

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

Appeal No. 181 of 2013

Dated: 11th July, 2014

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

In the matter of:

**Raghu Rama Renewable Energy Ltd.,
Plot No. 30A, Door No. 1,
Film Nagar, Jubilee Hills,
Hyderabad- 500 033**

... Appellant (s)

Versus

- 1. Tamil Nadu Generation and Distribution Corporation Limited,
Rep. by its Chairman and
Managing Director, 144, Anna Salai,
Chennai- 600 002**
- 2. The Chief Engineer/PPP,
TANGEDCO
VI Floor, Eastern Wing, NPKRR Maaligai,
144, Anna Salai,
Chennai- 600 002**
- 3. The Superintending Engineer,
TANGEDCO
Ramnad Electricity Distribution Circle,
Ramnad- 623 501**
- 4. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No. 19A, Rukmani, Lakshmipathy Salai,
Marshalls Road, Egmore,
Chennai- 600 008**

...Respondent(s)

Counsel for the Appellant(s): Mr. Rahul Balaji
Mr. T. Srinivasa Murthy,
Mr. Shruti Iyer

Counsel for the Respondent(s): Mr. S. Vallinayagam for R-1 to 3

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Raghu Rama Renewable Energy Ltd. against the order dated 4.6.2013 passed by Tamil Nadu Electricity Regulatory Commission (“State Commission”) in a dispute between the generating company and the distribution licensee regarding claim of penalty for short fall in supply.

2. The Appellant is a generating company. The Respondent no. 1 to 3 are officers of TANGEDCO, the generating and distribution company. The State Commission is the Respondent no. 4.

3. The facts of the case are as under:

3.1 The Appellant entered into an Energy Purchase Agreement (‘EPA’) with TANGEDCO on 14.10.2011 for

supply upto 10 MW of surplus power from its coal based power plant for a period of one year w.e.f. 1.6.2011.

3.2 The EPA had a provision for default in supply by the Appellant or off-take of power by TANGEDCO. Accordingly, if the Appellant failed to schedule 80% of the contracted energy in a month then it would pay compensation to TANGEDCO at the rate of Re. 1 per kWh to the extent of shortfall in energy supply. Similarly, if TANGEDCO failed to off take 80% of contracted energy in a month then the compensation would be paid by TANGEDCO @ Re. 1 per kWh to the extent of the shortfall to the Appellant.

3.3 There was also a provision in the EPA for payment of energy charges by TANGEDCO within 30 days from the date following the date of submission of invoice by

the Appellant and if the payment was made belatedly, surcharge would be payable by TANGEDCO @ 12% per annum.

3.4 The Appellant generated and supplied power to TANGEDCO as per the terms of the EPA during the period from June, 2011 to May, 2012. The Appellant raised the invoices as per the EPA but TANGEDCO failed to make payment in a prompt manner causing cash flow problem to the Appellant. According to the Appellant, they could not procure sufficient quantity of fuel due to cash crunch faced by them due to persistent default in payment by TANGEDCO.

3.5 The Appellant wrote to TANGEDCO on 7.11.2011 calling upon to make payment towards the power supplied from June 2011 to October 2011 and also requested to waive application of compensation clause

for default in supply/off take or allow the Appellant to make up the shortfall from excess supply from its other group companies for the month of October 2011 as quality of fuel had been affected by heavy rain at the plant site. However, there was no response from TANGEDCO.

3.6 The Appellant was unable to supply the contracted quantum of energy for the month of November 2011. Thereafter, TANGEDCO by letter dated 13.12.2011 raised a claim of Rs. 28,80,000/- towards compensation charges for non-scheduling of 80% contracted energy for the month of November 2011.

3.7 The Appellant sent several letters to TANGEDCO to submit that the failure to adhere to the contracted quantity of energy was due to failure on the part of

TANGEDCO to make payment of bills and requesting them to waive the application of compensation clause of the EPA.

3.8 Despite above letters, TANGEDCO raised demand notices on monthly basis towards compensation for short-fall in supply from November 2011 to May 2012. Thus, the Appellant had paid a compensation of Rs. 2,22,26,000/- during the above period and the compensation amount was deducted from the invoice raised by the Appellant towards supply of energy.

3.9 TANGEDCO also did not pay interest for delay in payment as per the terms of the EPA.

3.10 The Appellant thereafter filed a petition before the State Commission praying for declaration of the compensation clause of EPA as inapplicable as the shortfall in supply was caused due to non-payment of

full invoice values by TANGEDCO and direct the TANGEDCO to refund the amount deducted from the invoice for supply of energy and pay interest for delay in payments.

3.11 The State Commission by its order dated 4.6.2013 rejected the plea of the Appellant for refund of compensation amount but directed TANGEDCO to pay the interest for delay in payment @ 12% per annum as per the EPA. Aggrieved by rejection of their plea for refund of compensation amount, this Appeal has been filed.

4. The main issue raised by the Appellant are as under:

i) The default of the Appellant in supply of power in accordance with the contracted quantity was entirely due to the fault of TANGEDCO in failing to

make timely payment against invoices raised. The payments were delayed by five months or more. While the payment was made by TANGEDCO belatedly after deducting the compensation amount, the interest for delay in payment as per the terms of the EPA was not made.

ii) The EPA involves reciprocal promises. The Appellant is obligated to supply power and at the same time it was contingent upon TANGEDCO to make timely payments.

iii) The compensation clause of EPA is in effect a penalty clause and is a clause *in terrorem*. It is well settled principle of contract law that the person seeking to impose a penalty for non-compliance of a contractual term or breach of contractual term by the other party has to prove actual loss suffered due to

such breach. TANGEDCO has not suffered any loss due to shortfall in supply in as much as it is not facing any legal action from any consumer or any other entity for shortfall in supply by the Appellant.

iv) The implementation of penalty clause would arise only when the party seeking to comply with the same is in full compliance of the terms of the agreement. In this case, TANGEDCO had delayed in making payments against invoice by as much as 5 months and also failed to pay interest on delayed payments. Therefore, TANGEDCO cannot seek to implement the compensation clause.

v) State of Tamil Nadu by GO Ms. No. 10 (Energy) dated 27.02.2009 had placed a ban on export of power from the generating stations in Tamil Nadu to other States. Thus, TANGEDCO had enjoyed a

monopolistic position and there was no option available to the Appellant except to sell its power to TANGEDCO despite non-payment of bills. Thus, it was unreasonable on the part of TANGEDCO to levy compensation for short supply without complying with its reciprocal promise of payment and surcharge as per the terms of the EPA.

5. On the above subject we have heard Shri Rahul Balaji, learned counsel for the Appellant and Shri S. Vallinayagam, learned counsel for TANGEDCO.

6. On the basis of the rival contentions of the parties the following questions would arise for our consideration:

i) Whether the State Commission has erred in deciding that the Appellant was liable to pay compensation for short supply of the contracted

energy to TANGEDCO ignoring the admitted fact that the payments against the invoice for supply were delayed by TANGEDCO resulting in financial crunch causing problem in procurement of requisite quantum of fuel?

ii) Whether the compensation for short supply in contracted energy should have been allowed by the State Commission despite the failure of reciprocal promise made in Energy Purchase Agreement regarding timely payment of dues and payment of interest for delay in payment by TANGEDCO?

iii) Whether compensation for short supply in contracted energy by the Appellant should not have been allowed in view of problem it was facing in procurement of fuel due to cash crunch caused by

non-payment of dues and due to fuel quality problem caused by heavy rains?

7. All three issues are interconnected and, therefore, being considered together.

8. Let us examine the Energy Purchase Agreement dated 14.10.2011 entered into between the Appellant and TANGEDCO. The relevant clause for compensation for default in supply/off-take is as under:

“8. Compensation for default in supply/off-take:

Without prejudice to the provision of Force Majeure the holder has to apply for open access for the quantum as per this agreement and if the company fails to schedule 80% of contracted energy in a month then the company shall pay compensation to TANGEDCO at the rate of Rs. 1.00 per kwh to the extent of shortfall of 80% of monthly contracted energy.

Similarly, if TANGEDCO failed to off take 80% of contracted energy in a month then the compensation shall be paid by TANGEDCO at the rate of Rs. 1.00 per kWh to the company for the shortfall which falls short of 80% of monthly contracted energy.”

Thus, Clause 8 of EPA provides for compensation @ Rs. 1.00 per kWh by the Appellant to TANGEDCO in case of failure to schedule 80% of contracted energy in a month on the shortfall in energy supply with respect to 80% of monthly contracted energy. Similarly, in case of TANGEDCO's failure to off take 80% of contracted energy in a month, TANGEDCO has to compensate the Appellant to the extent of short fall in off-take of energy with respect to 80% of the contracted energy.

9. Clause 10 of the EPA relating to Billing and Payment provides for as under:

“10. Billing and Payment:

(a) The energy bills for sale of power shall be claimed by the generation plant Holder for the Billing Period based on the meter reading and presented to the Superintending Engineer of Electricity Distribution Circle concerned where the generation plant is located.

.....

(d) The billing will be made on a monthly basis.

(e) The TANGEDCO agrees to make payment within 30 days from the date following the date of submission of invoice by the Company.

(f) If the payment is made belatedly, the surcharge payable by TANGEDCO will be at 12% per annum.”

Thus, Clause 10 provides for payment to be made by TANGEDCO within 30 days from the date following the date of submission of invoice for monthly energy

supplied by the generating company. However, if there is a delay in payment, TANGEDCO will pay surcharge @ 12% per annum.

10. Force Majeure is described in Clause 12 as under:

“12. Force Majeure :

No party shall be liable for any claim of any damage whatsoever arising out of failure to carry out the terms of the agreement due to the reasons governed by Force Majeure conditions as given below:

- (i) Act of war, invasion, armed conflict, blockade, revolution, riot, insurrection or civil commotion, terrorism, sabotage, fire explosion or criminal damage.*

- (ii) Act of God, including lightning, cyclone, typhoon, flood, tidal waves, earthquake, land slide, epidemic or similar cataclysmic even.*

(iii) *Non-availability of transmission capacity by TNEB SLDC.*

(iv) *Change in Law.”*

According to clause 12, while flood is covered under force majeure, torrential rains as claimed by the Appellant during October 2011 is not a force majeure.

11. The validity period of the EPA is one year from 1.6.2011. Clause 13(b) provides that in case of breach or violation of any of the clauses in the agreement by any party, the other party shall be at liberty to cancel the agreement by giving 30 days notice.

12. Let us now examine the findings of the State Commission in the impugned order dated 4.6.2013. The findings of the State Commission are summarized

as under:

(i) Clause 8 of the Agreement regarding compensation for default and clause 10 regarding payment are two independent provisions and have to be followed as such.

(ii) There is no need to prove the loss suffered by TANGEDCO due to short supply of energy by the Appellant for invoking specific provision for compensation provided in the agreement.

(iii) The issue of reciprocal promise namely, TANGEDCO did not make the payment in time due to which the Appellant generating company could not procure fuel and consequently could not supply the contracted energy is not relevant in this case, when there are specific and separate provisions for compensation and payment of dues.

(iv) TANGEDCO has been undergoing financial problem and defaulted in payment to many generators. If there is delay in payment there can be only compensation by payment of surcharge as per the agreement entered into between the parties.

(v) Regarding proposal of the Appellant for supply of power from its group companies, the same should have been mutually agreed between the parties for amendment of the agreement. However, this argument is in contradiction of the main issue viz. non-payment of dues by TANGEDCO has resulted in the Appellant not procuring fuel and not supplying power.

(vi) The State Commission has concluded that:

“(a) Specific provision exists in the Power Purchase Agreement entered into between the parties for payment of compensation by the generator, the petitioner or the purchaser,

namely, respondent TANGEDCO for inadequate supply of power or inadequate receipt of power, as the case may be. The rate is the same for both non-supply or non-receipt and the rate is Rs. 1.00 per kwh. Therefore, this provision will operate independently.

(b) The belated payment warrants payment of surcharge at 12% as per Power Purchase Agreement which the respondent TANGEDCO shall pay to the petitioner for the period of delay involved”.

13. Thus, the State Commission has concluded that clause 8 of the agreement regarding compensation will operate independently and TANGEDCO is liable to pay surcharge @ 12% for the period of delay as per the agreement.

14. The Appellant's position is that the compensation would not be leviable for the reason that:

(a) There was inordinate and substantial delay in settling payments by TANGEDCO running to more

than 5 months for each of the invoices which made it impossible for the Appellant to procure fuel;

(b) The fuel that was stocked at the Appellant's plant could not be used during the months of October-December 2011 due to torrential rains which affected such stock and the Appellant was not in a position to procure additional fuel as its funds stood exhausted by then, and

(c) TANGEDCO failed to accept mitigation offered by the Appellant to make good the shortfall in supply of power from excess supply from other power plants of Appellant's group companies. The Appellant promptly notified TANGEDCO of the above in October 2011 as soon as the situation arose and continued to do so at regular monthly intervals but there was no positive response forthcoming from TANGEDCO. Legally it was impossible to supply power outside the State due to

direction of the State Government under Section 11(1) of the Electricity Act, 2003. The delay by the monopoly purchaser of the Appellant's generation had a deeply prejudicial effect on the Appellant's capacity to purchase fuel, carry out generation activities and continue to supply power that too with no indication of when the payments would come in.

15. It is pointed out by the Appellant that they procured fuel from June 2011 to October 2011 utilizing own resources and by arranging loans from the banks. However, by October the financial situation had become precarious.

16. According to TANGEDCO, the payment was delayed as the EPA was entered only on 14.10.2011 and that they were facing severe financial crisis which was known to the Appellant. The Appellant was not

compelled to enter into EPA and had an option to sell power to anyone in the State by obtaining open access. Further, Clause 8 and 10 of the Power Purchase Agreement are independent clauses and the Appellant had failed to establish that the application of Clause 8 was subject to fulfillment of obligation under Clause 10. Further, the Appellant had the option to terminate the EPA for breach/violation of payment clause by TANGEDCO which the Appellant did not exercise. The claim of the Appellant that requisite quantum of power could not be supplied due to torrential rain was covered under force majeure was also not correct as torrential rain would not amount to event of force majeure as per the EPA.

17. Let us examine the terms and conditions of the bid documents floated by TANGEDCO inviting bids for procurement of short-term power in which the

Appellant participated and was awarded the contract for supply of power.

18. Clause 20 of the bid document stipulates that the payment will be made within 7 working days from the date of receipt of invoice and if payment is made within 7 days, TANGEDCO will be entitled to a rebate of 2% on the bill amount. However, TANGEDCO will avail 1% rebate on billed amount if payment is made within 30 days. If the payment is outstanding beyond 30 days, the surcharge will be applicable on daily basis at SBI PLR rate or rate mutually agreed between the parties. Clause 22 of the bid stipulates the compensation by the generating company for shortfall in supply below the stipulated quantum and similarly for shortfall in off-take of power below the stipulated quantum the generating company has to be compensated by TANGEDCO.

19. Thus, the bidders were assured of payment within 30 days and if any payment is outstanding beyond 30 days of receipt of invoice then surcharge as applicable on daily basis would also be paid.

20. In the EPA dated 14.10.2011 the billing and payment Clause has been modified but provision for payment within 30 days and delayed payment surcharge have been kept under clause 10. Similarly clause 8 was included for compensation for default in contracted supply/off-take.

21. It is seen that the Appellant had the obligation to schedule 80% of the contracted energy in a month and in case of failure to do so it had to pay compensation to TANGEDCO @ Re. 1 per unit to the extent of shortfall. However, if TANGEDCO failed to off take 80% of the contracted energy then it had pay compensation to the Appellant @ Re. 1 per unit for the

shortfall in off-take. Thus, the compensation clause is a mirror image for both the conditions viz. failure to supply and failure to off-take.

22. It is also seen that the EPA also had placed obligation on TANGEDCO to make payment against the invoice raised by the Appellant and in case of delay, the invoice has to be paid along with surcharge calculated @ 12% per annum.

23. Admittedly the payments by TANGEDCO were delayed as under:

<u>Supplies made during</u>	<u>Payment made</u>	<u>Delay beyond scheduled date of payment(30 days)</u>
June 2011	25.10.2011	3 months
July 2011	18.12.2011	4 months
August 2011	24.02.2012	5 months
Sept., 2011	31.03.2012	5 months
October 2011	31.03.2012	4 months
Nov. 2011 to March 2012	02.08.2012*	4 to 9 months
April 2012	18.08.2012	3 months
May 2012	5.10.2012	3 months

* Lump sum payment after deducting compensation.

24. It is seen that there was no default in supply by the Appellant from June to Sept., 2011 i.e. for four months. No payment was released by TANGEDCO till the end of receiving 4 months supply. The first payment against supplies for June 2011 was made only on 25.10.2011. However, surcharge for delayed payment was not paid. For the supplies made during the period November, 2011 to March, 2012 for which the compensation for short supply has been deducted by TANGEDCO, no payment was made during the period of contract and lump sum payment was made only on 2.8.2012, well after the EPA expired, after deduction of compensation for short supply. Again the surcharge for delay in payment was not made. As pointed out by the Appellant, the fuel cost comprises about 60% of the total tariff. Thus, for four months the Appellant was not only meeting the fixed cost of the power plant but also the fuel cost for maintaining the power supplies to TANGEDCO.

25. We also find that since November 2011 the Appellant has been sending letters every month to TANGEDCO bringing to their notice reduction in fuel supply due to non payment. The first letter dated 7.11.2011 in this regard is reproduced below:

“Ref: RRREL/TNEB/F. sale 2011-12/2011-14

Dated: 7.11.2011

To

*The Chairman cum Managing Director,
TAMIL NADU GENERATION AND DISTIRBUTION CORPORATION LTD.
144, Anna Salai,
Chennai-600 002.*

Dear Sir,

Sub: Elecy- M/s. Raghu Rama Renewable Energy Limited, Pamboor Village in Paramakudi taluk, Ramnad District (RRREL) – Supply of power to TANGEDCO from private power plants in Tamilnadu for the period from June 2011 to May 2012- Reg.

*Ref: 1. Hon’ble TNERC order dated 11.7.2011 & 4.10.2011 on PPAP No. 5 of 2011
2. Agreement executed with SE/EDC/RAMNAD dated 14.10.2011
3. Letter from our holding company to TANGEDCO vide IBPIL/TNEB/F. sale 2011-12/2011-1 dated 28.10.2011
4. Our Lr. No. RRREL/TNEB/F.sale 2011-12/2011-13 dt.4.11.2011*

Based on the TNERC order under reference no. 1 cited and the Energy Purchase Agreement ececuted with SE/EDC/Ramnad vide reference no. 2 cited, we are supplying RTC power to TANGEDCO from 1.6.2011. Due to the non payment of energy bills by TANGEDCO for the period from June 2011 to

October 2011 resulting in reduction in fuel supply due to non-payment of fuel bills, we have requested vide our letter under reference no. 4 cited to either (i) waiver of levy of compensation till such time the pending payments are regularized in full as per the contract or (ii) compensation be levied considering our group of companies as a single unit as requested by our holding company vide reference no. 4 cited.

Apart from the reduction in supply of fuel, due to the heavy rains in the Plant area during October 2011, the generation from the plant has been affected very much owing to the high moisture content in the available stock of fuel by which we were not able to supply the contracted quantum during the month of October 2011.

This being beyond the control of RRREL under the Force Majeure conditions, we request that levy of compensation as per clause 8 of the Energy Supply Agreement be waived for the month of October 2011 or else the short fall may be adjusted with the excess generation from other plants in our Ind-Barath group of companies considering all the four plants as a single unit as requested by our holding company, M/s. Ind-Barath Power Infra Limited vide letter under reference no. 3 cited.

We request that the SE/EDC concerned may be instructed suitably in this regard and levy of compensation may be waived or adjusted with the excess generation from other plants in our group of companies.

Thanking you,

Yours faithfully”,

26. The Appellant vide the above letter pointed out that non-payment of energy bills by TANGEDCO from June

2011 to October 2011 has resulted in reduction in fuel supply due to non payment of fuel bills and made a request to waive the levy of compensation till such time the pending payments are liquidated in full as per the contract or the shortfall be adjusted with the excess generation from other plants of their group companies. The Appellant also informed that due to heavy rains in the plant area during October 2011 the generation from plant has been affected owing to high moisture content in the available fuel stock and they were not able to supply the contracted quantum of energy during October 2011.

27. Similar letters were sent on 30.11.2011, 23.12.2011, 10.1.2012, 30.1.2012, 9.2.2012, 27.2.2012, 03.3.2012, 19.3.2012, 7.4.2012, 10.5.2012, 11.5.2012, 19.5.2012, 5.6.2012, 14.6.2012 and 19.6.2012. However, no reply was given by TANGEDCO regarding

delay in payment or indicating schedule of payment till the end of the contract period on 31.5.2012. However, from December 2012 onwards every month TANGEDCO was sending a communication to the Appellant raising claim for compensation for short supply from the month of November 2011 onwards without giving an indication for liquidation of outstanding dues and timely payment of current bills. TANGEDCO was also adjusting the compensation for short supply whenever the payment was released without making positive adjustments for delayed payment surcharge.

28. As pointed out by the Appellant in the above referred letters, persistent default in payment of dues by TANGEDCO resulted in shortfall in power generation as the Appellant could not procure fuel for sustaining the generation at its power plant. In this case we find that persistent failure to make payment, non-payment

of surcharge but at the same time deducting the compensation for short supply resulted in failure on the part of the Appellant to fulfill its promise to maintain the contracted supply. TANGEDCO did not even respond to the various letters of the Appellant to give at least a schedule for payment of outstanding dues with surcharge and assuring timely payment of current dues. It was also in the interest of TANGEDCO to ensure sustained supplies from the Appellant as per the contract to meet its consumer demand. TANGEDCO should have sat with the Appellant to work out a payment schedule to enable the Appellant to arrange regular fuel supplies of adequate quantum. However, no efforts were made by TANGEDCO in this regard.

29. The explanation given by TANGEDCO in their written submission for delay in payment indicates the casual and monopolistic approach of TANGEDCO.

TANGEDCO have explained that the payments were delayed because the Power Purchase Agreement was entered on 14.10.2011. However, the Appellant was not responsible for the delay in entering into the PPA. TANGEDCO has not held the Appellant responsible for the delay in entering into the Agreement. On the other hand, TANGEDCO was availing regular power supplies from the Appellant without signing the PPA.

30. We find that the State Commission had granted approval for procurement of power to TANGEDCO for the months of June, July, August and September 2011 by order dated 11.7.2011. Thereafter, the approval for the period October to June 2012 u/s 62 and 86(1)(b) of the Electricity Act, 2003 was granted on 4.10.2011. TANGEDCO placed orders for short term supply subsequent to the orders of the State Commission from time to time. Thus, there was no reason for

TANGEDCO for not making payment every month from July 2011 onwards as the State Commission had already approved the procurement of power including the rate on 11.7.2011.

31. The other reason given by TANGEDCO for delay in payment is poor financial condition. This explanation also could not be accepted as TANGEDCO had obligation to make payment within 30 days as per the EPA. Further, the energy supplied by the Appellant was sold by TANGEDCO to its consumers and it made recovery for its consumers for the same. If the Appellant had not supplied the energy to TANGEDCO then to that extent the supply to consumers and consequently the recovery from the consumers would have reduced. The incremental supply by the Appellant has resulted in incremental recovery by TANGEDCO.

Thus, the explanation regarding poor financial condition would also fail.

32. We also find that TANGEDCO made a lump sum payment for energy supplied from November 2011 to March 2012 in 2.8.2012 after deduction of compensation for short supply. However, the surcharge for delay in payment was not released by TANGEDCO. Even after the impugned order dated 4.6.2013 of the State Commission directing TANGEDCO to pay surcharge for delay in payment, the interest charges have not been paid as yet. Thus, the default on the part of TANGEDCO has continued even after passing of the impugned order.

33. We feel that the TANGEDCO by not discharging its obligation under the EPA made the performance of the contract by the Appellant impossible. Numerous letters

from the Appellant to TANGEDCO intimating that continuous default in payment was resulting in problem in procuring fuel, did not elicit any response from TANGEDCO to indicate its position and giving schedule for liquidation of arrears and assurance for making current payments. The Appellant sustained power supplies at contracted level for 4 to 5 months by infusing funds from their own resources and taking working capital loans from banks but could not sustain generation any further. Heavy rain in the plant area also caused further problem in using the fuel stocks. As fresh fuel supplies could not be arranged by the Appellant due to financial crunch caused by the persistent non-payment of dues by TANGEDCO, it resulted in shortfall in generation.

34. According to TANGEDCO, heavy rains is not covered in force majeure conditions as per the EPA and

the Appellant should have maintained adequate stocks to maintain generation. This reasoning is not at all convincing. Admittedly, heavy rain is not a force majeure condition as per the EPA. However, no power plant is expected to maintain a fuel stock of several months. At the most the fuel stock could be maintained for one to one and a half month. If the payments had been made on due date by TANGEDCO, the Appellant could have arranged fresh supplies of fuel to substantiate the fuel stocks and with the help of fresh supplies and constrained supplies from stocks due to heavy rains, the generation could have been maintained.

35. According to TANGEDCO, the Appellant had option to cancel the EPA in the event of breach or violation of payment clause of the agreement by TANGEDCO. We find that Tamil Nadu Government in exercise of power

conferred under Section 11(1) of the Electricity Act, 2003 had directed all the generating units operating in the State to operate and maintain the generating stations to maximum capacity and supply all the electricity to the State grid for supply to either Tamil Nadu Electricity Board or to any other HT consumers within the State vide notification dated 27.2.2009 which was prevalent during the period under dispute. As rightly pointed out by the Appellant in view of the above notification, they could not have supplied power outside the State and had limited choice of supplying either to TANGEDCO or to an HT consumer in the State. Thus, the right of the Appellant generator to supply power according to its choice was curtailed by the State Government's directions u/s 11(1) of the Act. The Appellant accordingly entered into an EPA with TANGEDCO. TANGEDCO having not responded to any

letter of the Appellant regarding payment and not making payment for energy supplies and delayed payment surcharge as per the terms of the EPA could not argue now that the Appellant had a choice to terminate the agreement.

36. In the present case, we feel that persistent failure by TANGEDCO to meet its obligation of payment as per the EPA caused financial hardship for the Appellant to procure adequate quantum of fuel to maintain the contracted supply. TANGEDCO did not even respond to any of the letters sent by the Appellant from November 2011 onwards indicating the financial problem in arranging fuel for sustaining power generation and did not make efforts that some payments are made to enable the Appellant to procure adequate quantum of fuel and meet the operating expenses of the power plant. According to the EPA, the Appellant had to supply power to TANGEDCO and in return TANGEDCO was expected to

make regular payments against the monthly invoices raised by the Appellant. The thermal power station can be expected to arrange fuel supplies by raising working capital from banks or from its own resources for 2 months but if no payment is released persistently for 4 to 5 months, the generator cannot be expected to meet its obligation to contracted power supply. In this case, the Appellant was prevented to perform its obligation of supply under the EPA by TANGEDCO by failing to make any payment even after receiving supplies for 4 months. The payment for the months of November 2011 to March 2012 was made with a delay of 4 to 9 months.

37. Hon'ble Supreme Court in (2001) 5 SCC 629 – Sikkim Subba Associates vs. State of Sikkim held as under:

“The agreement between parties in this case is such that its fulfilment depends upon the mutual

performance of reciprocal promises constituting the consideration for one another and the reciprocity envisaged and engrafted is such that one party who fails to perform his own reciprocal promise cannot assert a claim for performance of the other party and go to the extent of claiming even damages for non-performance by the other party. He who seeks equity must do equity and when the condonation or acceptance of belated performance was conditional upon the future good conduct and adherence to the promises of the defaulter, the so-called waiver cannot be considered to be forever and complete in itself so as to deprive the State, in this case, of its power to legitimately repudiate and refuse to perform its part on the admitted fact that the default of the appellants continued till even the passing of the Award in this case. So far as the defaults and consequent entitlement or right of the State to have had the lotteries either foreclosed or stopped further, the State in order to safeguard its own stakes and reputation has continued the operation of lotteries even undergoing the miseries arising out of the persistent defaults of the appellants. The same cannot be availed of by the appellants or used as a ground by the

Arbitrator to claim any immunity permanently for being pardoned, condoned and waived of their subsequent recurring and persistent defaults so as to deny or denude forever the power of the State as other party to the contract to put an end to the agreement and thereby relieve themselves of the misfortunes they were made to suffer due to such defaults. Once the appellants failed to deposit the prize money in advance within the stipulated time, the time being essence since the prizes announced after the draw have to be paid from out of only the prize money deposited, the State was well within its rights to repudiate not only due to continuing wrongs or defaults but taking into account the past conduct and violations also despite the fact that those draws have been completed by declaration or disbursement of prize amounts by the State from out of its own funds. The conclusion to the contrary that the State has committed breach of the contract is nothing but sheer perversity and contradiction in terms.”

38. The above findings will be applicable in the present case too where TANGEDCO prevented the Appellant to fulfill its commitment to maintain the scheduled supply

of power by not meeting its obligation under the EPA by not making any payment for several months due to which the Appellant could not arrange fuel for sustained operation of the power plant. TANGEDCO did not care to respond to the repeated letters by the Appellant in this regard and their offer to make up supply from the alternate source of generating stations of their group companies. Whenever the payment was made by TANGEDCO at its own whims and fancy, the surcharge for delayed payment as per the EPA was not made. Even after the impugned order dated 4.6.2013 directing the Appellant to pay delayed payment surcharge, the same has not been paid as yet. TANGEDCO cannot claim compensation for short supply when TANGEDCO itself was responsible for creating circumstances for the Appellant for not being able to make the contracted supply.

39. In (2004) 3 SCC 381 – Jai Durga Finvest (P) Ltd. vs. State of Haryana & Others the question raised by the Hon’ble Supreme Court was as to whether clause 18A of the agreement remained enforceable despite the fact that appellant allegedly could not extract any sand against the mining contract granted by the State by reasons of omission and commission on the part of the respondents concerned. The Appellant who was granted the mining contract raised a plea that the contract became impossible to be performed as the land owners of the area in question did not receive compensation and despite request, the third respondent did not enforce clause 27 of the agreement. Hon’ble Supreme Court held as under:

“The High Court, as noticed hereinbefore, has merely proceeded on the basis that the appellant had entered into the contract with his eyes wide open; but, the same would not, in our opinion, mean that they were bound to pay the contract amount, get its security

amount forfeited, as also pay interest at the rate of 24 per cent, although it could not, by reason of acts of omission and commission on the part of the respondents, carry out the mining operation as per the terms of the agreement.

12. Whether in such a situation the doctrine of frustration will be invoked or not should have been considered by the High Court.

13. For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside accordingly.”

40. In the present case also TANGEDCO did not comply with its obligation to make payment even after receiving contracted power supplies for four months from June 2011 to September 2011 and thereafter also delaying payment by 4 to 9 months despite Appellant's repeated requests, which had direct bearing on the performance of Appellant and the Appellant could not meet its obligation for supplying full contracted

quantum of power in the subsequent months from November 2011 onwards. TANGEDCO which had failed to perform into own reciprocal promise cannot claim for performance of the Appellant and claim damages for non-performance of the Appellant caused due to non receipt of payment.

41. **Summary of our findings:**

Appellant in the EPA had promised to supply the contracted power to TANGEDCO which is in turn had promised to make payment for the same by the due date which was agreed to be within 30 days of receipt of invoice. Appellant despite non-payment of any money kept its promise and supplied the contracted power for four months from June to September 2011 by arranging own finances or taking loans. Several requests by the Appellant for payment elaborating financial difficulties in arranging fuel did not elicit

even a reply from TANGEDCO. When the payment was made belatedly by TANGEDCO at its own whims and fancy no surcharge for delayed payment was made. Payment for supplies made during the period November 2011 to March 2012 was made on 2.8.2012 well after the conclusion of the EPA, in lump sum after a delay of 4 to 9 months, after deducing the penalty for short supply without paying delayed payment surcharge. Even after the impugned order dated 4.6.2013 by the State Commission directing payment of interest for the delayed payment as per the EPA, the same has not been paid so far by TANGEDCO. The Appellant was also constrained in seeking termination of the contract as directions of the State Government u/s 11(1) to the generators in the State to supply to the State Grid were in vogue. We feel that in the circumstances of the case, TANGEDCO is not entitled to claim compensation for short supply of power when

it had failed to perform its own reciprocal promise and creating circumstances leading to non-fulfillment of obligation of maintaining contracted supply on the part of the Appellant.

42. In view of above, the Appeal is allowed and the impugned order is set aside to the extent of compensation for short supply of power. TANGEDCO is directed to refund the compensation amount deducted from the bills of the Appellant within 30 days of the receipt of this judgment. Interest will be payable to the Appellant @ 12% for any delay in refunding the amount after 30 days of the receipt of a copy of this judgment. No order as to costs.

43. Pronounced in the open court on this
11th July, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

REPORTABLE/NON-REPORTABLE

Vs