellant is not valid in law.
39. In the next plea, the Appellant has argued that the relief for specific performance cannot be given when there is a remedy of liquidity damages as contemplated under the PPA.
40. It is true that in the impugned order dated 31.5.2011, the State Commission not only held that the termination notice was illegal but also directed the Appellant to purchase the power from Wardha Power Company as per the PPA.
41. According to the Appellant, even assuming that the State Commission is right in setting aside the termination notice it can utmost order for liquidity damages and it cannot exercise the powers

of the specific performance by directing the Appellant to purchase the power only from the Wardha Power as per the PPA. While a similar question had been raised in this Tribunal by the judgment in Appeal No.156 of 2009 reported in 2010 ELR (APTEL) 36. In the said judgment, it is held that while upholding the sanctity of the letter of Intent that remedy of specific performance would be proper even when there is a provision under the PPA for providing liquidity damages. The relevant portion of the judgment is as follows:

“52. ....

*On the basis of this concept, it is contended by the learned senior counsel for the Respondent No. 2 that the act of Appellant suddenly going back from his obligation to perform the contract would highly affect the public interest as well as public law. He cited the following authority to substantiate this plea:*

***(1991) a SCC 492 in the matter of Raunaq International Ltd. Vs. I.V.R. Construction Ltd and Others.***

*The relevant observations are as follows:*

*“..... Even when the state or a public body enters into a commercial transaction, consideration which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the state enters into such a contract, there could be in a given case, an element of public law or public interest involved even in such a commercial transaction.*

*10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfillment of the*

*contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work-thus involving larger outlays of public money and delaying the availability of services, facilities or goods. e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.”*

*53. In the submissions made by the learned senior counsel for the Respondent NO. 2 on the strength of the above decision rendered by the Hon’ble Supreme Court, we find force. Under those circumstances we are to conclude that the Appellant cannot be allowed to make a plea that too in the form a fresh plea before this Tribunal just to escape from its obligation to sign the PPA and supply power as agreed by the Appellants as a generating company”*

42. In this judgment this Tribunal ordered specific performance in terms of Letter of Intent by asking the Power generators to execute the PPA. In the said case, this Tribunal upheld the sanctity of the Letter of Intent and ordered specific performance whereas in the present case, there is legally valid PPA which has been executed pursuant to a transparent process of bidding. Therefore, contracts such as present PPA have to be viewed and interpreted differently keeping in mind that substantial public interest is involved and as such, all attempts have been made to ensure that such contracts are implemented.
43. As indicated above, the Appellant pointed out that there is a remedy of liquidity damages as per the PPA. The provision of liquidity

damages in the PPA does not imply that there cannot be any specific enforcement of performance. In this context, it would be worthwhile to refer to Section 23 of the Special Relief Act, 1963 which is as under:

*“23. Liquidation of damages not a bar to specific performance*

- (1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.*
- (2) When enforcing specific performance under this Section, the Court shall not also decree payment of the sum so named in the Contract”*

44. So, above provision would make it clear that a contract otherwise proper to be specifically enforced, may be so enforced, though a liquidity damages as the amount to be paid in case of its breach. In this regard it would be appropriate to refer to Section 10 of the Special Relief Act, 1963 which is as follows:

*“10. Cases in which specific performance of contract enforceable*

*Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-*

- (a) When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or*

*(b) When the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.*

*Explanation-Unless and until the contrary is proved, the court shall presume-*

*(i) That the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and*

*(ii) That the breach of a contract to transfer movable property can be so relieved except in the following cases;*

*(a) Where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the markets;*

*(b) where the property is held by the defendant as the agent or trustee of the plaintiff”.*

45. So, these provisions would make it clear that the specific performance can be ordered in case a property is not an ordinary article of commerce or is of special value or interest or consists of goods which are not easily available in the market. The Hon'ble Supreme Court in the Pallavi Refractories and Ors etc Vs Singareni Collieries Co Ltd reported in AIR 2005 SC 744 and Tata Power Company Ltd Vs Maharashtra Electricity Regulatory Commission and Ors reported in 2009 ELR (SC) 246 has observed that the electricity is an essential commodity and electricity is in short supply.

46. While dealing with the issue of grant of specific performance this Tribunal in Adani Power Limited Vs Gujarat Electricity Regulatory

Commission and Ors., in Appeal No.184 of 2010 has dealt the issue in detail. The relevant observations are as follows:

*“118. So, the above provisions would make it clear that the specific performance is an appropriate remedy and such a relief is fully in consistent with the provisions of Section 63 of the Electricity Act. The contention of the Appellant that the provision of the Specific Relief Act, 1963 bar the remedy of specific performance in the present case is misplaced. Section 10 of the Specific Relief Act, 1963 provides that the contracts Judgement in Appeal No.184 of 2010 106 may be specifically enforced in the Act agreed to be done as such the compensation in money for non performance would not afford adequate relief.*

.....

*121.The PPA is not a contract dependent on the personal qualifications or volition of the parties or such nature that the implementation cannot be enforced. The Contract is for 25 years. There is no termination except by non defaulting party for breach of the other party. The Appellant entered into the PPA with the object of performing the agreement for 25 years. Therefore, the Appellant cannot claim any prolonged, unforeseen or undeserved hardship. If the specific performance is not granted, it would cause great hardship to the Gujarat Holding Company. The equitable situation for the specific performance of the PPA in the present case is totally and completely in favour of the Gujarat Holding Company and not in favour of the Appellant. Further more, once it is held that the termination is not valid and as such, the PPA is to be restored, then the consequential relieve would be direct to the Appellant to supply power in compliance with the provision of the PPA.*

.....

*129. Summary of Our Findings*

*iii) The provision for liquidated damages in the PPA does not in any manner affect the right of the Gujarat Holding Company to seek specific performance of the PPA particularly when*



*conditions subsequent are fulfilled. There was no bar on the Special Relief Act to give a direction for specific performance. In the present case, the PPA has been entered by both the Appellant and the Respondent for 25 years in order to meet the electricity requirements of the public at large of Gujarat on long term basis on economical price. The specific performance is, therefore, an appropriate remedy. Such a relief is fully consistent with the provisions of the Section 23 of the Special Relief Act. Therefore, the directions issued by the State Commission to the Appellant to supply the power as per the PPA is perfectly legal.*

47. In view of the ratio decided by this Tribunal as well as by the Hon'ble Supreme Court, it has to be held that the provision for liquidity damages in the PPA would not affect the right of the party to seek for the direction for the specific performance of the PPA particularly when the conditions subsequent have been satisfied and therefore, we are of the opinion that the relief of specific performance granted by the State Commission in favour of Wardha Power is fully consistent with the provision of the Section 23 of the Special Relief Act and therefore the consequential directions issued by the State Commission to the Appellant to supply the power to Wardha Power as per the PPA is perfectly justified.
48. The Learned Counsel for the Respondent would raise the issue with reference to the unfair conduct of the Appellant by hurriedly entering into addendum PPA with its sister concern Vidharbha for 404 MW and by hurriedly issuing the termination notice even after coming to know that the petition filed by the Wardha Power (R-2) was pending before the State Commission on the same issue.

49. It is also contended by the Respondent that the Wardha Power has completely satisfied the conditions subsequent but only the Appellant has been in breach of performing its reciprocal performance. We feel that we need not deal with these incidental issues as we have already dealt with the main issue and held that the termination notice was illegal and consequential direction is legal giving various reasons.

50. **Summary of Our Finding**

- (a) **The decision of this Tribunal rendered in Appeal No.184 of 2010 directly applies to the facts of the present case. Accordingly, it has to be held that the agreement dated 24.2.2011 entered into between the Wardha Power and Videsh Coal Services Limited is in due satisfaction and conditions subsequent of the PPA dated 4.6.2010. As such, there is a due fulfilment of the conditions subsequent relating to the Fuel Supply Agreement on the part of the Wardha Power as per the term of the PPA.**
- (b) **Bare reading of clause 3.4.2 would reveal that right to terminate the contract would occur when the fulfillment of the condition subsequent is delayed beyond 3.3.2011 and the seller has not furnished additional performance guarantee. Both the conditions viz., continued delay beyond 9 months and non-furnishing additional contract performance guarantee would have to be satisfied for giving termination notice. Admittedly, in this case the seller has not furnished the additional contract performance**

**guarantee but had fulfilled the conditions subsequent of entering in to fuel supply agreement with Vidhesh Coal on 22.2.2011. Thus clause 3.4.2(i) would not be applicable in this case.**

- (c) The contention of the Appellant that the copy of FSA had not been furnished upon him with in stipulated period of 9 months and therefore conditions subsequent had not been fulfilled is not tenable being too technical. In the Appellant's own submissions, the seller Wardha Power had permissible time to execute FSA was upto 3.3.2011. Supply of copy of FSA naturally would take place after 3.3.2011. The delay in supplying copy of FSA has already been dealt with in the foregoing paras above. It is important to note that the contracts are entered in to by the parties to be executed in good faith and for mutual benefits and not for terminating them on one or the other grounds. The fact that the Seller had entered into fuel supply agreement within the stipulated time of 9 months and has been able to supply power to the Appellant with effect from the schedule date of delivery i.e. 1.4.2011 would itself is a testimony for the seller's intention to perform the contract. Therefore, we are to conclude that, the termination notice dated 7.3.2011 sent by the Appellant is not valid in law.**
- (d) In view of the ratio decided by this Tribunal in Appeal No. 184 of 2010 as well as by the Hon'ble Supreme Court, it has to be held that the provision for liquidity damages in the**

**PPA would not affect the right of the party to seek specific performance of the PPA particularly when the conditions subsequent are fulfilled. Therefore, we are of the view that the relief of specific performance granted by the State Commission in favour of Wardha Power is fully consistent with the provision of the Section 23 of the Specific Relief Act and hence the consequential directions issued by the State Commission to the Appellant to procure the power from Wardha Power as per the PPA is perfectly justified.**

51. In the light of our above findings, the Appeal is dismissed as devoid of merits. However, there is no order as to costs.

**(V.J. Talwar)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated: 23<sup>rd</sup> Mar, 2012

√Reportable/Not Reportable