

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

**Appeal no. 62 of 2013 and
Appeal no. 47 of 2013**

Dated : 30th June, 2014

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

Appeal no. 62 of 2013

In the matter of:

**PTC India Limited
2nd Floor, NBCC Tower
15, Bhikaji Cama Place
New Delhi**

....Appellant(s)

Versus

**1. Gujarat Electricity Regulatory
Commission
1st Floor, Neptune Tower
Opp. Nehru Bridge, Ashram Road
Ahmedabad – 380 009
Gujarat**

...Respondent(s)

**2. Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidhyut Bhavan
Race Course
Vadodra – 390 007
Gujarat**

Counsel for the Appellant(s) : Mr. Amit Kapur
Mr. Rajiv Bhardwaj
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Mr. Varun Pathak
Mr. Ravi Krishna
Mr. S.S. Sharma
Mr. Maheshwari

Counsel for the Respondent(s): Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Appeal no. 47 of 2013

**Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidhyut Bhavan
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**1. PTC India Limited
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for payment of compensation to Gujarat Urja Vikas Nigam Ltd. (“Gujarat Urja”).

3. Appeal no. 47 of 2013 filed by Gujarat Urja is against non-grant of interest for non-payment of compensation for breach of agreement by PTC to Gujarat Urja within the stipulated time period.
4. Since both the Appeals are against the same impugned order, this common judgment is being rendered. The facts of the case are as under:
 - i) Gujarat Urja is the holding company of the State power utilities and has been assigned the function of procurement of power on behalf of the Distribution licensees after reorganization of the Electricity Board in the State of Gujarat. PTC is a trading licensee.

- ii) On 23.11.2009 Gujarat Urja invited offers for purchase of 200 MW power on Round the Clock (RTC) basis for the period December, 2009 to February 2010 indicating the terms and conditions which *inter alia*, included “Take or Pay” liability and compensation for failure to off-take 80% of the contracted quantum in a month @ Rs. 2/- per kWh. Similarly, compensation will be paid by Gujarat Urja for failure to supply 80% of the contracted quantum in a month @ Rs. 2/- per kWh.
- iii) In response to the above intimation, PTC on 25.11.2009 submitted its offer to purchase 200 MW of power on firm basis from 16.12.2009 to 28.2.2010. However, PTC in its offer proposed that the compensation for default in off take/supply shall be applicable only if power is sold and open access is granted by the nodal Regional Load Dispatch Centre

(“RLDC”) . PTC also proposed rate of compensation by PTC as Rs. 1.96 per kWh instead of Rs. 2.00 per kWh proposed by Gujarat Urja.

- iv) Gujarat Urja vide its letter dated 27.11.2009 confirmed its willingness to supply electricity to PTC on firm basis with “Take or Pay” liability at the Gujarat periphery for the period from 16.12.2009 to 28.2.2010 at the indicative tariff. Gujarat Urja reduced the rate of compensation payable by PTC at Rs. 1.96 per kWh as proposed by PTC but retained the other terms for “Take or Pay” liability as per its earlier offer. This offer was acknowledged and accepted by PTC vide communication dated 30.11.2009.

- v) However, PTC failed to off-take the contracted power fully from Gujarat Urja for re-sale during the period of contract as it was unable to find suitable buyer (s) for

the contracted power. Power supply to the extent of 80 to 100 MW could only be off-taken by PTC during the month of Feb., 2010.

- vi) Gujarat Urja raised a claim for compensation against PTC. When PTC did not pay the compensation, Gujarat Urja sought to enforce the said claim for damages before the State Commission. PTC submitted before the State Commission that Gujarat Urja was not a trading licensee according to the Electricity Act, 2003 and as such it could not invoke the jurisdiction of the State Commission for adjudication of dispute u/s 86(1)(f) of the Act and even if it is assumed that Gujarat Urja is a licensee, the State Commission could not adjudicate the dispute between two licensees u/s 86(1)(f) of the Act.

vii) On 30.1.2012 the State Commission dismissed the preliminary objection of PTC on the question of jurisdiction of the State Commission. PTC filed an Appeal being no.31 of 2012 against the order dated 30.1.2012 on the jurisdictional issue. The Tribunal by judgment dated 1.10.2012 dismissed Appeal no.31 of 2012 filed by PTC upholding the order of the State Commission on jurisdiction.

viii) On 5.1.2013 the State Commission passed the impugned order by allowing the petition filed by Gujarat Urja and held that PTC has breached the agreement and is liable to pay compensation for not off taking 80% of the contracted quantum of electricity for the period from 16.12.2009 to 28.2.2010 in terms of the Agreement between the parties. However, the State Commission has not allowed any interest/delayed

- payment charge for the delay in payment of compensation by PTC to Gujarat Urja as prayed for by Gujarat Urja.
- ix) PTC in Appeal no. 62 of 2013 has challenged the finding regarding breach of agreement and consequential grant of compensation to Gujarat Urja for PTC's failure to off-take power supply as per the agreement. Gujarat Urja is aggrieved by non-grant of interest/delayed payment charge and has filed the Appeal no. 47 of 2013 to claim interest for delay in payment of compensation.
5. PTC has raised following issues in Appeal no. 62 of 2013.
- i) The contract in question is not enforceable in law in terms of Section 2, 10 and 23 of the Indian Contract

Act, 1872. Gujarat Urja is a trading licensee which is procuring power in its own name and not as an agent of Distribution Licensees for onward supply to the Distribution Licensees. Gujarat Urja is a holding company which owns and controls its wholly owned subsidiary GETCO, the transmission licensee. As such, in light of the judgment of the Tribunal in Appeal no. 182 of 2008 in the matter of Maharashtra State Electricity Power Trading Corporation Pvt. Ltd. Vs. CERC, the transaction undertaken by Gujarat Urja are per-se illegal and contravene Regulation 22 (b) of the State Commission's Licensing of Electricity Trading Regulations of 2005 which prohibits trading licensee to either directly or indirectly or through a subsidiary, engage in the business of transmission of electricity. This is also in contravention to proviso to Section 39(1) and Section 41 of the Electricity Act, 2003. The object of the Agreement is illegal within the meaning of

- Section 23 of the Indian Contracts Act and void agreement cannot be enforced as held by Hon'ble Supreme Court in Bihari Lal Jaiswal Vs. Commissioner of Income Tax (1996)1SCC 443 and Waman Shrinivas Kini Vs. Rati Lal Bhagwandas AIR 1959 SC 689.
- ii) In support of its case, PTC, the Appellant relied upon the settled positions of law that when a statute provides for a certain transaction or activity to be undertaken in a particular manner, then that activity can be done only in that manner or not in any other manner and if a transaction is violative of the scheme of the governing Act, then anything done thereafter cannot validate that transaction.
- iii) The bidding process evolved by Gujarat Urja was in variance from the standard bidding document as per the Competitive Bidding guidelines notified by

Government of India under Section 63 of the Act. The bidding was restricted to only traders. Unlike generating company or distribution licensee with surplus capacity, a trader neither generates or controls availability of generating stations. According to the Agreement, compensation shall be applicable only if the power is sold and open access is granted by the nodal agency viz. nodal Regional Load Dispatch Centre, for the said transaction. However, no sale of power took place and, therefore, no compensation is payable. The State Commission has misconstrued the contractual agreement between PTC and Gujarat Urja.

- iv) PTC in all its communications to Gujarat Urja had indicated that compensation was not payable by it, since there was no sale of power and hence off-take was an impossibility. The liability of compensation comes on the trader only when there is great demand

of power in the market and the trader has not made any sincere efforts to sell the contracted power. Under the current requirement, trader is only an intermediary with a fixed commission of 4 to 7 paise per unit of sale and the liability of compensation or performance by supply or buy is always on buyer and seller and never on the trader.

- v) Gujarat Urja has failed to establish that there was any loss suffered by it due to breach of alleged agreement as it had been trading its surplus power all along.

- vi) One of the cornerstones of the Indian law in this field is that a party is entitled to compensation in case of default or breach or breach of terms of the contract by the other party and such compensation must be quantified in terms of actual loss suffered by the party claiming the damages and should be restitutive in

- nature so as to restore the party to a financial position when such default had not occurred. It does not envisage any windfall gain or profit arising out of such a situation. The claim of Gujarat Urja appears to be driven to profiteer.
- vii) “Take or Pay” clause in the contract is to deter an ultimate beneficiary from modulating the off-take under the committed contract. It is meant to protect the commercial interest of seller and not an instrument for profiteering or a tool to foist disproportionate penalty on the trader who has no incentive to renege its obligation as its margin is regulated.
- viii) Risk and return are two sides of the same coin. Thus, return cannot be regulated. The Return cannot be capped wherever the risk remains open ended exposing a trader to exponential penal damages.

- ix) Gujarat Urja seeks to saddle a liability on PTC which is 30 times the PTC's gross margin.

- x) Section 74 of the Contract Act is attracted in the present case. Section 74 only stipulates that reasonable damages shall be payable by the parties. Section 74 merely dispenses with proof of "actual loss or damages", it does not justify the award of compensation when in consequence of the breach no legal injury has been resulted. Learned Counsel for the PTC has relied on AIR 1963 SC 1405 in the matter of Fateh Chand Vs Balkishan Dass to press this point.

- xi) The Agreement is silent on the aspect of interest to be paid on the alleged compensation. Section 3(2) of the Interest Act, 1978 confers discretionary power upon the State Commission to either allow or disallow the

interest/delayed payment charges. The State Commission in exercise of its discretionary power has chosen not to award any interest/delayed payment charges on the alleged compensation charges.

6. Gujarat Urja in reply has made following submissions:
 - i) PTC had accepted the condition of “Take or Pay” liability for purchase of electricity laid down by Gujarat Urja in letter dated 27.11.2009 without any reservation or conditions. Thus, by the correspondence dated 27.11.2009 which was unconditionally and unequivocally accepted by PTC on 30.11.2009, the contract between the parties came into existence.
 - ii) Initially PTC had sought waiver of compensation to be paid to Gujarat Urja citing difficulties in onward sale of electricity but later on they starting raising force

- majeure conditions, market issues, etc., to avoid payment of compensation.
- iii) The State Commission has correctly decided that PTC is liable to pay liquidated damages for the breach of the contract between the parties and has directed PTC to pay the amount of Rs. 41,70,12,000/-.
- iv) PTC cannot challenge the status of Gujarat Urja as trading licensee on the ground that a subsidiary of Gujarat Urja is a transmission licensee. Even if it is assumed that there is a case on merit on this ground, the proceedings that are possible in this regard is for maintenance of transmission licence and not trading licence. Prohibition under Section 39 or 40 of the Electricity Act, 2003 is for a transmission licensee to undertake trading in electricity. The action that can be taken in this regard to the grant of transmission

- licensee or taking action against the transmission licensee in appropriate proceedings and not challenge to competence to enter into trading transaction by Gujarat Urja.
- v) The issue of competence of Gujarat Urja raised by PTC is peculiar in the sense that PTC has been entering into contract with State owned trading licensees such as Gujarat Urja and has been taking advantage of the transactions by claiming trading margin. If the contract is defaulted by opposite party PTC will claim liquidated damages but when it comes to PTC's own default it will raise the competence of other party to undertake trading.
- vi) The status of Gujarat Urja was raised by PTC in earlier proceeding being Appeal no. 31 of 2012 while purporting to challenge the jurisdiction of the State

Commission which was rejected by the Tribunal in its judgment dated 01.10.2012. Hence, it is not open to PTC to again raise the issue of status of Gujarat Urja.

vii) PTC's contention that there was no concluded contract is misconceived when all along it has duly acknowledged and has accepted the Agreement. The Agreement was acted upon by the parties and PTC undertook purchase of electricity partly during the period of contract. PTC also sought waiver of compensation payable. It is now not open for the PTC to take the stand that there was no Agreement between the parties. The present contention of PTC is a clear afterthought and only to avoid obligation for compensating Gujarat Urja for breach of Agreement.

viii) A similar contract was acted upon by the parties in the month of March, 2010 when the same compensation

clause was invoked by PTC which was honoured by Gujarat Urja.

- ix) The very concept of liquidated damages under Section 74 of the Indian Contract Act, 1872 is for the specific purpose that the parties to the contract agreement provide a genuine pre-estimate of the damage in case of breach of contract without having the necessity to prove the actual damage caused. It is clear that Gujarat Urja had the requisite surplus capacity during the relevant period of the contract for delivering the contracted capacity and Gujarat Urja has suffered legal injury on account of breach in contract by PTC. There was surplus quantum of electricity which could be sold by Gujarat Urja to PTC during the period from 16.12.2009 to 28.2.2010 for which liquidated damages are payable. The very purpose of liquidity damages is

to dispense with the calculation and proof of actual damages.

- x) The contention of mitigation of losses is misconceived. The damages in the present case are in the form of liquidated damages under Section 74 and are not to be assessed and quantified in terms of actual loss suffered. In the circumstances, the question of assessment of damages by applying the principles of mitigation does not apply.
- xi) Gujarat Urja is entitled to interest @ 15% per annum in terms of the agreement between the parties. The compensation under the clause of "Take or Pay" liability was payable by PTC immediately upon the invoices being raised by GUVNL and for the delay in the payment, PTC is liable to pay the interest @ 15% as provided for in the agreement. As the agreement

already has a provision for payment of interest for delay in payment, there is no justification in the State Commission denying the same.

xiii) The interest was payable not only in terms of the Agreement but also on the principles of restitution and equity.

7. We have heard Shri Amit Kapur, Learned Counsel for PTC and Shri M.G. Ramachandran, Learned Counsel for Gujarat Urja on the above issues.

8. On the basis of the submissions made by the parties before us, the following issues would arise for our consideration.

i) Was there a valid and concluded agreement between PTC and Gujarat Urja for purchase/sale of

- power and whether the agreement is enforceable under the law?**
- ii) Whether PTC has breached the contract by not off-taking the contracted power for which it is liable to pay compensation to Gujarat Urja as per the terms of the agreement?**
- iii) Whether the claim has to be restricted in view of it being disproportionate to the margin available to PTC?**
- iv) Whether Gujarat Urja has to establish loss suffered by it due to breach of contract by PTC for not off-taking the contracted power to claim compensation?**

v) Whether Gujarat Urja is entitled to claim interest for delay in payment of compensation for breach of agreement by PTC?

9. Let us take up the first issue regarding validity of the Agreement.

10. Shri Amit Kapur, learned counsel for PTC has challenged the enforceability of the contract as per law on account of following:

“Gujarat Urja as holding company of the distribution licensee also owns GETCO, the transmission licensee. Gujarat Urja being a trading licensee cannot simultaneously undertake the business of transmission as per Section 39 and 41 of the Electricity Act and Licensing Regulations for trading notified by the State Commission”.

11. We find that PTC before the State Commission had contended that there was no concluded agreement between the parties on the following grounds:

- (i) There was no unqualified acceptance of offer, as stipulated in Section 7 of the Indian Contract Act, 1872.
- (ii) Counter offer dated 27.11.2009 of PTC has the effect of rejection of the original offer.
- (iii) Making an offer different from the original offer has the effect of revoking the original offer.
- (iv) Contract is valid due to mistake of fact, as there was no consequences ad idem between the parties in respect of structure of compensation clause.

12. The above issue was considered by the State Commission and after detailed analysis it came to conclusion that there was a valid and concluded agreement between the parties for the period 16.12.2009 to 28.2.2010.

13. Let us examine the findings of the State Commission.
The relevant extracts are as under:

“10.3. The contention urged by the respondent deserves to be seen with consideration of settled law that valid contract can exist between the parties by way of (i) the offer made by one party, (ii) absolute and unconditional acceptance by the parties, and (iii) conduct of parties. Concluding a contract by signing a contract document is only a formality. The “Interpretation-clause” of the Indian Contract Act, 1872 clearly indicates that the agreement can be reached by the process of offer and acceptance through the conduct as well. Therefore, we have to consider the issue on the available materials on record and decide as to whether the elements of offer and acceptance

have been established in this case through the conduct of the parties. For this purpose, we have to first examine the chain of letters exchanged between the parties between 23.11.2009 and 30.11.2009”.

14. Thereafter, the State Commission has considered the letters dated 23.11.2009, 25.11.2009, 27.11.2009 and 30.11.2009 exchanged between PTC and Gujarat Urja in details. Thereafter, the State Commission has come to the following conclusion:

“10.13. Careful analysis of the above 4 (four) documents i.e. letters dated 23.11.2009, 25.11.2009, 27.11.2009 and 30.11.2009 clearly indicates that the offer made by the petitioner through letter dated 27.11.2009, read in conjunction with the NIT dated 23.11.2009, was clearly and unambiguously accepted by the respondent through its letter dated 30.11.2009. We, therefore, observe that the agreement was concluded with the acceptance letter dated 30.11.2009 of the respondent.

10.14. Though we have observed above that there was a concluded agreement between the parties, we would like to examine this fact further, in the light of the subsequent actions of the parties. In this context, we refer to the following facts/documents:

A. The compensation bills raised by the petitioner for the non-fulfillment of the terms and conditions of contract by the PTC for the period 16.12.2009 to 31.12.2009, 1.1.2010 to 31.1.2010 and 1.2.2010 to 28.2.2010.

B. Compensation amount claimed by the petitioner for the above period and reminders for the same.

C. Letters of PTC requesting waiver of the compensation amount claimed by the petitioner on various grounds.

D. Denial by the petitioner for waiver of the compensation amount bills raised by it.

E. Claim of compensation by the respondent for non-supply of power by the petitioner during the month of March, 2010.

F. Acceptance of the compensation claimed by the respondent PTC India Ltd. by the GUVNL and agreeing to adjust the said amount against the compensation amount claimed by the petitioner and no specific denial of the same by the respondent.

10.15. The above documents clearly demonstrate that both the parties had acted in accordance with the terms of the agreement. After the petitioner raised its claim, at no time the respondent has claimed that there was no concluded agreement. On the other hand, it requested the petitioner as well as the Government of Gujarat to waive off the compensation due to prevailing market conditions.

10.16. Based on the above, we decide that there exists a valid and concluded agreement between the petitioner and the respondent for sale/purchase of power during the period 46.12.2009 and 28.02.2010.

10.17. Let us now consider the plea of the respondent that the contract is void due to a mistake of fact in the contract between the parties. He submitted that the NIT dated 23.11.2009 issued by the petitioner stipulated that the respondent shall be liable to pay compensation @ Rs. 2.00/kWh for the quantum of power falling short of 80% of the contracted quantum except open access denied by RLDC. However, the respondent, in its offer dated 25.11.2009, stated that the compensation shall be payable @ Rs.1.96/kWh, only if the power is sold and open access is granted by nodal RLDC. In response, the petitioner made a counter offer dated 27.11.2009, wherein the stipulation made in the respondent's letter dated 25.11.2009 regarding no compensation payable if the power is not sold, was missing. As such the parties were under different impressions regarding the situation under which the compensation becomes payable, which makes the alleged agreement/contract between the parties void because of mistake of fact.

10.18. The petitioner submitted that there is no mistake of fact in the present case. The petitioner, vide its letter dated 27.11.2009 made it clear that the compensation will be payable by the respondent except for open access denied by RLDC, which was same as that proposed in the NIT dated 23.11.2009. There is no ambiguity in the proposal of the petitioner, which was unconditionally accepted by the respondent through its letter dated 30.11.2009. In fact, the respondent, in its subsequent letters never questioned the terms of the contract, it only requested waiver of the compensation claimed by the petitioner in view of the prevailing market conditions. As such, there is no mistake of fact and the contract cannot be declared as void.

10.19. We have considered the submissions made by the parties and are of the view that it was very clear from the original NIT dated 23.11.2009 and the counter offer dated 27.11.2009 of the petitioner that the compensation shall be payable by the respondent for short-fall in off-take of supply below 80% of contracted quantum except for open access denied by RLDC. The respondent agreed to the conditions unequivocally in

the letter dated 30.11.2009. The subsequent letters of the respondent requesting for waiver of compensation also indicate that the respondent had never raised objections to the claims of the petitioner on this ground. We, therefore, decide that there is no mistake of fact and the respondent's request to declare the contract as void is rejected".

15. In view of the clear reasons given in the impugned order, we are in complete agreement with the above findings of the State Commission that there existed a valid Agreement between the parties based on the offers made and the unconditional acceptance by PTC for the final offer dated 27.11.2009 made by Gujarat Urja and the fact that both parties acted upon the Agreement.

16. However, now in the Appeal no. 62 of 2013, PTC is raising a different ground regarding enforceability of the agreement by Gujarat Urja which happens to be the

holding company for all the State Power Utilities including the Transmission Licensee.

17. Let us now deal with the issue raised by PTC before us.
18. Let us first examine the findings of this Tribunal in judgment dated 1.10.2012 in Appeal no. 31 of 2012 which was earlier filed by PTC in the same matter challenging the jurisdiction of the State Commission to arbitrate upon in the matter.
19. PTC in Appeal no. 31 of 2012 had *inter alia* contended that Gujarat Urja was neither a licensee nor a deemed licensee in view Section 131 (2) of the Act which did not recognize a trading licensee and that State Commission could exercise its jurisdiction in respect of licensees to whom licence was granted by the State Commission whereas in this case no licence had been granted by

the State Commission to Gujarat Urja. However, PTC had not contended that Gujarat Urja as holding company of GETCO, the transmission licensee could not have undertaken trading, as contended now in Appeal No. 62 of 2013.

20. The Tribunal in Appeal no. 31 of 2012 held as under:

“47. Though we decide that Gujarat Urja may not be deemed licensee, we cannot brush aside the fact that Gujarat Urja admittedly is the holding company and the distribution licensees are its subsidiaries. Gujarat Urja has 100% equity holding of the distribution licensee. Gujarat Urja is also procuring power on behalf of its subsidiary distribution licensees and also trading power surplus to the needs of the distribution licensees.

48. Thus there is a nexus between the PPA entered into between Gujarat Urja and PTC and the distribution licensees. Even assuming that Gujarat Urja is not a deemed licensee, there is no illegality if Gujarat Urja as the holding company enters into PPA on behalf of and as a representative of the distribution licensees to procure power and to sell power surplus to the needs of the distribution licensees. Gujarat Urja has signed PPA with PTC after stepping into the shoes of the distribution

licensees and on their behalf. Thus, the PPA signed by Gujarat Urja with PTC on behalf of the distribution licensees will be construed as a PPA between the distribution licensees and the PTC.

50. Thus, on the first issue, even assuming that Gujarat Urja is not a deemed licensee, we hold that there is a nexus between the PPA entered into between PTC and Gujarat Urja and the distribution licensees of Gujarat. Therefore, the dispute in question between PTC and Gujarat Urja will be construed to be a dispute between PTC and the distribution licensees i.e. between two licensees, for the purpose of deciding the jurisdiction of the Appropriate Commission. Accordingly, we answer this question against the Appellant.”

21. Thus, this Tribunal in the present matter has already held that even assuming that Gujarat Urja is not a deemed licensee, there is no illegality if Gujarat Urja as the holding company of the distribution companies, has entered into an agreement on behalf of and as a representative of the distribution licensees and this Agreement will be construed to be as an Agreement between the Distribution licensees and PTC. This

Tribunal has also held that PTC was aware of the status and functions of Gujarat Urja at the time of entering into agreement and raised the status of Gujarat Urja and jurisdiction only when Gujarat Urja sought penalty/compensation from PTC. PTC has now raised new grounds to argue that the Agreement is illegal and invalid.

22. This Tribunal in Appeal no. 31 of 2012 has already upheld the legality of the Agreement entered into between Gujarat Urja and PTC in the present matter. This judgment has already been challenged by PTC before the Hon'ble Supreme Court. The same issue cannot be raised again before us by PTC in Appeal no. 62 of 2013.

23. PTC has participated in the bidding and entered into the Agreement for off-taking power with Gujarat Urja fully

knowing the status of Gujarat Urja as holding company of the power utilities in the State. PTC also acted upon the agreement. Gujarat Urja as holding company of GETCO, the transmission licensee, has not misused its position against PTC in any manner in the present case. Now that Gujarat Urja has claimed breach of the agreement and consequential damages on account of default of PTC, it cannot now be claimed by PTC that Agreement was invalid and Gujarat Urja cannot enforce the claim under the Agreement.

24. In view of above, the new argument urged before us is misconceived and is rejected.
25. Thus, the first issue is decided against PTC.

26. The second and third issues regarding liability of PTC to pay compensation are interconnected and are being dealt with together.

27. The main contentions of PTC are:

a) The contract was not concluded as PTC could not find a buyer for power, despite all efforts.

b) PTC is only a trader of electricity and not a user. It can only enter into back to back agreement with the actual user of power and pass on the "Take or Pay" liability.

c) Compensation shall be applicable only if power is sold and open access is granted by the nodal Regional Load Dispute Centre (RLDC) for the said transaction. No sale of power took place, hence no compensation.

d) The margin of PTC as trader is regulated and it cannot take the heavy burden of “Take or Pay” Liability.

28. According to Learned Counsel for Gujarat Urja, the agreement has been duly acknowledged, accepted and acted upon by the parties. The communication exchanged particularly by letters dated 27.11.2009 and 30.11.2009 are clear and form the Agreement between the parties. The agreement was in fact implemented by the parties and PTC undertook purchase of electricity partly during the period of contract. PTC had in fact requested for waiver of compensation payable from Gujarat Urja and when the same was not accepted at that stage they challenged the existence of the contract itself, which is impermissible.

29. Let us first examine letter dated 23.11.2009 from Gujarat Urja to PTC seeking offers for off-take of 200

MW power for the period from December 2009 to February 2010 on round-the-clock basis. The letter which is a Notice Inviting Tender ('NIT') clearly indicates that if the bidder failed to off-take 80% of contracted quantum except when open access is denied by the Regional Load Dispatch Centre ('RLDC'), the trader shall pay to Gujarat Urja @ Rs.2 per unit for the shortfall of 80% of contracted quantum. Similar penalty will be paid by Gujarat Urja to the trader if it failed to supply 80% of the contracted power except when open access is denied by RLDC. The take or pay liability has to be calculated and settled for each month separately. The power is offered at the delivery point at the periphery of GETCO i.e. interconnection between GETCO system and CTU system.

30. Let us now examine letter dated 25.11.2009 by PTC giving their offer for purchase of power from Gujarat

Urja. PTC in this letter has agreed to buy 200 MW power delivered by Gujarat Urja at the delivery point. PTC has offered compensation once open access quantum is approved and PTC thereafter revises its availability below 80% of the open access quantum of energy @ Rs.1.96/kWh. Similarly if power scheduled by Gujarat Urja is less than 80% of open access capacity approved for open access for the concerned month, Gujarat Urja shall pay compensation @ Rs. 2/- per kWh. Thus, PTC in their offer dated 25.11.2009 made two deviation from the NIT issued by Gujarat Urja viz.,

- (i) rate of compensation by PTC was suggested as Rs. 1.96/- per kWh instead of Rs. 2/- per kWh.
- (ii) Compensation will be applicable only once the open access quantum is approved.

31. Subsequently, Gujarat Urja vide letter dated 27.11.2009 issued letter giving its willingness for sale of 200 MW

surplus round the clock power on firm basis with Take or Pay liability at GETCO periphery from 16.12.2009 to February 2010 to PTC. The letter gives the terms and conditions of sale of power. The Take or Pay liability is defined in the letter as under:

“Sale of power is with “Take or Pay” liability on either side in case you fail to off take 80% of the contracted quantum except open access denied by RLDCs, you shall pay to GUVNL @ Rs. 1.96 per unit for the quantum of off-take that falls short of 80% of contracted quantum except open access denied by RLDCs. If GUVNL fails to supply 80% of contracted quantum except open excess denied by RLDCs, GUVNL shall pay you @ Rs. 2.00 per unit for quantum of supply that falls short of 80% of contracted quantum except open access denied by RLDCs. Take or pay liability shall be calculated and settled on monthly basis. All open access charges, transmission charges and losses beyond delivery point shall be borne by you.”

32. Thus, Gujarat Urja accepted the first deviation of compensation suggested by PTC of Rs. 1.96 per kWh instead of Rs. 2/- per kWh. However, Gujarat Urja maintained the same condition for ‘Take or Pay’ liability

as per its NIT, i.e. the compensation against 'Take or Pay' is to be levied if PTC fails to off-take 80% of the contracted power or if Gujarat Urja fails to supply 80% of contracted quantum except when open access for transmission of power beyond the point of delivery is denied by RLDC.

33. PTC vide letter dated 30.11.2009 to Gujarat Urja acknowledged the above letter dated 27.11.2009 and confirmed that they shall comply with the terms and conditions of the NIT. Thus, letter dated 30.11.2009 from PTC is an acceptance to purchase power from Gujarat Urja at the terms and conditions offered by Gujarat Urja and conclusion of the agreement. No exception or exclusions have been sought by PTC in the acknowledgment and acceptance of the offer of Gujarat Urja. Under the agreement PTC has undertaken full responsibility for off-taking of the contracted power and bear 'take or pay' liability in case

of failure to off-take power. Admittedly, PTC is not a user of power. However, PTC as a trader is expected under the agreement to arrange off-take of power by entering into back to back agreement with the actual user of power.

34. The terms of agreement clearly indicate that in case PTC fails to off-take 80% of the contracted energy in a month, it is liable to pay compensation to Gujarat Urja at a pre-determined rate of Rs. 1.96/kWh for the shortfall in energy. The only exception under which the 'Take or Pay liability' is not leviable is when RLDCs has not granted open access for inter-State transmission of power. Thus, penalty would be leviable if PTC failed to arrange off-take of power.

35. We find that after PTC failed to arrange off-take of any power during the period 16th December 2009 to 31st

- December 2009 and during January 2010. Gujarat Urja raised claims for the shortfall in off-take as per the agreement. PTC did not pay the compensation and vide letter dated 27.1.2010 requested for waiver of compensation.
36. Thus, PTC was aware about its liability with regard to “Take and Pay” condition stipulated in the agreement with Gujarat Urja. It is correct that PTC in its offer to Gujarat Urja had mentioned applicability of compensation only after open access is applied and booked. However, this was not accepted by Gujarat Urja and they issued final offer with ‘Take or Pay liability’ as stipulated in their NIT. Eventually the same was accepted by PTC in toto.
37. PTC has entered into the Agreement with open eyes. As a trading company in business for many years it was expected to be aware of the market risks before

unconditionally accepting the offer of Gujarat Urja. PTC at the time of accepting the offer of Gujarat Urja had consciously undertaken to bear the market risk to avail the business opportunity. Variation of market prices is also not a condition which could not be contemplated. PTC cannot now turn back to say that it was not liable to pay compensation for not being able to arrange to off-take the contracted power as it was not able to find a buyer or that it was not able to bear the liability which is several times of its trading margin.

38. Learned Counsel for PTC has argued that its trading margin is regulated and is very small compared to the compensation claimed under "Take or Pay" clause.

39. Admittedly, the trading margin of a trader is regulated and the trader is not free to sell power at any rate depending on the market conditions. The trader sells power at the cost of purchase of power including

transmission loss and transmission charges plus the margin as specified by the Appropriate Commission. The risk bearing capacity of PTC was known to it at the time of entering the agreement with Gujarat Urja. Despite this, PTC consciously decided to take the market risk and agreed for "Take or Pay" liability of Rs. 1.98/kWh without insisting for inclusion of safeguard regarding triggering of the "Take or Pay" liability only after back to back agreement is entered into for resale of the contracted power. PTC, thus, consciously took market risk to further their own business interests. Unfortunately, the actual market conditions during the contract period did not materialize as anticipated by PTC and PTC could not get sell the contracted power at the desired price. When the market risk was consciously taken by PTC, they also have to take the liability accrued under the contract.

40. According to PTC, the market prices crashed during the period of contract and this should be considered as a force majeure condition. We are not convinced by the argument of PTC. The short-term market prices of power are mainly dependent on demand and supply of power and vary from day to day, week to week and season to season. This variation is normal and cannot be considered as a force majeure condition.
41. In view of above, the second and third issues are decided as against PTC.
42. The fourth issue is regarding quantum of compensation and whether Gujarat Urja has to establish loss suffered by it due to breach of contract by PTC.
43. According to Learned Counsel for PTC, the accepted position of law is that the compensation has to be

quantified in terms of actual loss suffered by the party claiming the damages and compensation should be restitutive in nature so as to restore the party to a financial position when such default had not occurred. According to him, the above position of law rules out profiteering or punitive action.

44. Learned Counsel for PTC has cited ruling in the following judgments in support of the above claim.

- a) Fateh Chand Vs Balkishan Das: AIR 1963 SC 1405
- b) M. Lachia Setty Vs Coffee Board : (1980) 4 SCC 636

45. According to Learned Counsel for Guajrat Urja, the very concept of liquidated damages under Section 74 of the Indian Contract Act, 1872 is for specific purpose that the parties to the contract agreement provide a pre-estimate of the damages in case of breach of contract without the necessity to prove the actual damage

caused. Gujarat Urja had the requisite surplus capacity during the relevant period of the contract for delivering the contracted power and Gujarat Urja has suffered legal injury on account of breach on the part of PTC. There were quantum of electricity which could be sold to PTC during the period of contract for which Liquidity Damage ('LD') is payable. The actual purpose of LD is to dispense with the calculation and proof of actual damages. He referred to the rulings of the Hon'ble Supreme Court in the following cases to establish his point.

- a) ONGC Ltd. Vs. Saw Pipes Ltd. : (2003) 5 SCC 705
- b) Fateh Chand Vs. Balkishan Das AIR 1963 SC 1405
- c) BSNL V. Reliance Communication Ltd. (2011) 1 SCC 394

d) State of Kerala & Others V. Messrs United Shippers
and Dredgers Ltd. : AIR 1982 Ker 281

46. Let us now examine the findings of the State
Commission in this regard. The relevant extracts of the
impugned order are reproduced below:

“12.4. There was no explanation as to how the compensation amount was derived by the parties for the non-offtake of the power by the respondent or shortfall in the power supply by the petitioner. It is confirmed that both the parties have pre-estimated the amount and agreed to be payable by the defaulting party in case of breach of the agreement. Hence, the compensation clause agreed by the petitioner and the respondent is on pre-estimated basis, by the parties.

12.5. Once the respondent agreed to the compensation amount on pre-estimation basis, it is not permissible to claim that the compensation amount be evaluated on the basis of action taken for mitigation of loss by the petitioner and with the consideration of the trading margin available to the respondent.

12.6. It is accepted by the parties that (i) the respondent failed to off-take the power as agreed in terms of the agreement between the parties, (ii) there is no evidence on record to specify that the open access was not granted by the RLDCs or any pleadings from the parties

on this issue. As stated above, it transpires that the respondent failed to off-take the requisite quality of power. Hence, it is a clear case of the breach of the agreement in terms of the agreement between the parties. We, therefore, decide that there is a breach of the contract.

12.7. In order to further analyze the quantum of compensation, it is necessary to refer Section 73 and 74 of the Indian Contract Act, 1872 which read as under:

Section 73: Compensation for loss or damage caused by breach of contract:

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.-

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such

person had contracted to discharge it and had broken his contract.

Explanation. - In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused- by the non-performance of the contract must be taken into account.

Section 74: Compensation for breach of contract where penalty stipulated for.-

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation. — A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception. — When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the [Central Government] or of any [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation. — A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

The above sections provide that while dealing with above provisions, the court is required to decide (i) whether there is any breach of the agreement, (ii) If there is a breach, amount of the penalty and (iii) Whether parties have mutually agreed to the amount of compensation or not. If no such amount has been agreed upon by the parties, the court shall decide the same and if the parties have agreed on the pre-determined amount of the penalty in advance, in such case the compensation is payable as agreed in the agreement.

12.8. Section 73 provides that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties know when they made the contract to be likely to result from the breach of it. Section 74 deals with the situation where penalty is stipulated in the contract, and, inter-alia, provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the

compensation named in the in the contract for such breach is genuine pre-estimate of loss which the parties know when they made the contract, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him.

12.9. The section 74 undoubtedly provides that the aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damages or loss is proved to have been caused by the breach. Thereby it dispenses with proof of actual loss or damage. The section further provides that the party complaining the breach is entitled to compensation named in the agreement.

12.10. We now refer the judgement which is relevant in this case. In case of ONGC V/s. Saw Pipes Ltd., (2003) 5 SCC 705, the Court held as under:”

.....
“In the above decision, the Hon’ble Supreme Court has recognized that the pre-determined liquidated damages, if any, decided by the parties to the contract with some consideration is required to be given effect by the court as valid compensation.

12.11. From the above observations, the plea of the respondent that (i) he is receiving only 4 paise per Kwh as a trading margin from purchase and resale of power against which the compensation to which the liquidated damages is of Rs. 1.96 per Kwh sought by the

petitioner, and that (ii) the petitioner is required to give the details of the power sold by it and revenue earned by it or any other remedial step taken to sell the power to decide the compensation, is not acceptable and the same is rejected because the respondent had agreed to the liquidated damages(compensation) on pre-estimate basis and on his above acceptance of the promise the whole contract was concluded. Even if the petitioner was unable to sell the power, for the energy which is not off-taken by the respondent, the petitioner was required to pay fixed charges on such quantity of the electricity to the generator from where the petitioner is procuring the power. Therefore, the respondent's plea that compensation sought by the petitioner is in contravention of the section 74 of the Indian Contract act, 1872 and the same is therefore rejected.

12.12. It is well known that the intention of the parties to an instrument/contract has to be gathered from the term thereof and that the contract must be construed having regard to the terms and conditions as well as nature thereof. Clause of the agreement provides for compensation to the petitioner for shortfall in off-take of power by the respondent below 80% of the contracted quantity and to the respondent for failure of the petitioner to supply 80% of the contracted capacity. There is no impediment or any obstacle for the parties to a contract to make provision of liquidated damages for specific breach only.

12.13The respondent is required to pay to the petitioner, compensation @ 1.96

kWh for its failure to off take 80% of the contracted power during the period 16.12.2009 to 28.02.2010 as per the above agreement between the parties.”

47. The findings of the State Commission on this issue are summarized as under:
- i) The compensation clause agreed to in the agreement between the parties was on pre-estimation basis.
 - ii) Once PTC agreed to the compensation amount on pre-estimation basis, it is not permissible to claim that compensation amount has to be evaluated on the basis of action taken for mitigation of loss by Gujarat Urja, and considering the trading margin available to PTC.
 - iii) Admittedly, PTC failed to off-take the contracted power and there is no evidence on record that open access was not granted by RLDC.
 - iv) Section 73 provides that when a contract is broken, the party who suffers by such breach is entitled to receive

compensation for the loss caused to him which the party knew when they made the contract to be likely to result from such breach. Section 74 deals with a situation where penalty is stipulated in the contract, the party complaining of breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable loss suffered. But, if the compensation named in the contract for such breach is genuine pre-estimate loss which the parties knew when they made the contract, such party is not required to prove the actual loss suffered by him.

- v) In case of ONGC V/s Saw Pipes Ltd., (2003) 5 SCC 705 it was recognized that the pre-determined liquidated damages, if any, decided by the parties of the

contract with some consideration is required to be given effect by the court as valid compensation.

- vi) Accordingly, PTC is required to pay to Gujarat Urja compensation @ Rs.1.96 per kWh for its failure to off-take 80% of the contracted power which was agreed to by PTC as liquidated damages on pre-estimation basis as per the agreement between the parties and Gujarat Urja need not establish the loss caused by the said breach of agreement. Even if PTC was unable to sell the power, they were required to pay fixed charges for such quantity of electricity to the generator from which Gujarat Urja was procuring power.

48. We concur with the above findings of the State Commission for the following reasons:

- i) The “Take or Pay” clause of the agreement clearly defines the default by PTC as failure to off-take power

by PTC below 80% of the contracted quantum. Similarly the default on the part of Gujarat Urja is defined as failure to supply 80% of the contracted quantum. The condition under which the “Take or Pay” liability will not be payable is also defined as when open access is denied by RLDC. The quantum of compensation is also pre-defined. It is Rs. 1.96/- per unit for default by PTC and Rs. 2/- per unit for Gujarat Urja on the shortfall of energy with respect to 80% of the contracted power.

- ii) It is not disputed that Gujarat Urja did not have the requisite capacity to supply power during the relevant period or open access was denied by RLDC.
- iii) The question whether a clause is penal or pre-estimate of damages depends on the contraction and the surrounding circumstances at the time of entering the contract. In this case the rate of energy agreed to is

varying from Rs. 3/- per unit to Rs. 5.96/- per kWh during different months and times of the day. When the buyer fails to off-take the contracted power, the seller suffers loss on account of non-recovery of the fixed cost of the generation sources of the seller whose available capacity could not be utilized due to breach of contract by the buyer. In order to actually evaluate the loss, one has to carry out detailed analysis for all the time blocks of the day to actually calculate the un-utilized capacity at different power plants with whom the seller has contracted power and then calculate the capacity charges paid for the idle capacity. This may be a cumbersome exercise. The parties in this case have agreed to a pre-estimated liquidated damages of Rs. 1.98/- per kWh for the event of default by PTC which has also been defined viz. failure to off- take 80% of the contracted power. Considering the rate of energy

agreed to in the agreement, the compensation amount cannot be considered as penal in nature.

- iv) The compensation payable by each party for their respective defaults has been pre-estimated and as such according to Section 74 of the Contracts Act, there is no need for Gujarat Urja to provide evidence for the actual loss incurred as a result of breach of contract by PTC.
- v) PTC had entered into the agreement with open eyes fully aware of the market risks and its capacity to bear the risk. Variation of prices in short term market is also not a situation which cannot be contemplated as the market prices vary day to day, month to month and season to season in normal course. It is now not open for PTC to claim that the liquidated damages can not be enforced.

49. It has been reported by Gujarat Urja that PTC had again entered into a similar agreement with Gujarat

Urja in March 2010 and during the period of the contract Gujarat Urja failed to supply the contracted power and PTC had claimed compensation at the rate agreed to in the agreement which was honored by Gujarat Urja. According to PTC, in that case PTC had tied up sale of power to actual user with back to back agreement. While answering the question about the quantum of compensation we are not considering the triggering of the "Take or Pay" clause. This issue has already been answered by us. What we are concerned with is as to whether the compensation has to be at the pre-defined rate agreed to in the Agreement or whether it has to be determined based on the evidence produced by Gujarat Urja. When PTC has charged the compensation for breach in agreement by Gujarat Urja in a similar agreement entered to subsequently at the pre-estimated rate which was honoured by Gujarat Urja, it is not open for PTC to dispute that in the present

- case contending that the Gujarat Urja has to establish the quantum of loss for claiming the compensation for breach of contract by PTC.
50. Let us now examine the ruling quoted by Learned Counsel for PTC.
51. Fateh Chand case (AIR 1963 SC 1405) dealt with sale of a building. In this case, the agreement between the parties provided for payment of a sum of amount by the vendee and in case the vendee failed to get the sale deed registered by a stipulated date, the sum of amount shall be deemed to be forfeited and agreement cancelled. Similar clause was there for default by the executant for its delay in registration of the sale deed under which the executant had to pay similar amount to the Vendee. The court held defendant responsible for breach of contract as it failed to pay the balance of the price and show willingness to obtain a conveyance. The

other issue decided was regarding the amount forfeited by the plaintiff out of the amount paid by the defendant against delivery of possession of building and land to the defendant. The entire amount was considered as earnest money and forfeited by the plaintiff. Regarding application of Section 74 of the Contract Act it was held as under:

“The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.”

In that case it was held that forfeiture of the amount paid by the defendant on possession of the property is by way of penalty. It was held that:

“10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of “actual loss or damage”; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage

which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.”

In that case the amount stipulated in the agreement was in the form of a penalty. In the present case the amount stipulated was in the form of compensation which was pre-estimated loss caused by the breach of Agreement which was defined in the agreement. Therefore, the finding of Fateh Chand case will not be any help to PTC.

52. Let us now examine Lachia Setty case ((1980) 4 SCC 636). This is a case of bidding of lots of coffee by Coffee Board by the Appellants and after they were declared as successful bidders they failed to pay for the lots of coffee and lift the same. Subsequently, Coffee Board reauctioned the lots and the loss on reauction was claimed from the bidders. The findings in this case

for mitigation of loss would not apply to the present case where the agreement was acted upon and the agreement had a provision for pre-estimated compensation for breach of contract.

53. In view of above, the third and fourth issues are also decided against PTC.
54. The fifth issue is regarding payment of interest for delay in payment of compensation by PTC which has been raised in Appeal no. 47 of 2013 by Gujarat Urja (Appellant).
55. According to the Learned Counsel for Gujarat Urja, any amount which is delayed beyond 30 days after due date of payment causes Interest @ 15% as per the terms of the agreement. Therefore, there was no justification on the part of the State Commission to deny the same. In any event it is a legal right of Gujarat Urja for the time

value of money. The interest was payable not only in terms of the agreement, but also on the principles of restitution and equity. He has referred to the following rulings to substantiate his point:

- a) South Eastern Coal Fields Ltd V. State of M.P. & Ors.
(2003) 8 SCC 648
- b) Sovintorg (India) Ltd. V. State Bank of India (1999) 6
SCC 406
- c) Mahanadi Multipurpose Industries & Ors. V. State of
Orissa and Anr. : AIR 2002 Orissa 150

56. According to Learned Counsel for PTC, the agreement is silent about the interest to be paid on the compensation. Section 3(2) of the Interest Act, 1978 confers discretionary power upon the State Commission to either allow or disallow the interest in respect of the damages allowed. The State

Commission in exercise of its discretionary power has chosen not to award any interest/late payment charges.

57. We have examined the findings of the State Commission in the impugned order. The findings of the State Commission in this regard are summarized as under:

- i) There is no provision in the agreement for payment of any delayed payment charges on “Take or Pay” liability.
- ii) Delayed payment charges @ 15% per annum is with regard to the energy bills on the payments outstanding after 30 days from due date of payment. The delayed payment clause for energy charges cannot be applied to “Take or Pay” liability.
- iii) Gujarat Urja had raised the bill for payment of liquidated damages on 1.1.2010 for the period from 16.12.2009 to

31.12.2009 for an amount of Rs. 12,04,22,400/-. Thereafter the bills for compensation amounts of Rs. 23,33,18,400/- and Rs. 7,90,27,200/- for non off-take of the requisite quantity of power during the months of January to February, 2010 were raised. The aforesaid bills amounts have not been paid by PTC till date. The correspondence was carried out between PTC and Gujarat Urja for waiver of the above dues which was finally denied by Gujarat Urja.

iv) Gujarat Urja is not entitled for any delayed payment charge for the amount of compensation.

58. We agree that there is no provision in PPA with regard to payment of delayed payment charges on 'take or pay' liability. Gujarat Urja has sought interest on the principles of restitution and equity. Let us examine the rulings referred to by the learned counsel for Gujarat Urja.

59. In *South Eastern Coalfields Ltd. vs. State of M.P.* (2003) 8 SCC 648, the Hon'ble Supreme Court has held as under:

“21. Interest is also payable in equity in certain circumstances. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement (see Chitty on Contracts, 1999 Edn., Vol.II, Para 38-248 at p. 712). Interest in equity has been held to be payable on the market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many”.

22..... The basis proposition of law that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by whatever name it may be called viz. interest, compensation or damages and this proposition is unmistakable and valid; the efficacy and binding nature of such law cannot be either diminished or whittled down.....”.

“24. We are, therefore, of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest.....”.

60. In *Sovintorg (India) Ltd. vs. State Bank of India*, (1999) 6 SCC 406, the Hon'ble Supreme Court has held as under:

“6. We, however, find that the general provision of Section 34 being based upon justice, equity and good conscience would authorize the Redressal

Forums and Commissions to also grant interest appropriately under the circumstances of each case. Interest may also be awarded in lieu of compensation or damages in appropriate cases. The interest can also be awarded on equitable grounds as was held by this Court in Satinder Singh v. Umrao Singh (AIR 1961 SC 908: (1961) 3 SCR 676).....”.

“..... The power to award interest on equitable grounds or under any other provisions of the law is expressly saved by the proviso to Section 1. This question was considered by the Privy Council in Bengal Nagpur Rly. Co. Ltd. vs. Ruttanji Ramji [(1937-38) 65 IA 66 : AIR 1938 PC 67]. Referring to the proviso to Section 1 of the Act the Privy Council observed ‘this proviso applies to cases in which the court of equity exercises its jurisdiction to allow interest’.”

61. In Mahanadi Multipurpose Industries vs. State of Orissa & Anr. AIR 2002 Orissa, 150, it has been held as under:

“11., we find that the trial Court can award interest even in the absence of a contract, if the same is equitable..... In such a situation, when the trial Court has awarded interest at the rate of 6% per annum in its discretion, it cannot be said that the Court has acted illegally or has exercised its discretion in an arbitrary or unreasonable manner. Though there was no specific agreement in pay interest, in the circumstances, we find that the award of interest from 1.11.1967 till the date of recovery can be sustained on the principle that the defendants are bound to disgorge the benefit they might have derived out of the amount advanced by the plaintiffs towards the value of the articles which they had failed to supply.....”.

62. We feel that on the ground of equity, interest is payable to Gujarat Urja from the date Gujarat Urja clearly informed PTC about its decision not to waive the amount of compensation. Accordingly, hold that simple interest may be paid by PTC to Gujarat Urja @ 6% alright per annum from the date at which Gujarat Urja

informed PTC about its decision not to waive the compensation amount till the amount is fully paid.

63. **Summary of our findings**

(i) There was a valid and concluded Agreement between PTC and Gujarat Urja for purchase/sale of power during the period 16.12.2009 to 28.02.2010.

(ii) Gujarat Urja can enforce the Agreement in the light of the findings of this Tribunal in its judgment dated 1.10.2012 in Appeal no. 31 of 2012.

(iii) PTC has breached the agreement by not arranging off-take of 80% of the contracted quantum in terms of the agreement and is liable to pay compensation to Gujarat Urja under the 'Take or Pay' clause agreed to between the parties.

(iv) PTC has entered into the agreement with open eyes. As a trading company in business for many years it was expected to be aware of the market risks before unconditionally accepting the offer of Gujarat Urja. PTC at the time of accepting the offer of Gujarat Urja had consciously undertaken to bear the market risk to avail the business opportunity. PTC cannot now turn back to say that it was not liable to pay compensation for not being able to arrange to off-take the contracted power as it was not able to find a buyer or that it was not able to bear the liability which is several times of its trading margin.

(v) Admittedly, the trading margin of a trader is regulated and the trader is not free to sell power at any rate depending on the market conditions. The

trader sells power at the cost of purchase of power including transmission loss and transmission charges plus the margin as specified by the Appropriate Commission. The risk bearing capacity of PTC was known to it at the time of entering the agreement with Gujarat Urja. Despite this, PTC consciously decided to take the market risk and agreed for “Take or Pay” liability of Rs. 1.98/kWh without insisting for inclusion of safeguard regarding triggering of the “Take or Pay” liability only after back to back agreement is entered into for resale of the contracted power. PTC, thus, consciously, took market risk to avail the business opportunity. Unfortunately, the actual market conditions during the contract period did not materialize as anticipated by PTC and PTC could not get sell the contracted power at the desired price. Upward and downward variation of

market price was not a condition which could not be contemplated as variation of prices in short term market is normal. When the market risk was consciously taken by PTC, they also have to take the liability accrued under the contract.

(vi) The variation in the market price of electricity during the period of contract cannot be considered as a force majeure condition as the short-term market prices of power are mainly dependent on demand and supply of power and are expected to vary from day to day, week to week and season to season. This variation is normal and cannot be considered as a force majeure condition.

(vii) The compensation clause agreed to between the parties was not in the form of penal clause but was a liquidated damages agreed on pre-estimation

basis. Accordingly, under Section 74 of the Contract Act, PTC is liable to pay for compensation @ Rs. 1.96 per kWh for its failure to arrange off-take of 80% of the contracted power.

(viii) PTC is liable to pay simple interest @ 6% on the amount of compensation due to Gujarat Urja as per the contract from the date on which Gujarat Urja informed its decision for not waiving the compensation charges till the payment is fully made.

63. In view of above, Appeal No. 62 of 2013 is dismissed and Appeal No. 47 of 2013 is allowed. No order as to costs.

64. Pronounced in the open court on this **30th day of June, 2014.**

(Rakesh Nath)

(Justice M. Karpaga Vinayagam)

Technical Member

Chairperson

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REPORTABLE/NON-REPORTABLE
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