APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 336 of 2017 & IA No.895 of 2017 &

IA NOs. 551 of 2018, 245 of 2018 & 785 of 2018

AND

APPEAL NO. 359 of 2017 & IA No.897 of 2017

Dated : 07th September, 2018

PRESENT : HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL EMBER
HON'BLE MR. S.D. DUBEY. TECHNICAL MEMBER

IN THE MATTER OF:

APPEAL NO. 336 of 2017& IA No.895 of 2017 &

IA NOs. 551 of 2018, 245 of 2018 & 785 of 2018

Uttar Pradesh Power Corporation Limited
7th Floor, Shakti Bhawan,
14, Ashok Marg,Lucknow-226001 - APPELLANT

VERSUS

1. Lanco Anpara Power Limited
   Through its Chairman
   411/9 River Side Apartments,
   New Hyderabad, Lucknow-226007

2. Uttar Pradesh Electricity Regulatory Commission
   Through its Secretary
   2nd Floor, Kisan Mandi Bhawan,
   Gomti Nagar, Vibhuti Khand
   Lucknow-226010

3. Rama Shanker Awasthi
301, Surbhi Deluxe Apartments,
6/7 Dali Bagh, Lucknow – 226 001 - RESPONDENTS

Counsel for the Appellant(s) **:** Mr. M. G. Ramachandran
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Mr. Avijeet Lala
Ms. Shikha Pandey
Ms. Astha Sharma
Mr. Nishant Kumar for R-1

Mr. C.K. Rai
Mr. Sachin Dubey for R-2

IN THE MATTER OF:

APPEAL NO. 359 of 2017 & IA No. 897 of 2017

Rama Shanker Awasthi,
301, Surbhi Deluxe Apartments,
6/7 Dali Bagh, Lucknow- 226001 - APPELLANT

VERSUS

1. Lanco Anpara Power Limited,
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- RESPONDENTS

Counsel for the Appellant(s) **:** Ms. Ranjitha Ramachandran
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Ms. Astha Sharma
Mr. Nishant Kumar for R-1

Mr. Rajiv Srivastava for R-2

Mr. C.K. Rai
Mr. Sachin Dubey for R-3

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

APPEAL NO. 336 of 2017& IA No.895 of 2017&

IA NOs. 551 of 2018, 245 of 2018 & 785 of 2018

1. The Appellant being aggrieved by the impugned order passed by the Uttar Pradesh Electricity Regulatory Commission (herein after referred to as the **`State Commission')** dated 16.08.2017 passed in Petition Nos. 871 and 891 of 2013 and Review Petitions 1062 of 2015 and 1104 of 2016, whereby the State Commission has decided on the additional tariff admissible to the Respondent No. 1, Lanco Anpara Power Limited (herein after referred to as **`Lanco')** for the generation and sale of electricity by Lanco to the Appellant under the Power Purchase Agreement dated 12.11.2006 (hereinafter referred to as '**PPA**') as amended by the Supplemental Agreement dated 31.12.2009.

1.1 The impugned Order has been passed by the State Commission in pursuance of the remand order dated 30.11.2016 passed by this Tribunal in Appeal No. 173 of 2016.

1.2 The Appellant is a company incorporated under the provisions of the Companies Act, 1956 with registered office at 7th Floor, Shakti Bhawan, 14, Ashok Marg, Lucknow-226001.The Appellant is a wholly owned Government of Uttar Pradesh Undertaking.The Appellant is a Licensee under the Electricity Act, 2003 and is undertaking the bulk purchase of electricity and bulk sale of

electricity primarily on behalf of and to enable the State Utilities - Distribution Licensees in the State to maintain electricity distribution to the public at large.

1.3 The Respondent No. 1, namely, Lanco is a generating company within the meaning of section 2 (28) of the Electricity Act, 2003 and is also a company incorporated under the provisions of the Companies Act, 1956. Lanco has established a generating station at Anpara in the State of Uttar Pradesh with a total capacity of 1200 MW comprised in two units of 600 MW each.

1.4 The Respondent No. 2 is the State Commission constituted under the Electricity Act, 2003 to discharge various functions mandated under the Act.

1.5 The Respondent No. 3 is a consumer in the State of Uttar Pradesh who had participated in the proceedings before the State Commission and was impleaded as a party in the remand proceedings before the State Commissions.

APPEAL NO. 359 of 2017 & IA No.897 of 2017

2. The Appellant being aggrieved by the impugned order passed by the Uttar Pradesh Electricity Regulatory Commission (herein after referred to as the **`State Commission')** dated 16.08.2017 passed in Petition Nos. 871 of 2013 whereby the State Commission has decided on the additional tariff admissible to the Respondent No. 1, Lanco Anpara Power Limited (hereinafter referred to as **`Lanco')** for the generation and sale of electricity by Lanco to the Respondent No. 2- Uttar Pradesh Power Corporation Limited (hereinafter

referred to as '**UPPCL**') under the Power Purchase Agreement dated 12.11.2006 (hereinafter referred to as '**PPA**') as amended by the Supplemental Agreement dated 31.12.2009.

2.1 The impugned Order has been passed by the State Commission in pursuance of the remand order dated 30.11.2016 passed by this Tribunal in Appeal No. 173 of 2016 filed by the Appellant.

2.2 The Appellant is a consumer in the State of Uttar Pradesh. The Appellant has been promoting the cause of the consumers in various proceedings before the State Commission, before this Tribunal and other forums. The Appellant has also been a member of the Advisory Committee constituted by the State Commission. The Appellant was impleaded as a party in the remand proceedings before the State Commission.

2.3 The Respondent No. 1, namely, Lanco is a generating company within the meaning of section 2 (28) of the Electricity Act, 2003 and is also a company incorporated under the provisions of the Companies Act, 1956. Lanco has established a generating station at Anpara in the State of Uttar Pradesh with a total capacity of 1200 MW comprised in two units of 600 MW each.

2.4 The Respondent No. 2, namely, UPPCL is a company incorporated under the provisions of the Companies Act, 1956 with registered office at 7th Floor, Shakti Bhawan, 14, Ashok Marg, Lucknow-226001. UPPCL is a wholly

owned Government of Uttar Pradesh Undertaking.UPPCL is a Licensee under the Electricity Act, 2003 and is undertaking the bulk purchase of electricity and bulk sale of electricity primarily on behalf of and to enable the State Utilities - Distribution Licensees in the State to maintain electricity distribution to the public at large.

2.5 The Respondent No. 2 is the State Commission constituted under the Electricity Act, 2003 to discharge various functions mandated under the Act.

3. **Brief Facts of the Case in Appeal No. 336 & 359 of 2017:-**

3.1 On or about 01.10.2004, Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited (hereinafter referred to as **'Uttar Pradesh Rajya Vidyut Nigam**'), the designated Nodal Agency for facilitating the process of procurement of power on behalf of the buyers in the State of Uttar Pradesh, initiated a competitive bidding process for inviting pre qualification bids for development, construction, commissioning, owning, operation and maintaining 2x500 MW Anpara 'C' project at Anpara, District Sonebhadra, Uttar Pradesh specifying that the said project shall share certain common facilities with the existing Anpara A (3x210 MW) and Anpara B (2x500 MW) thermal power projects owned and operated by the Uttar Pradesh Rajya Vidyut Nigam.

3.2 On 02.05.2005, the Uttar Pradesh Rajya Vidyut Nigam filed a Petition being No. 257 of 2005 before the State Commission for approval of Request for Proposal ('**RFP**') documents of the 2x500 MW Anpara C thermal project for

inviting bids for procurement of power under Section 63 of the Electricity Act on behalf of the Appellant in pursuance of the Government of India Competitive Bidding Guidelines dated 19.01.2005. The qualified bidders/prospective Developers also participated in the proceedings in Petition No. 257 of 2005.

3.3 By Order-dated 19.10.2005, the State Commission directed the Uttar Pradesh Rajya Vidyut Nigam to amend the RFP documents Inter alia as under:

The Commission has considered above submissions of the Petitioner and bidders and allows 12 months time to the successful bidder, from the date of issue of letter of acceptance by the procurers, to comply with the conditions precedent and directs the Petitioner to own responsibilities on behalf of the buyers to help the successful bidder in securing clearance from MOEF, FSA with NCL. The transfer of land for the project and housing of the staff shall be ensured to the prospective project company from GoUP free from all encumbrances within six months of issue of letter of acceptance by the procurers. Performance Bond by the successful bidder shall be submitted immediately after the issue of letter of acceptance by the procurers.

5.0 Fuel Linkage: Regarding fuel linkage, it is seen that long term coal linkage for the project has been granted with the condition that FSA shall be concluded by 31.12.2003. UPRVUN was required to confirm the status of this linkage. Further, issues such as coal quality, pricing, time frame of supply, conditions of FSA have not been firmed up. In such a scenario, it was required to be considered whether the bidder could get fuel supply from any other source at lower price.

<u>Submissions on 4.8.05</u>

The Petitioner has submitted that the Seller is responsible for obtaining its requirements of fuel for the Power Station. Therefore, the Bidder is free to get supply from any source. However, in order to facilitate the Seller, the GOUP on the specific request of the Seller, shall recommend transfer, in its name, of approvals/consents/authorisations, including those relating to fuel allocation and coal linkage, which have been issued in respect of the Project to any other entities.

3.4 Thereafter, by another Order dated 06.02.2006, the State Commission decided the Petition being 297 of 2005 filed for review of the order dated 19.10.2005 and clarified various aspects, Inter alia, as under:

"(b) Condition precedent:

(d) Right of refusal beyond normative availability and sale of surplus capacity to third party:

3.5 In terms of the above two orders of the State Commission, it was concluded that the Fuel risk shall be of the Seller (selected bidder) and the bidding documents were to be modified accordingly. The bid process was proceeded with on the basis that the Fuel Supply Agreement (FSA) had not been firmed up at the time of the passing of the said orders; that FSA with Northern Coal Field Limited (**NCL**) was to be entered into as a condition precedent and the role of the Appellant was only of facilitating nature. As regards Gross Calorific Value (**GCV**), the State Commission specifically stated that it should be left to the Developers to ascertain and get the available coal GCV authenticated by the supplier of coal. The bidders were therefore required to make independent testing of GCV of the coal indicated in the bidding documents.

3.6 Based on the above and on 06.06.2006, the technical as well as the price bid submitted by the bidders were opened by the Bid evaluation committee and on 27.09.2006, Uttar Pradesh Rajya Vidyut Nigam issued a 'letter of acceptance' to M/s. Lanco Kondapalli Power Private Limited, as the successful bidder.

3.7 On 12.11.2006, the PPA was entered into between the Lanco and the Appellant for 2x500 MW Anpara C Project on build, own, operate and maintain basis.

3.8 On or about 24.07.2007, the Government of Uttar Pradesh allowed a +20% variation on unit size of future as well as existing thermal power projects. In pursuance of the same, Lanco vide its letter dated 11.08.2007 sought the increase in the project capacity from 1000 to 1200 MW (+20%). The Government of Uttar Pradesh accorded its consent to install Generating Units of 2x600 MW on certain terms and conditions, namely, (a) all statutory clearance for the revised capacity shall be the responsibility of the Seller i.e. Lanco and (b) completion date of the project shall not be extended.

3.9 On 18.10.2007, Ministry of Coal, Government of India vide its Notification issued a New Coal Distribution Policy (hereinafter referred to as '**NCDP**').

3.10 On 31.12.2007 i.e. after the introduction of the NCDP, the State Commission approved the PPA dated 12.11.2006 entered into between Lanco and the Appellant holding the PPA to be in conformity with the guidelines and competitive bidding process.

3.11 On 17.12.2008, due to the change in capacity of the Anpara C-Plant from 2x500 MW to 2x600 MW, the Standing Committee, Ministry of Coal, authorised Northern Coal Field Limited for issuance of Letter of Acceptance for linkage of coal for the additional 200 MW capacity and consequently on

01.07.2009, the Northern Coal Field Limited issued Letter of Acceptance for 2x600 MW project for 4.182 MTPA coal (Grade C/E).

3.12 On 31.12.2009, Lanco entered into a supplementary agreement with the Appellant for supply of additional 100 MW over and above the 1000 MW already agreed to vide PPA dated 12.11.2006. With the supplementary agreement coming into force, the contracted capacity, which had to be supplied from the Lanco to the Appellant, increased to 1100 MW. The Government of Uttar Pradesh also allowed the seller i.e. Lanco to sell the balance 100 MW of additional 200 MW to third parties. In view of the aforesaid, Lanco became entitled to sell the 100 MW to third parties on a market-determined tariff.

3.13 On 12.3.2010, the State Commission approved the supplementary agreement and determined the tariff for the additional capacity as per Section 86 (1) (a) of the Electricity Act, 2003 in contradiction to the prescribed bidding process and guidelines to be followed under Section 63 of the Electricity Act, 2003.

3.14 On 24.04.2012, a Fuel Supply Agreement (**FSA**) was entered into between Lanco and Northern Coal Field Limited and as per the provisions of the Fuel Supply Agreement it was agreed that the coal will be made available to Lanco from the different mines of Northern Coal Field Limited by Rail/Merry Go Round System (MGR System)/Road Transport. It was also stated that the Annual Contracted Quantum to be supplied to Lanco would only be to the extent of the PPA entered with the Appellant i.e. 1100 MW.

3.15 On 28.09.2012, the Appellant and Lanco entered into a Fuel Policy Agreement in accordance with Article 7.9.3 of the PPA.

3.16 Thereafter on 10.12.2012, Lanco issued a notice to the Appellant purported to be the Preliminary termination notice under Article 15.2 of the PPA dated 12.11.2006 alleging certain defaults on the part of the Appellant. On 24.01.2013 and 11.02.2013, the Lanco followed the above with termination notices to the Appellant purporting to be in terms of Article 15.4.6 of the PPA and also claimed as a consequence of termination the buyout of the project by the Appellant. The Appellant herein disputed the claims of Lanco and replied to the above notices.

3.17 On 28.01.2013, Lanco filed Petition No. 871 of 2013 before the State Commission regarding payment of outstanding dues by the Appellant and to determine the new tariff for supply of power or in the alternative to determine the new tariff till the successful buy-out of the plant. The prayers made by Lanco were as under:

"a) To direct Respondents to clear all outstanding dues under the PPA till date;

b) To Pass an Order determining new tariff for the supply of power from the Anpara C Plant to Respondents till the successful completion of the buy-out of the Plant;

c) In the alternative, pass an Order determining new tariff for the supply of power from the Anpara C Plant to Respondents, instead of a buyout of the Plant keeping in view the viability and sustainability of the Plant after taking into account the accumulated losses of the Plant till date

d) Pass any other Order which may be consequential upon prayer (a), (b) and/or (c) and any other Order as this Hon'ble Commission may deem fit."

3.18 On 21.05.2013, the Appellant filed a Petition being No. 891 of 2013 challenging the termination notice dated 24.01.2013 and buyout notice dated 11.02.2013 issued by Lanco.

3.19 During the course of hearing dated 31.01.2014 in the above petitions, the State Commission after hearing Lanco and the Appellant put forth following questions before the parties and directed the parties to make submissions on the questions raised :

"(*i) Whether the solution within the terms of PPA can be explored with the sincere efforts of all the parties and the recourse of termination may be discussed subsequently, if required?*

(ii) Whether it would be acceptable to both the parties if any "Compensatory Tariff" is allowed within the PPA?"

3.20 Thereafter, Lanco submitted written submissions dated 14.02.2014 and 20.02.2014 to the questions raised by the State Commission and requested for grant of regulatory tariff as per Central Electricity Regulatory Commission norms or grant compensatory tariff to ensure long-term viability and sustainability of the plant.

3.21 By order dated 28.04.2014 passed in the above Petition Nos. 871 and 891 of 2013, the State Commission proceeded to constitute a committee for working out and recommending the 'Compensatory Tariff' over and above the tariff as decided under the PPA. This was based on the decision dated 21.08.2013 passed by the Maharashtra Electricity Regulatory Commission in Petition No.

68 of 2012 and decision dated 02.04.2013 and order dated 21.02.2014 in Petition No. 155/MP/2012 by the Central Electricity Regulatory Commission holding that the Regulatory Commission appointed under the Electricity Act, 2003 can in the exercise of the regulatory powers give compensatory Tariff a generating company over and above the Tariff admissible under the PPA.

3.22 On 03.03.2015, the Committee constituted by the State Commission submitted its report to the State Commission and on 30.06.2015, an addendum report was also submitted to the State Commission. The Committee recommended a compensatory tariff of Rs. 0.226/kWH (levelised for PPA duration) as well as Rs 499.58 crores as compensation for past losses (from the date of Commercial Operation Date of Unit I i.e. 10.11.2011 till 11.02.2013).

AA. Thereafter by order dated 23.11.2015, the State Commission decided on grant of compensatory tariff based on the recommendations of the Committee. The relevant extract of the order is as under:

"23. In view of the above submissions and deliberations and for 'safeguarding interest of Consumers of the State of UP' and at the same time to allow 'recovery of cost of electricity in a reasonable manner', considering the distinctiveness of the case and request of UPPCL as well as LAPL for a sustainable solution, the Commission decides to allow compensation / compensatory tariff as suggested by the Expert Committee and admitted by LAPL and UPPCL in the process.

A. Compensation for recovery of the past losses (from COD to the date of notice of termination i.e. 11th February 2013):

S. No	*Elements*	*LAPL Request (Rs Crores)*	*As determined by the Committee and approved by the*

			Commission (Rs Crores)
1	*Under recovery of fixed charges*	*401.31*	*401.31*
2	*Under recovery of Variable Charges*	*81.66*	*77.46*
3	*Compensation for Higher Secondary Oil Consumption*	*26.01*	*20.81*
	Total	***508.98***	***499.58***

B. Compensatory Tariff for sustainability of the project *(Levelized for the PPA duration)**:***

S. No.	*Elements*	*LAPL claim (Rs/kWh)*	*As determined by the Committee and approved by the Commission (Rs/kWh)*
1	*Interest on Loan*	*0.069*	*0.069*
2.	*Interest on Working Capital*	*0.062*	*0.062*
3.	*O&M Expenses*	*0.079*	*0*
4.	*Secondary Fuel consumption*	*0.078*	*0.024*
5.	*Increase in Capital Cost**	*0.075*	*0.071*
Total		***0.363***	***0.226***

BB. Aggrieved by the Order dated 23.11.2015, the Appellant filed a Petition being Review Petition No. 1104 of 2016 seeking review of the impugned order, particularly, where it was recorded wrongly that the Appellant had consented to the said Order. The Appellant had placed on record of the State Commission that the consistent stand of the Appellant had been that the matter be decided by the State Commission in accordance with law and keeping the interest of the

consumers at large. The above representation made by the Appellant before the State Commission was during the stage when the Central Electricity Regulatory Commission as well as the State Commission of Maharashtra Electricity Regulatory Commission had made decisions holding that a Regulatory Commission constituted under the Electricity Act has general regulatory powers to give compensatory tariff to a Generator, though the case made out by the Generator may not fall under the provisions of Force Majeure or Change in Law as stipulated in the Power Purchase Agreement.

CC. The Respondent No. 3 herein had filed an Appeal being Appeal No. 173 of 2016 before this Tribunal challenging the Order dated 23.11.2015 passed by the State Commission.

DD. By Order dated 30.11.2016 passed in Appeal No. 173 of 2016, this Tribunal was pleased to set aside the Order of the Hon'ble Commission passed in Petition No. 871 of 2013 and 891 of 2013 for grant of compensatory tariff in exercise of the general regulatory powers. Lanco did not challenge the Order dated 30.11.2016 of this Tribunal. The judgement holding that no compensatory tariff can be paid in exercise of the regulatory powers has become final and binding in so far as Lanco is concerned, notwithstanding any developments in any other cases. In the order-dated 30.11.2016, the Tribunal had remanded the matter for consideration of the matter in the light of the Tribunal's judgment.

EE. By Order dated 11.04.2017 passed by the Hon'ble Supreme Court in *Energy Watchdog –v- Central Electricity Regulatory Commission* (2017) 4 SCALE 580, the Hon'ble Supreme Court considered the appeal arising out of the Order dated 07.04.2016 passed by this Tribunal in Appeal No. 100 of 2013 and batch, the matter of Adani Power and other connected matters in relation to considering the promulgation of the Indonesian Regulations as a Force Majeure Event. This Tribunal had in the said Order dated 7.4.2016 set aside the decision of the Central Commission holding that it has regulatory powers to give compensatory tariff to Adani Power and others on account of the bench marking of the coal price under the Indonesian Regulations promulgated effective 23.09.2011.

FF. By Order dated 11.04.2017, the Hon'ble Supreme Court has set aside the decision of this Tribunal in so far as it proceeds to grant relief to Adani Power on the basis of treating the promulgation of the Indonesian Regulations as a Force Majeure Event. The limited extent to which a relief is admissible to the generator under the Orders of the Hon'ble Supreme Court dated 11.04.2017 is in regard to the New Coal Distribution Policy (**'NCDP')** and the relief is further limited to the non-availability of domestic coal for which a linkage had been granted or a Letter of Assurance has been issued by the Company/ Companies due to change in the Policy of the Government of India and

consequent to the Coal Company not signing the Fuel Supply Agreement (**'FSA')** for the full quantum as given in the Letter of Assurance or Linkage.

GG. In the circumstances mentioned herein above, in the remand proceedings, the State Commission was required to consider the matter arising out of the remand in the context of the decision dated 11.04.2017 of the Hon'ble Supreme Court in the case of Energy Watchdog –v- Central Electricity Regulatory Commission (2017) 4 SCALE 580 as well as other decisions of the Hon'ble Supreme Court.

HH. In the proceedings Lanco had claimed increase in the tariff related to the following heads as recorded by the State Commission in the impugned Order as under:

i. Deemed availability due to delay in handing over of land.
ii. Under recovery of fixed charges due to coal issues.
iii. Losses on account of higher heat rate, secondary oil consumption and O&M expenses due to coal issues.
iv. Higher working capital due to coal issues.
v. Capital cost incurred on wharf wall due to coal issues.

JJ. On 16.08.2017, the State Commission has decided the Petition No. 871 and 891 of 2013 and Review Petitions 1062 of 2015 and 1104 of 2016. In the impugned Order the State Commission has proceeded to allow a mandatory relief to Lanco under the following heads:

(a) Compensation for recovery of the past losses (from COD to the date of notice of termination i.e. 11.02.2013);

(b) Additional tariff from 12.02.2013 related to Interest on Loan, Interest on Working Capital and Secondary Fuel Oil Consumption;

The aggregate quantum of increase in the tariff allowed is Rs 0.155/KwH after 12.02.2013 besides the monetary compensation of Rs 499.58 crores for the past period.

KK. Aggrieved by the Order dated 16.08.2017 passed by the State Commission, the Appellants have preferred the present appeal(s).

4. **FACTS IN ISSUE:**

4.1 The interpretation made by the State Commission of the Order dated 11.04.2017 passed by the Hon'ble Supreme Court in Energy Watchdog v Central Electricity Regulatory Commission(2017) 4 SCALE 580 in regard to factual aspects prevalent in the case of Respondent No. 1 – Lanco;

4.2 Compensation given for the past losses i.e. for the period from COD of the generating station to the date of Notice of Termination i.e. 12.2.2013;

4.3 Additional tariff allowed to provide additional Interest on Loan equivalent to Rs 0.069/KwH as claimed by Lanco;

4.4 Additional tariff of Rs 0.062/KwH towards additional Interest on Working Capital as claimed by Lanco; and

4.5 Additional tariff of Rs 0.024/KwH towards Secondary Fuel Oil consumption as claimed by Lanco.

5. QUESTIONS OF LAW:

The Appellant have raised following questions of law in their Appeals for our consideration :-

5.1 Whether the decision of the State Commission is not perverse, and only a collection of various pleadings and Orders with no application of mind?

5.2 Whether the State Commission has correctly interpreted and applied the law laid down by the Hon'ble Supreme Court in Energy Watchdog v Central Electricity Regulatory Commission(2017) 4 SCALE 580 in regard to the exercise of powers by a Regulatory Commission to grant relief to a Generator, particularly when there is no invocation or application of Force Majeure or Change in Law specified in the PPA?

5.3 Whether the State Commission has acted consistent with the directions issued by this Tribunal in the decision dated 30.11.2016 passed in Appeal No. 173 of 2016 while remanding the matter or has attempted to over-reach the directions by maintaining substantially the same order passed before on the above specific issues?

5.4 Whether the State Commission is right in referring to and completely basing its decision on the report of the Expert Committee recommending compensatory tariff to be paid, relying on which the earlier Order dated 23.11.2015 was passed, when the said Order has been set aside by this

Tribunal holding that there cannot be an exercise of regulatory powers to grant compensatory tariff?

5.5 Whether the order of the State Commission can be said to be a reasoned order when except for extensively quoting the pleadings and the Expert Committee's report given earlier, the State Commission has applied its mind to the facts and legal issues pending before it to decide on the claim of Lanco?

5.6 Whether the State Commission has considered any legal basis in allowing compensatory tariff or monetary relief under the different heads mentioned in the facts in issue in the circumstances of the case?

5.7 Whether the relief granted by the State Commission to Lanco has anything to do with the National Coal Distribution Policy, 2013 or any implication thereof, when no relief has been sought for or allowed in regard to coal cost and relief sought for and allowed is related to the capital cost, matters other than those related to National Coal Distribution Policy?

5.8 Whether the State Commission is right in dealing with the aspect that Lanco was entitled to terminate the PPA and enforce compulsory buyout of the plant by the Appellant when the said issue was not proceeded with after the Order dated 28.04.2014 and 23.11.2015 passed by the State Commission and the same has become final and binding?

6. The Learned Counsel, Mr. M.G. Ramachandran appearing for the Appellant has filed the written submissions in Appeal No. 336 of 2017 and adopted in companion Appeal No. 359 of 2017 as follows :-

Proposition I : Exercise of Regulatory Powers to grant compensatory tariff is erroneous and contrary to the decisions of the Ho'ble Supreme Court and this Tribunal**.**

6.1 The exercise of general regulatory powers to grant such compensatory tariff is not available with the State Commission/Central Commission and this has been authoritatively laid down by the Hon'ble Supreme Court in Energy Watchdog Case (2017) 4 SCALE 580, followed by the Hon'ble Supreme Court itself in the decision dated 20.04.2017 in Civil Appeal Nos. 9643-44 of 2016-Sasan Power Limited –v- Central Electricity Regulatory Commission and thereafter, followed by this Tribunal in Appeal No. 283 of 2015 in Nabha Power Limited –v- Punjab State Power Corporation Limited and Anr. decided on 17.05.2018.

6.2 The relevant extracts from the above three decisions are as under:

1. Energy watchdog case

"*18. The construction of Section 63, when read with the other provisions of this Act, is what comes up for decision in the present appeals. It may be noticed that Section 63 begins with a non-obstante clause, but it is a non-obstante clause covering only Section 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not "determine" tariff but only "adopts" tariff already determined under Section 63. Thirdly, such "adoption" is only if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a stand alone provision and has to be*

construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this Section on 19th January, 2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with clause 4.

19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to

"regulate" tariff. ***It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."***

2. **Sasan Power Limited Case**

"We have heard the learned Senior Counsel/learned counsel appearing for the parties.

Since the points which arise for determination in these matters have already been dealt with by us in the Judgment delivered in "Civil Appeal Nos. 5399-5400 of 2016 (Energy Watchdog vs. Central Electricity Regulatory Commission and Others) and other Connected matters" on 11.04.2017, we do not find any reason to entertain these Civil Appeals.

Accordingly, the Civil Appeals are dismissed."

(Corrected by a later order as disposed off instead of dismiss)

3. **Nabha Power Limited Case**

8. We have heard the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent at considerable length of time and we have also gone through carefully the written submissions filed by the learned counsel appearing for both the parties and also perused the relevant material on records, the issues that arise for consideration are as follows:

.....

(B) Whether the State Commission by the exercise of its 'regulatory powers' can fashion a relief for a generator which is not stipulated in the concluded PPA between the parties?

.....

9.14 While taking note of the arguments and submissions of the Appellant and the Respondent and also, findings of various judgments of the Apex Court and this Tribunal, we find that the PPA entered into by the parties is a statutory and binding instrument which crystallises the

rights and obligations of the involved parties. Accordingly, the same would need to be interpreted in the spirit of agreed terms and cannot be defined or derived in its "implied term". The Hon'ble Supreme Court in GUVNL case (2017) has also held that PPAs are binding and cannot be varied by the Regulatory Commission. Thus, it is clear that the State Commission by the exercise of its regulatory powers cannot fashion a relief for the Appellant (NPL) which is not stipulated in the concluded PPA between the parties.

6.3 The principles laid down in Paras 18 and 19 of the Energy Watchdog Case (quoted above) is that the general regulatory power available to Central Commission under section 79 (or to the State Commissions under section 86) can be exercised in regard to matters which have not been provided in the guidelines and bidding documents provided under section 63 or when there are no guidelines at all under section 63. Accordingly, in matters specifically dealt in the guidelines and the bidding documents under section 63, including the PPA, there cannot be any exercise of general regulatory powers under section 79 or 86 to grant relief.

6.4 The decisions relied by Lanco as under are precisely within the ambit of absence of guidelines notified by the Central Government recognized by the Hon'ble Supreme Court in para 19 of the Energy Watchdog cases.

A. Indian Wind Energy Association -v- Gujarat Urja Vikas Nigam Limited dated 03.11.2017 by the Single Judge of the Hon'ble High Court of Gujarat:
B. Indian Wind Energy Association -v- Gujarat Urja Vikas Nigam Limited dated 4.11.2017 by the Division Bench of the Hon'ble High Court of Gujarat:
C. The decision of this Tribunal in JBM Solar Power Pvt Limited -v- Haryana Electricity Regulatory Commission dated 19.3.2018.
D. The decision of this Tribunal inBalarch Renewable Energy Pvt. Limited -v- Haryana Electricity Regulatory Commission dated 27.3.2018.

6.5 The reliance placed by Lanco on the decision of the Hon'ble Supreme Court in All India Engineering Federation v Sasan Power Limited (2017) 1 SCC 497 to suggest that the regulatory powers can be exercised to grant compensatory tariff is totally misconceived. The relevant paras, namely, **Para 30 and 31 at Page 44** of the said judgment are to be read together. They read as under:

*"**30.** A perusal of the CERC tariff adoption order in the present case dated 17-10-2007 makes it clear that the tariff is adopted by the Commission only because the competitive bidding process which has been undertaken is in accordance with the Guidelines so issued.*

***31.** All this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act. This is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with Guidelines issued. If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest."*

6.6 In the above case, the matter related to declaration of Commercial Operation Date (COD) and conditions attached thereto and not to the exercise of Regulatory Powers to grant compensatory tariff. The said decision dealt with the interpretation and application of the provisions of the PPA entered into and the validity of the waiver claimed by the generator based on the alleged conduct of the Procurer. It was held that even if the Procurer by his conduct said to have waived any condition of the PPA entered into pursuance to a

Competitive Bidding Process under Section 63 of the Act, the same is not valid unless it is approved by the Appropriate Commission, taking into account the public interest. In this regard reference may be made to the decision of the All India Engineering Federation v Sasan Power Limited (2017) 1 SCC 497 which reads as under:

"25. *It is thus clear that if there is any element of public interest involved, the court steps in to thwart any waiver which may be contrary to such public interest."*

6.7 The above five decisions relied on by Lanco are clearly not on the aspects of the exercise of regulatory power to grant compensatory tariff when there are guidelines and bidding documents and therefore have no application to the present case.

6.8 Lanco has proceeded on the basis that it is the Appellant's contention that no regulatory power can be exercised by the Appropriate Commission in regard to tariff determination under Section 63 of the Electricity Act, 2003 and that the Appropriate Commission acts only as a post office. This is factually incorrect. The Appellant never argued either before the State Commission or before this Tribunal that Section 79/86 of the Electricity Act, 2003 has no application at all to the bidding process under Section 63 or that the State Commission should act only as a post office. These are being wrongly attributed to be the submissions of the Appellant.

6.9 It is also incorrect on the part of Lanco to urge that the Hon'ble Supreme Court in Energy Watchdog case (supra) has quashed the decision of the full bench of this Tribunal dated 07.04.2016 on the aspect of non-existence of regulatory powers to carry or modify the tariff discovered under section 63 of the Act. On the other hand, the Hon'ble Supreme Court has upheld the decision of this Tribunal on this aspect and held that the general regulatory powers cannot be exercised to grant compensatory tariff. The appeals filed by Adani Power Limited and Coastal Gujarat Power Limited, the generators in the said case, to claim compensatory tariff under the exercise of regulatory powers were rejected by the Hon'ble Supreme Court. The limited extent to which the Hon'ble Supreme Court decided the matter in favour of the generator is on the aspect of New Coal Distribution Policy (NCDP). In this regard, Para 54 of the Energy Watchdog case the operative part makes is abundantly clear.

"54. However, Shri Ramachandran, learned senior counsel for the appellants, argued that the policy dated 18th October, 2007 was announced even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. We are afraid that we cannot accede to this argument for the reason that the change in law has only taken place only in 2013, which modifies the 2007 policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources. ***It is to this limited extent that change in law is held in favour of the respondents."***

6.10 Following the Energy Watchdog case, the Hon'ble Supreme Court had rejected a similar claim of exercise of regulatory powers to grant compensatory tariff claimed by Sasan Power Limited vide Order dated 20.4.2017 passed in Civil

Appeal Nos. 9643 and 9644 of 2016.In the Nabha Power Case (Supra), this Tribunal has rejected similar claim made by the generator applying the decision of the Hon'ble Supreme Court in Energy Watchdog Case.

6.11 Another important aspect to be considered is that wherever the guidelines notified by the Central Government under section 63 intended to give the powers to the Appropriate Commission it has been specifically recognized and provided. The illustrative list of the same are as under:

(a) **Clause 3.1**- In case, there are deviations from the bidding conditions contained in the guidelines, approval of the appropriate Commission shall be sought.

(b) **Clause 4.2**- In case the price of the fuel has not been determined by the Government of India, Government approved mechanism or the Fuel Regulator same shall have to be approved by the appropriate Regulatory Commission.

(c) **Clause 5.6 (vi)** - Following shall be notified and updated by the Central Electricity Regulatory Commission (CERC) every six months for the purpose of evaluation:

(i) Applicable discount rate
(ii) Escalation rate for coal
(iii) Escalation rate for gas/LNG
(iv) Inflation rate to be applied to indexed capacity charge component;

(d) **Clause 5.7**- In case the qualified bidders responding to the RFQ/RFP is less than two, and procurer still wants to continue with the bidding process, the same may be done with the consent of the Appropriate Commission.

(e) **Clause 6.14**- The final PPA along with the certification by the evaluation committee shall be forwarded to the Appropriate Commission for adoption of tariffs in terms of Section 63 of Act.

6.12 In contrast to the above, the guidelines and bidding documents including the PPA specifically deals with quoted tariff, force majeure, capacity charges, energy charges, Indian Political Event, change in law, payment security and consequences etc. without any stipulation as to the exercise of regulatory powers by the Appropriate Commission.

6.13 The guidelines and the PPA, as a part of bidding documents, having duly provided the specific aspects to be dealt in accordance therewith without contemplating any exercise of regulatory power in regard to the same, the circumstances, envisaged in Para 19 of the Energy Watchdog case for exercise of regulatory powers in the absence of guidelines or that the guidelines do not deal with the subject, does not arise.

6.14 The entire arguments of Lanco has proceeded on the basis that Paras 18 and 19 of the Hon'ble Supreme Court decision in Energy Watchdog case has held that the exercise of regulatory powers under section 86 exist for granting compensatory tariff. The State Commission has also proceeded on the same basis. During the arguments before this Tribunal, the State Commission has

also argued that there exists regulatory power with the State Commission to grant compensatory tariff.

6.15 In the light of the above submissions of the Appellant, the claim made by Lanco in regard to the availability of exercise of regulatory powers in support of compensatory tariff or the decision made by the State Commission in the present case in regard to the continued availability of regulatory powers to grant compensatory tariff over and above the tariff determined under section 63 are erroneous and are liable to be rejected.

6.16 In any event, the stand taken by Lanco and the State Commission on the exercise of general regulatory powers to grant compensatory tariff and the decision on application of change in law, force majeure/frustration of contract is ambivalent and incomprehensible. In the circumstances, the impugned order is liable to be set aside and case remanded for reconsideration specifically under the terms of the PPA without being influenced by the notion that the State Commission has the regulatory power to give compensatory tariff. In regard to the above, the reference may be made to the following decisions of the Hon'ble Supreme Court on the proposition that the judgment given by a judicial/quasi-judicial body needs to be comprehensible, dealing with the respective contentions of the parties and that it should be a reasoned order:

(a) Kranti Associates Private Limited –v- Masood Ahmed Khan and Others (2010) 9 SCC 496
(b) U. Manjunath Rao –v- U. Chandrasekhar and Another- (2017) 15 SCC 309

(c) S.N.Mukherjee –v- Union of India (1990) 4 SCC 594
(d) A.M.Sangappa –v- Sangondeppa and Anr. (2013) SCC Online SC 1013

Proposition II : Grant of reliefs under Article 14 of the PPA dealing with change in law on the premise that there was an assurance of 100% coal supply from Khadia Mines is erroneous

6.17 The change in law is claimed by Lanco in regard to New Coal Distribution Policy**(NCDP)** of the Government of India, whereby the coal availability from the linked mines got reduced necessitating the concerned generating company to procure coal from alternate sources to the extent of coal non-availability from the linked mines. There can be and there is no dispute that if on account of the policy of Government of India, the coal supply is reduced, it is change in law and this has been held in the Energy Watchdog case. This is not disputed by the Appellant.

6.18 The relief admissible for such change in law is the payment of difference in price of procurement of coal from alternate sources including imported coal and the price at which coal is available from the linked mines. Such differential amount is to be allowed to the generating company, subject to prudence check by the Appropriate Commission. The above relief has not been denied by the Appellant. Such a consequence of the actual cost of coal procured from other sources was already anticipated and has been provided in the PPA itself in Article 1.1, defining fuel Supply Agreement read with Articles 3.12 (p), 7.9, 7.10,13.3.3 and Schedule 8 to the PPA. In fact, the Appellant and Lanco

executed a Fuel Policy dated 28.09.2012 in accordance with Article 7.9 of the PPA**,** specifically dealing with the issues related to the NCDP and the consequences and relief thereto to be provided to Lanco. The relevant clauses are extracted in the summary of events filed herewith. In addition to the above, Lanco had signed the Fuel Supply Agreement dated 24.04.2012 with Northern Coalfields Limited (NCL) which also envisages supply of coal from sources other than Khadia mines, the transportation by road/rail, import of coal and increase in price of coal.

6.19 In the present proceedings, Lanco is not seeking and the State Commission has not allowed relief for differential cost of coal on account of NCDP. The above relief has already been provided for in the PPA and the Fuel Policy dated 28.09.2012and has been duly allowed by the Appellant and availed by Lanco even without the need for the State Commission to intervene and pass any order.

6.20 The relief which Lanco has sought and the State Commission has allowed is something altogether different, namely deemed fixed charges upto target availability. Substantially, the reliefs granted under change in law are under the heads : **under recovery of fixed charges, under recovery of Variable Charges and Compensation for Higher Secondary Oil Consumption.**

6.21 The basic premise on which the above effect of the change in law claim has been pursued by Lanco and allowed by the State Commission in the impugned

order is allegedly that at the time of bidding and signing the PPA, there was an assurance of 100% coal availability from Khadia Mines of Northern Coalfields Limited (NCL) for the Project and therefore Lanco did not have to establish the infrastructure and equipments for procurement/import of coal in the project from other sources.

6.22 The above plea is fundamentally flawed. The scope and extent of assurance of coal availability from Khadia Mines is to be determined with reference to the basic contract documents at the time when the bidding took place and the PPA entered into in pursuance thereof. In this regard the Applicant craves reference to the following documents:

A. PPA dated 12.11.2006
B. Orders dated 19.10.2005 and 06.02.2006 passed by the State Commission which stands incorporated in the PPA in terms of Article 20.14
C. Fuel Supply agreement dated 23.04.2012, the FSA is referred to in Article 3.1.2 (P) read with definition of the term 'Fuel Supply Agreement' in Article 1 and Article 7.10 of the PPA.
D. Fuel Policy dated 28.09.2012 referred to in Article 7.9 of the PPA.
E. Revised RFP dated 20.02.2006.

6.23 Thus :

(a) the bid invited by the Appellant under the competitive bid process was not premised on the availability of coal from Khadia mines and the risk and responsibility for procuring of coal required from any source was specifically stipulated to be of Lanco:

(b) Lanco was duly, sufficiently and unambiguously made known that fuel risks is of Lanco, there will be a need for Lanco getting coal from sources other than the Khadia Mines including coal imported from outside India and there will be rail/road transportation of coal (not entirely the use of MGR System).

6.24 In the circumstances, Lanco was required to make arrangement for all infrastructure and plant and equipment to deal with sourcing of coal from other than Khadia Mines and its transportation by rail or road while constructing the power generating units.

6.25 The above also gets fortified by the fact that Lanco did not raise any issue on the claim for under recovery of fixed charges, under recovery of Variable Charges and Compensation for Higher Secondary Oil Consumption at the time when the contract document was entered into or even at the time when the fuel supply agreement dated 24.04.2012 was executed between Lanco and NCL and also at the time, when the Fuel Policy Agreement dated 28.09.2012 was executed, each one of them envisaging fuel procurement from other sources and that Lanco had commenced commercial operation since 10.12.2011 (First Unit) and 18.01.2012 (Second Unit). Further, these issues were not even raised when the preliminary default notice was issued on 10.12.2012. The contemporaneous documents and dealings clearly negate the claim of Lanco. Lanco had raised the above aspects only 24.01.2013 for the first time as an

afterthought, which is four (4) days before filing of the Petition No. 871 of 2013.

6.26 In view of the above, the claims made by Lanco and allowed by the State Commission for non-availability of coal from Khadia Mines for matters such as under recovery of fixed charges, under recovery of variable charges and higher secondary fuel charges are patently erroneous and devoid of any merit.

Proposition III : In any event the issue of coal availability from Khadia Mines has no nexus/correlation to the reliefs granted.

6.27 Even assuming for the sake of arguments but not admitting that the coal was to be made available primarily from Khadia mines, the non-availability of the coal from the said mines either on account of NCDP or otherwise can have only the consequence of procurement of coal from other sources including imported coal and claim by the generating company for the payment of the actual cost of bring such coal to the project site for use in the power plant.

6.28 In the present case, the PPA in Schedule 8 already provides for actual cost of coal procured to be allowed. The Fuel Policy at provides for the cost of linkage coal or from alternate sources being a pass through. Thus, financially, to the legally extent applicable, Lanco is fully protected. There is, therefore, no adverse financial impact to Lanco because of non-availability of coal from alternate sources. The reliefs granted by the State Commission has no nexus to the application of NCDP as change in law.

6.29 Further, the State Commission has ignored the specific provision namely Article 13.3.3 of the PPA which stipulates as under :

"*It is expressly understood that a fuel supply interruption caused by the Fuel Supplier or the Seller shall not constitute an Indian Political Event.*"

6.30 In the light of the above provision there cannot be any claim for under recovery of fixed charges, under recovery of Variable Charges and Compensation for Higher Secondary Oil Consumption, allegedly on account of less coal availability from Khadia Mines.

6.31 The coal issue raised by Lanco had therefore no relation whatsoever to the issue of Change in Law decided by the Hon'ble Supreme Court in regard to NCDP. In the decision of the Hon'ble Supreme Court in Energy Watchdog Case what has been considered is the shortage in the availability of coal from the linked sources, namely, in the quantum as per the Letter of Linkage or Letter of Assurance given and the inability of the Coal Company to sign the FSA to the full extent of the reason of change in the NCDP. Such a situation does not arise in the present case. In fact, the present case of Lanco is Case 2 Competitive Bid Process where the energy charges are allowed on the basis of a formula contained in Schedule 8 of the PPA and the bid process was only to decide on the quoted capacity charges and net quoted heat rate (NQHR). The coal price, from coal sources other than Khadia mines, inclusive of the purchase cost as well as the coal transportation and unloading charges is

allowed on actual basis. There is, therefore, no impact on Lanco in so far as the change in the source of coal availability.

6.32 The claim of Lanco, in the present case for increased capacity charges or additional capital cost over and above the quoted capacity charges is totally misplaced. The increase in capacity charges claimed had nothing to do with the energy charges payable. The capacity charges were quoted by Lanco as per its decision at the time of the submission of the bid. It was for Lanco to factor all the relevant aspects. Thus, it was not open to Lanco to claim any additional capacity charges except for force majeure/the Indian Political Event as provided in Articles 12 and 13 or Change in Law as provided in Article 14 of the PPA.

6.33 There cannot be any increase in the quoted capacity charges on account of reasons as claimed by Lanco. A similar claim was made by Sasan Power Limited in Civil Appeal Nos. 9643-44 of 2016 filed before the Hon'ble Supreme Court arising out of the Order dated 07.04.2016 passed by this Tribunal. Sasan Power Limited had claimed an increase in the capacity charges on account of exchange rate fluctuation. The Tribunal by Order dated 7.4.2016 had rejected the same. The Hon'ble Supreme Court had also not allowed the same. The Civil Appeals filed by Sasan Power were disposed of vide Order dated 20.4.2017.

6.34 Similarly the issue of implication of higher Station Heat Rate on account of lesser generation has been considered and rejected by this Tribunal in Appeal No. 283 of 2015 in Nabha Power Limited –v- Punjab State Power Corporation Limited and Anr. decided on 17.05.2018 wherein this Tribunal has clearly held that though …… *the operation of such plants at low load or at varying load would result in higher SHR than the rated one* however …….*the claim of NPL arising out of higher SHR is beyond the periphery of concluded PPA*… . This Tribunal, has ultimately held that ***it is clear that the State Commission by the exercise of its regulatory powers cannot fashion a relief for the Appellant (NPL) which is not stipulated in the concluded PPA between the parties.*** The principles laid down in the above cases squarely applies to the claim for secondary fuel consumption at a higher quantum.

6.35 The above is also supported by the findings of this Tribunal in the judgment dated 19.04.2017 passed in the case of Sasan Power Limited –v- Central Electricity Regulatory Commission wherein it has been held '*the tariff is a per unit tariff allowed on the electricity generated and supplied and such a bid submitted by bidder is inclusive of all element*'.

Reference in this regard may be made to the decision of the Central Commission in the case of **EMCO Energy Limited/GMR Warora Energy Limited –v- Maharashtra State Electricity Distribution Company Limited** (Order dated 01.02.2017 in Petition No. 8/MP/2014)

Proposition IV : The issues raised on payment security mechanism, letter of credit and non-payment of amounts becoming due etc. cannot be said to be frustrating event under section 56 of the Indian Contract Act, 1872.

6.36 On the face of it, the State Commission holding that the PPA entered into between the Appellant and Lanco got frustrated as the Appellant had offered a payment security mechanism, letter of credit and due payment, knowing fully well that it was impossible for the Appellant to fulfil, is far-fetched, incomprehensible and perverse. The Appellant has been purchasing electricity from different sources and the issue of the Appellant deliberately signing the PPAs with different generators with the knowledge that it will not fulfil the payment obligation is preposterous.

6.37 This is amply clear from the fact that as on the date of the passing of the impugned order, namely after more than 9 years of the signing of the PPA, there was no outstanding from the Appellant to Lanco. Further, during the course of these 9 years, the PPA has been actually implemented with generation and supply of power from the project, which is contrary to the PPA being frustrated at the time of signing itself.

6.38 Another irrebuttable evidence of the perverse finding on the payment security mechanism, letter of credit, outstanding dues is that these were raised before the Expert Committee and the decision of the Expert Committee was not that

the same lead to frustration under section 56 of the Indian Contract Act, 1872. The Expert Committee had concluded that these aspects are covered by the remedies provided under the PPA namely Article Article 4.9 dealing with third party sales. The relevant extracts from the Expert Committee report quoted in the impugned order is as under:

"Payment and Payment Security Mechanism:

The Committee recommends that payment and payment security mechanism as mandated under RFP/PPA should be implemented by UPPCL. In case of non-compliance of the same by UPPCL within a definite time frame, the Committee recommends that Hon'ble UPERC to allow LAPL for 3rd Party sale of power and issue standing directions to grant open access, as required."

Based on the above, in the earlier order dated 23.11.2015, the State Commission did not grant any relief on account of any matters concerning the alleged non-establishment of payment security mechanism.

6.39 There is no justification for the State Commission to have evolved a new concept of frustration under section 56 of the Indian Contract Act, 1872 to grant reliefs to Lanco. The basic scope and effect of section 56 of the Indian Contract Act, 1872 has been misapplied by the State Commission. Section 56 of the Indian Contract Act, 1872 deals with impossibility of performance. The issue is whether the PPA entered into was impossible to perform. The answer is obviously '**NO',** as the PPA has been performed and the direction in the impugned order is also to perform the PPA and pay higher tariff. It is incomprehensible and unknown to any principle of law that the PPA which is

held to be frustrated for alleged payment security issue can be said to be capable of being performed with higher tariff being paid. The two are oxymoron. If the PPA is to be performed as decided by the State Commission with increased tariff, the PPA cannot be said to be impossible to perform in the first instance to term it as frustrated.

6.40 In any event, payment security and payment issues are the obligation on the part of the Appellant as per the provisions of the PPA and would constitute to be an event of default and not a frustrating event under section 56 of the Indian Contract Act, 1872 or Force Majeure/ Indian Political Event under Articles 12 and 13 of the PPA. In fact, the PPA having dealt with Force Majeure/ Indian Political Event, the invocation of section 56 of the Indian Contract Act, 1872 does not arise at all. This has been settled by the Hon'ble Supreme Court in the following cases:

(a) The Hon'ble Supreme Court in Satyabrata Ghosh –v- MugneeramBangur (AIR 1954 SC 44)

(b) The Hon'ble Supreme Court in the case of Energy Watchdog case, referring to Satyabrata Ghose,

(c) In the case of Naihati Jute Mills Ltd. v. Khyaliram Jagannath AIR 1968 SC 522, the Hon'ble Supreme Court was pleased to hold as under:

"12. It is not hardship or inconvenience or material loss which brings about the principle of frustration into play. There must be a change in the significance of obligation that the thing undertaken would if performed, be a different thing from that which was contracted for.

…….

17……..As Lord Sumner in Bank Lime Ltd. v. Capel (A) Co. Ltd. [1919] A.C. 435 said :-

"Where the contract makes provision (that is, full and complete provision, so intended) for a given contingency it is not for the court to import into the contract some other different provisions for the same contingency called by different name."

18. In such a case the doctrine of discharge by frustration cannot be available, nor that of an implied term that the existing state of affairs would continue at the date of performance. The reason is that where there is an express term the court cannot find on construction of the contract an implied term inconsistent with such express term.

6.41 Accordingly, as the contract between the parties itself deals with a particular contingency, namely, in terms of Article 12 (Force Majeure), then Section 56 of the Contract Act, 1872 will have no application.

6.42 Further, Section 56 of the Contract Act, 1872 and the remedy provided for compensation to be paid by a person who enters into a contract knowing that it impossible to perform is based on the principle of quantum merit and when the contract is not performed. It is well settled that the express terms of the contract should not be ignored and the court cannot grant relief to the plaintiff on the basis of quantum merit. Lanco cannot get increased rates on the basis of quantum merit. **Reference*:*<u>Alopi Parshad and Sons Ltd.</u> v. <u>Union of India,</u> AIR 1960 SC 588 and <u>State of Rajasthan</u> v. <u>Motiram,</u> AIR 1973 Raj 223**

6.43 There has, in fact, been a compliance of payment security mechanism by the Appellant. Reference in this regard may be made to the contents of Petition No. 891 of 2013 filed by UPPCL before the State Commission challenging the

termination notices of Lanco. But the same has not been considered by the State Commission in the findings. The extracts of Petition 891 of 2013 are contained in the Summary of Events.

6.44 Further, nothing has been shown by Lanco as to how the alleged non-establishment of payment security mechanism has caused prejudice to Lanco for which additional tariff need to be given. There are no details given correlating the alleged payment security mechanism and the impact on loan etc.

6.45 Barring some delays, the Appellant had made all the payments to Lanco. The ready for delayed payment is already provided under Article 10.3 of the PPA which is payment of delayed payment surcharge. There cannot be any additional or other claims over and above the delayed payment surcharge.

6.46 The payment security mechanism was established as per Article 10.9 Article 10.9 of the PPA clearly stipulates that the Default Contingency Agreement is the only payment security mechanism and the buyer standby letter of credit is merely a standby payment mechanism. The Default Contingency Agreement dated 11.01.2007 in accordance with the PPA were signed by the four distribution companies in Uttar Pradesh with Lanco and the Central Bank of India.

6.47 In view of the above, the State Commission is wrong in construing that the non-opening of the Letter of Credit or non-timely payments constituted an

important event for Lanco to perform. The non-opening of the Letter of Credit or non-establishment of the payment security mechanism (even assuming but not admitting), cannot lead to the grant of additional tariff or increased tariff. There is no nexus between the above aspects of payment security mechanism or the Letter of Credit to the grant of additional tariff.

6.48 The default in payment cannot lead to a claim for higher tariff. There is no nexus between the issue of payment security mechanism and the tariff to be allowed to Lanco. It cannot be that for any issue on the payment security mechanism, Lanco is entitled to the compensatory tariff/additional tariff. There is no provision in the PPA for allowing such amount in excess of the quoted tariff on account of any issue being raised on the payment security mechanism.

6.49 Above all, the issue of frustration of contract was never raised by Lanco in the earlier proceedings. In the impugned order, the State Commission has itself held that new issues cannot be raised however, has allowed substantial relief of Rs. 0.069 per unit to Lanco for the duration of the PPA from 12.02.2013 on account of alleged default in non-establishment of payment security mechanism.

Proposition V : The impugned order is perverse when it has proceeded on the basis that lanco was entitled to terminate and require the appellant to buy out and since the appellant did not accept the termination and buy out higher tariff to be paid.

As regards the claim made by Lanco related to the termination of the PPA or for the buy-out of the power plant by the Appellant, the earlier order dated 28.04.2014 was passed by the State Commission.

6.50 Lanco did not file any Appeal against either order dated 28.04.2014 or the Order dated 23.11.2015 passed by the State Commission. To this extent, the decision of the State Commission to not to allow the termination of the PPA or enforce the claim for buy-out of the power plant by UPPCL had become final. The Expert Committee report on which the State Commission has placed heavy reliance did not also provide for any relief of termination of the PPA etc. on account of payment security issues.

6.51 The State Commission even in the impugned order has not decided Petition No. 891 of 2013 filed by the Appellant disputing the termination notices of Lanco and has only proceeded to decide on the aspects raised by Lanco in relation to additional tariff to be granted to Lanco. Therefore, it was not open to the State Commission to have proceeded on the basis that to avoid the effect of termination and buyout of the power plant by the Appellant, the State Commission is entitled to grant compensatory tariff.

Proposition VI : It is well settled that there cannot be any relief granted to a party on grounds of equity, hardship, viability and similar other considerations and that the relief has to be within the scope of the agreement between the parties i.e. PPA.

6.52 The impugned order has proceeded on the basis that Lanco had faced hardship and viability of the project has been threatened. Though an attempt has been made to justify the grant of relief with reference to exercise of regulatory power, Section 56 of the Indian Contract Act, 1872, Article 12 and 13 dealing with Force Majeure/Indian Political Event and Article 14 dealing with Change in Law, the basic thread in the judgment is that Lanco should be protected of its hardship and viability. The public interest has also been purported to be invoked on the ground that Lanco is providing electricity at a price which is next best price to the supply by Sasan Power Limited.

6.53 Such consideration of hardship, viability etc. would have been relevant if the Regulatory Commission could exercise general regulatory powers to grant compensatory tariff. If no such regulatory power can be exercised, there cannot be any consideration of such aspects of equity, hardship, viability of the project, Appellant getting cheaper electricity etc. to grant relief to Lanco.

6.54 The State Commission has acted contrary to the basic principle that if in a contract the parties had agreed on the implications of an event, the relief is necessarily confined to what the parties had agreed. It is not open to the Court or Judicial Authority to re-write the contract for the party or to provide a relief other that those given in the contract on grounds on grounds of alleged equity or justice or public interest etc. In this regard, reference may be made to the

Hon'ble Supreme Court in Naihati Jute Mills –v- Khyaliram Jagannath AIR 1968 SC 522.

6.55 In the present case, even assuming that the entire claim made by Lanco as to the non-availability of coal from the Khadia mine, non-establishment of payment security mechanism and non-payment of money from UPPCL to Lanco in time are correct, the remedies, if any, is provided under the PPA read with the Fuel Policy, namely:

a) To procure coal from other sources and claim the actual cost of coal;

b) To seek regularization of the payment security mechanism; and

c) To seek delayed payment surcharge in terms of Article 10 of the PPA

The PPA does not envisage any change in the quoted tariff, directly or indirectly. None of the elements applicable for modification in a tariff determination process under Section 62 can be considered in dealing with a quoted tariff in a tariff based competitive bidding process under Section 63. The State Commission has proceeded to create a fundamentally a new contract with new implications than what has been provided in the PPA.

6.56 In this regard the Hon'ble Supreme Court in **Shin Satellite Public Co. Ltd.-v-Jain Studios Ltd., (2006) 2 SCC 628 at page 634** has held as under:

> *"15. It is no doubt true that a court of law will read the agreement as it is and cannot rewrite nor create a new one. It is also true that the contract must be read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement*

of the rest if otherwise it is not permissible. But it is well settled that if the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable."

6.57 Another contention raised by Lanco that the public interest will suffer if power available from Lanco project is not available on account of Lanco becoming financially unviable (Lanco facing liquidation proceedings) and thereby, the public will not get power at economical rate, is required to be rejected in limine. This cannot be a legal contention before this Tribunal. A similar contention was raised by the Generating Company- Sasan Power Limited in the case of All India Power Engineers Federation –v- Sasan Power Limited (2017) 1 SCC 487, however no relief was granted to Sasan Power on the said account. Para 9 of the judgment reads as under:

"9. *As against this, Shri Chidambaram and Shri Sibal, learned Senior Counsel appearing on behalf of Sasan Power Ltd., have argued that as against 69 and 70 paise per unit for electricity supplied under the PPA, the procurers were in fact procuring electricity at much higher rates.*

Proposition VII : The findings on the aspect of the conduct of the appellant in the earlier proceedings, the appellant taking diametrically opposite stand in the subsequent proceedings after the remand made by the Tribunal vide order dated 30.11.2016 are all without any basis and are also not relevant:

6.58 The proper perusal of the records of the case will clearly show that there is no inconsistent approach on the part of the Appellant. The Appellant in the earlier proceedings had also not accepted the claim of Lanco to terminate the

PPA and buy out of the project by the Appellant. The Appellant had specifically contested the said claim of Lanco by filing the Petition No 891 of 2013. The prayers in the said petition read as under:

> *"WHEREFORE, it is most respectfully prayed that this Hon'ble Commission may kindly be pleased:*
>
> *i) to issue a suitable order or direction setting aside the impugned notices dated 24.01.2013 and 11.2.2013 issued by the Respondent to the petitioners, as are contained in Annexure No.1 and Annexure No.2 respectively to this Petition and direct Respondent to continue Power supply as per Agreement in the larger interest of Public of the state.*
>
> *ii) To issue any other order or direction which this Hon'ble Commission may deem just and proper in circumstances of the case;*
>
> *iii) To allow this petition with all costs in favour of the petitioners."*

iv) The Appellant had also contested the claim of Lanco on the aspects of coal non-availability from the Khadia Mines and admissibility of any relief under the PPA on account of the same and also with regard to the payment security issues. In this regard,the submissions made by the Appellant, in reply to the Petition No 871 of 2013 filed by Lanco, recorded in order dated 28.04.2014 are as under:

(a) Order dated 19.10.2005

(b) Issue of transportation through different modes namely Rail/MGR/Road Transport

(c) Issue of payment security mechanism

6.59 Thus the Appellant's stand from the beginning was clear and unambiguous namely that there cannot be any relief to Lanco if the relief is not claimed under the provisions of the PPA. In other words, the re-opening of the quoted tariff claimed by Lanco on account of hardship faced by Lanco is impermissible in the tariff based on the Competitive Bid Process except for a Change in Law or force majeure or for an escalation provided for in the PPA itself.

6.60 The State Commission in the order dated 28.04.2014 also accepted the above position as per the stand taken by the Appellant and decided specifically that

"*The bid tariff has been discovered through a transparent process of competitive bidding and is applicable for the 25 years term of the PPA. The tariff has been adopted by the Commission under section 63 of the Electricity Act, 2003. So, it is evident that any new tariff could be considered during extended period i.e. only after expiry of the term of 25 years. Therefore, the only viable solution seems to a 'compensatory tariff' which is acceptable to both the parties"*

6.61 Lanco had also accepted the said position of non-availability if relief under the PPA and did not challenge the above decision and proceeded in the basis of grant of compensatory Tariff under exercise of general regulatory powers. The possibility of relief under exercise of Regulatory powers was set out by the State Commission in the same order dated 28.04.2014 as under:

"Therefore, at this point in time, in view of legal position discussed and in light of the orders of Hon'ble CERC and Hon'ble MERC cited above and the willingness expressed both by LAPL and UPPCL, the

Commission considers that the answer to the problem may lie in allowing without affecting the terms of existing PPA a "Compensatory Tariff" as acceptable to both the parties.""

6.62 It is in the above context that the Appellant agreed to the finding of the solution to the hardship alleged by Lanco. In the letter dated 05.03.2014, the specific statement of the Appellant was as under:

"Notwithstanding the submissions exchanged in the above said petitions and without prejudice to its legal position, if the Hon'ble Commission takes the decision to provide them an increased tariff due to various impediments faced by M/s Lanco as stated in their letter dated 20.02.14, we do not have any objection as long as the solution carved out in the matter the legal frame work and it is in the general interest of people Uttar Pradesh by providing cost effective electricity on a long term basis."

6.63 The above cannot be construed as unconditional and absolute undertaking or agreement of the Appellant to the grant of reliefs under any circumstances as sought to be alleged by Lanco and considered by the State Commission in the Impugned order.

6.64 The Appellant did not dispute the claim of Lanco that it had faced hardship on account of events arising out of non-availability of coal from Khadia Mines to the full extent in the context of the exercise of Regulatory powers to give compensatory tariff and not in the context of the application of the provisions of the PPA. The above stand taken by the Appellant and certain statement made at that time when every one proceeded on the basis of availability of regulatory powers to grant reliefs de hors the PPA cannot now

be used against the Appellant in regard to admissibility of relief under specific provisions of the PPA.

6.65 The basic flaw in the approach of the State Commission is mixing up the acceptance of hardship faced by the Lanco in the context of exercise of regulatory powers to grant of compensatory tariff de hors the provisions of the PPA and the consideration of the same hardship for relief under the provisions of the PPA. The Appellant in the earlier proceedings did agree to the consideration of hardship faced by Lanco on account of non-availability of coal from Khadia Mines but it did not mean the Appellant accepted that the relief is also available under the PPA.

6.66 The State Commission in the earlier round of the proceedings proceeded on the basis that no relief is admissible under the provisions of the PPA for increasing the quoted tariff for the duration of the PPA. The Expert Committee appointed by the State Commission, had recommended the payment of compensatory tariff based on the legal position as was understood at the relevant time and pursuant to which the Order dated 23.11.2015 was passed by the State Commission. The basis of recommendations by the Expert Committee for grant of compensatory tariff was that the Central Electricity Regulatory Commission had by Order dated 02.04.2013 and 21.02.2014 had decided that it has the general regulatory powers to grant such compensatory tariff and the said decision of the Central Commission was also

followed by the Maharashtra Electricity Regulatory Commission in Petition No. 68 of 2012 decided on 21.08.2013. The very basis on which the Expert Committee had recommended the grant of compensatory tariff, namely, in exercise of the regulatory powers stands rejected by the decision of this Tribunal in Uttar Haryana Bijli Vitran Nigam –v- Central Electricity Regulatory Commission [2016 (ELR) APTEL 733 as well as in Order dated 11.05.2016 passed by this Tribunal in Appeal 166 of 2014 setting aside the decision from Maharashtra Electricity Regulatory Commission exercising such regulatory powers to grant compensatory tariff.

6.67 As mentioned above, the Hon'ble Supreme Court in Energy Watchdog case approved the above principle decided by the Tribunal and rejected the appeal filed by the Generators claiming that they are entitled to compensatory tariff under exercise of general regulatory powers. It was, therefore, not open to the State Commission to still proceed on the report of the Expert Committee and grant compensatory tariff to Lanco.

6.68 Therefore, the State Commission ought to have discarded the report of the Expert Committee which was constituted by it after holding that Lanco should be given compensatory Tariff and independently considered on the admissibility of relief under the PPA. The State Commission has also wrongly proceeded on the basis that the Appellant had from time to time accepted the claim of Lanco ignoring the fact that the Appellant had filed

Petition No. 891 of 2013 as well as the UPPCL had raised objections to the termination of the PPA, the failure to establish the Payment Security Mechanism and also claim for buyout of the power plant.

6.69 In regard to the above, the following aspects have been completely overlooked by the State Commission though placed by the Appellant during arguments:

a. The letter dated 05.03.2014 was in the context of the legal framework prevalent at that time in February 2014 when there was a decision dated 21.02.2014 passed by the Central Electricity Regulatory Commission in Petition No. 155/MP/2012 holding that under the Electricity Act, the Regulatory Commissions have the jurisdiction and authority to grant compensatory tariff in exercise of its general regulatory powers. The Appellant had then stated that if a solution can be carved out in the matter within the legal framework and if it is in the general interest of the consumers of Uttar Pradesh, the same can be considered by the State Commission by providing a cost effective electricity on long term basis, even by increasing the tariff.The letter-dated 05.03.2014 written by the Appellant was not an open-ended agreement to pay additional tariff that may be determined by the State Commission without any objection. The Appellant, being a public utility and required to safeguard the interest of the consumers, can never have represented for such a course. In this

regard, the letter itself states that the decision by the State Commission should be in the general interest of the people of Uttar Pradesh. Accordingly, the reliance placed on the letter-dated 05.03.2014 and the inferences sought to be made based thereon are devoid of any merit.

b. The Appellant had filed a Petition being Petition 1104 of 2016 for review of the order dated 23.11.2015 before the State Commission, particularly, where it was recorded (wrongly) that UPPCL had consented to the said Order.

6.70 Similarly, the reliance placed by Lanco in the letter dated 10.03.2016 from Chairman of the Appellant to Coal India Limited and selectively referring to some sentences here and there to contend that the Appellant has admitted the payment of compensation to Lanco if that the Appellant accepted that there was absolute assurance of 100% supply of coal from Khadia Mines is also without any merit. Firstly the rights and obligations of the parties are to be determined with reference to the contract documents and not by subsequent correspondence or acts. The well settled principle of contract law is that it is not open to Lanco to place reliance on any correspondence subsequent or pleadings or arguments made in the earlier round of litigation to interpret the scope and ambit of the contract between the parties. [Bank of India and Anr - v- K. Mohandas and Ors (2009) 5 SCC 313 and (ii) the Full Bench decision

of this Tribunal in the case Uttar Haryana Bijli Vitran Nigam Limited -v- Central Electricity Regulatory Commission 2016 ELR (APTEL) 733.

6.71 The submissions made by Lanco that the Appellant cannot be allowed to change its stand in regard to non-availability of regulatory powers to the State Commission as the Appellant in the earlier round of proceedings has contended that the powers are available with the State Commission to exercise regulatory powers is also baseless. The Appellant craves reference to the following decisions on the aspect that the Appellant is not bound by the legal interpretation or approach or stand taken by the Appellant in certain context. Reliance in this regard may be made to:

a) P. Nallammal and Anr -v- State (represented by Inspector of Police) (1999) 6 SCC 559

b) M.P. Gopalkrishnan Nair and Anr -v- State of Kerala and Ors (2005) 11 SCC 45

c) Groupe Chimique Tunisien SA -v- Southern Petrochemicals Industries Corporation Limited (2006) 5 SCC 275

6.72 Accordingly, it is not open to Lanco to refer to and rely on the stand taken by the Appellant in the context of exercise of Regulatory Powers in Appeal No. 173 of 2016 to claim that the Appellant cannot argue on the non-grant of relief under the PPA. As mentioned above the existence of hardship isdifferent than the relief admissible under the PPA. There is no estoppel of fact against the

Appellant in making submissions different from the submissions made in the earlier proceedings when the facts are not in issue.

6.73 The basic premise under which Lanco and the State Commission has proceeded is that there was an assurance of 100% coal supply from the Khadia Mines. This is patently erroneous and contrary to the basic contract documents as mentioned under Proposition II above. These documents categorically establish that the fuel risk is of Lanco, the rail, road transportation of coal to be procured from the mines other than Khadia Mines was duly envisaged, the import of coal was duly envisaged. In this regard, the Notes of Arguments dated 16.05.2018, Note on the analysis of the impugned order 01.08.2018 and the rejoinder note dated 07.08.2018 filed before this Tribunal gives the full details. No attempt has been made by Lanco or the State Commission to deal with the specific aspects raised by the Appellant. The attempt by Lanco is only to refer to some documents selectively, mostly which are subsequent to the contract documents to suggest that Lanco was entitled to 100% coal availability from Khadia mines.

Propositions VIII : The Reliance placed by Lanco on clause 1.4 of the fuel policy to contend that the deemed fixed charges was agreed to is misconceived.

6.74 The reliance on Clause 1.4 of the Fuel Policy Agreement has been made for the first time during the reply arguments before this Tribunal. It was not raised before the State Commission nor in the Reply filed to the Memorandum of Appeal. The issue of non-availability of coal from Khadia Mines leading to a claim for deemed charges was itself raised only on 24.01.2013 and not before as more fully set out herein.

6.75 It is submitted that Clause 1.4 is under Chapter `Background'. Primarily, it speaks about the inability of the Seller to meet the target availability and Lanco to make all endeavor to meet the target availability. The Fuel Policy, in the operative part, deals extensively with the obligation of Lanco to make arrangements and procure coal from alternative sources. The Deemed Fixed Charges dealt in Clause 1.4 was a part of the discussion and would apply if the coal is not available from any source whatsoever including the imported coal. In any event, such observation in the Fuel Policy taken under the head `Background' cannot be used to interpret the contractual terms as at the time of the signing of the PPA. The Fuel Policy has to be read as a whole and not selectively that a sentence in the middle of Clause 1.4 to read that it is creating an obligation for the payment of fixed charges. The relevant extract from the Fuel Policy document has been given in the Summary of Events filed by the Appellant and the Appellant had dealt with the implications in the opening argument. The Appellant has relied on **Clause 1.5, Clause 3; Clause**

4.1; Clause 7, 7.1 and 7.2. Neither Lanco nor State Commission has dealt with the said clauses of the Fuel Policy Document.

6.76 The claim for deemed fixed charges by Lanco based on Clause 1.4 of the Fuel Policy document is an afterthought. The COD of the first unit was achieved on 10.12.2011 and the second unit on 18.01.2012. The Fuel Supply Agreement was signed on 23.04.2012. If 100% coal was to be available from Khadia Mines, Lanco would have raised the issue immediately when it commenced commercial operation or at the time of the FSA dated 28.04.2012. The Fuel Policy was signed on 28.09.2012. Lanco did not raise any issue on Deemed Fixed Charges payable for the period from 10.12.2011 to 28.09.2012 even at the time of the signing of the Fuel Supply Agreement or soon thereafter. The first Termination Notice was issued on 10.12.2012. Even at this stage, the issue of Deemed Fixed Charges was not raised. The issue of Deemed Fixed Charges was raised for the first time on 24.01.2013 i.e. after more than one year of the COD and further substantial part of the alleged claim of Rs 401.31 crores had already arisen.

6.77 It is inconceivable that Lanco would not have raised this issue before if the agreement between the parties was that Lanco would be entitled to Deemed Fixed Charges in case of coal non-availability from the Khadia Mines.

PROPOSITION IX: MISCELLANEOUS ISSUES

6.78 The impugned order does not consider the following specific aspects which were most relevant and which were pleaded by both during the earlier proceedings and in the later proceedings.

(a) Order dated 19.10.2005

(b) Issue of payment security mechanism

(c) Issue of transportation through different modes namely Rail/MGR/Road Transport

6.79 The State Commission has failed to consider the basic aspects that the Appellant was willing to consider the hardship in the Committee Meeting, provided the exercise of regulatory powers to grant compensatory tariff was available with the State Commission. With the decision in Energy Watchdog case, the regulatory powers cannot be exercised to give compensatory tariff, the claim of Lanco has to be confined to the provisions of the PPA.

6.80 The State Commission has also wrongly proceeded on the basis that the UPPCL had from time to time accepted the claim of Lanco ignoring the fact that the UPPCL had filed Petition No. 891 of 2013 as well as the UPPCL had raised objections to the termination of the PPA, the failure to establish the Payment Security Mechanism and also claim for buyout of the power plant.

6.81 The State Commission has stated that it is giving the relief based on the Expert Committee report. But in regard to payment Security Mechanism and payment issues, the expert committee had recommended only third party sale

and not termination or frustration. In the earlier Order dated 23.11.2015, the State Commotion had accepted the same. There is no cause or justification for the State Commission to deviate from the same and give substantial relief in the Impugned order.

6.82 In the earlier order dated 23.11.2015, the State Commission had given the reliefs only for the period from the date of the Order dated 23.11.2015 i.e. prospectively but in the impugned order, the relief has been given retrospectively from 12.02.2013 and thereby increasing the quantum without any justification or cause. In the earlier order dated 23.11.2015, the State Commission had reduced the return on equity by 0.5%, but in the impugned order the reduction of 0.5% has been excluded and thereby increasing the quantum without any justification or cause.

6.83 The claim for deemed fixed charges, higher variable charges, higher secondary fuel oil charges, interest on loan, interest on working capital, higher capital cost allowed by the state commission is not only not covered by force majeure provisions or change in law provisions of the PPA but are contrary to the following specific clauses of the guidelines and contract documents :

6.84 In view of the above, the grant of financial relief by the State Commission to Lanco, both in regard to the period from Commercial Operation Date to 11.02.2013 and the period from 12.02.2013 onwards including the additional

tariff on account of increased capital cost, is erroneous and is liable to be set aside with costs.

7.0 The Learned Senior Counsel, Mr. S.B. Upadhyay appearing for the Respondent has filed the written submissions in Appeal No. 336 of 2017 and adopted in companion Appeal No. 359 of 2017 as follows :-

7.1 After the conclusion of bidding process and the execution of the PPA on 12.11.2006, the Central Government altered its policy for allocation of coal under the New Coal Distribution Policy ("**NCDP**") on 18.10.2007. As a result, Northern Coalfields Limited ("**NCL**") was no longer obligated to supply coal to the plant exclusively from Khadia mines as envisaged earlier under the bid documents.

7.2 Consequently, LAPL was constrained to source coal from different sources through different modes of transport including rail and road transportation. The supply of coal from other sources and its transportation by non-MGR mode had an adverse impact on the operation of the plant as the plant was not designed to receive and unload coal through a non-MGR system.

7.3 The plant was commissioned on 10.12.2011(Unit I) and 18.01.2012 (Unit II), following which LAPL started supplying power to the UPPCL.

7.4 There were repeated instances of default in payment by UPPCL / Discoms. Further, the Payment Security Mechanism to secure timely payment of dues as envisaged in the PPA, was not put in place by UPPCL / Discoms. This resulted in admitted outstanding dues of Rs. 526 Crores as on 11.02.2013

with effect from which date LAPL was constrained to terminate the PPA and issue Buy-out notice to UPPCL, after having already issued preliminary termination notice under Article 15.2 of the PPA on 10.12.2012.

7.5 On 28.01.2013, LAPL filed Petition no. 871 of 2013 before the State Commission with the following prayers:

> *"a) Direct Respondents no. 2-5 to clear all outstanding dues under the PPA till date;*
>
> *b) Pass an Order determining new tariff for the supply of power from the Anpara C Plant to Respondents no. 2-5 till the successful completion of the buy-out of the Plant;*
>
> *c) In the alternative, pass an Order determining new tariff for the supply of power from the Anpara C Plant to Respondents Nos. 2-5, instead of a buy-out of the Plant keeping in view the viability and sustainability of the Plant after taking into account the accumulated losses of the Plant till date;*
>
> *d) Pass any other Order which may be consequential upon prayer (a), (b) and/or (c) and any other Order as this Hon'ble Commission may deem fit."*

7.6 On 18.05.2013, UPPCL filed Petition No. 891 of 2013 before the State Commission praying for setting aside of Termination Notices dated 24.01.2013 and 11.02.2013 issued by LAPL.UPPCL also moved an interim application requesting the State Commission to ensure that the power supply from the LAPL's plant is not stopped following the termination of PPA by LAPL. In view of the continuing power crisis in the state of U.P., the State Commission vide its order 23.05.2013 directed LAPL to continue supplying

power to UPPCL till the final disposal of the matter. LAPL in deference to the directions of the State Commission continued supplying power to UPPCL despite having terminated the PPA and issued a Buy-out notice to UPPCL.

7.7 Under Article 13.6 and 15.2 of the PPA, LAPL was entitled to terminate the contract followed by the Buy-out of the plant by UPPCL. However, UPPCL neither accepted the termination nor agreed for a Buy-out of the plant and insisted on LAPL to continue supply of power as it was one of the cheapest sources of power. Vide letter dated 05.03.2014, UPPCL requested the State Commission to resolve the impediments being faced by LAPL wherein UPPCL categorically stated that they do not have any objection if the State Commission takes the decision to provide LAPL an increased tariff as long as the solution can be carved out falls within the legal framework and is in the general interest of the people of U.P.

7.8 ***Impact:***

1. The reduction in generation on account of coal logistic issues arising as a consequence of NCDP along with the default in payment related obligations by UPPCL had adversely affected the operations as well as the financial viability of the project.

2. Generation from the plant was admittedly reduced to a level less than 40% over a period of 432 days on account of coal and coal logistic related issues.

3. Due to the default of UPPCL in payment related obligations, LAPL could not re-negotiate the interest costs with the financial institutions. Since the Payment Security Mechanism under the Default Contingency Agreement has not been made operational till date, it has caused serious prejudice of downgrading of LAPL's credit rating and inability to re-negotiate interest costs.

7.9 ***Relief granted by the State Commission vide the Order dated 16.08.2017:***

In the backdrop of above facts and in consideration of the admitted difficulties faced by the plant and the impact on its operations as found by the Expert Committee constituted by the State Commission on detailed examination of the documents etc., the State Commission vide order dated 16.08.2017 ("**Impugned Order**") provided the relief to Respondent No. 1/ LAPL under 'Change in Law' and 'Force Majeure' provisions of the PPA, which is evinced from the following extract from the Impugned Order:

> *(e) Thus, the legal position would be that this Commission, where the case has been remanded to by Hon'ble APTEL, has to decide the matter, but now on the basis of conclusions drawn by Hon'ble Supreme Court. In terms of this judgment, this Commission is mandated to examine the claim of LAPL under provisions of PPA, specifically under 'Force majeure' (Article 12), 'Indian political events (Article 13) and 'change in law' (Article 14)' ….*"

1. Recovery of past losses from COD i.e. 10th December 2011 to the date of termination notice i.e. 11th February 2013:

S. No	Elements	As allowed in the Impugned Order (Rs. Crores)
1	Under recovery of fixed charges	401.31
2	Under recovery of Variable Charges	77.46
3	Compensation for Higher Secondary Oil Consumption	20.81
Total		**499.58**

2. Additional Tariff from 12th February 2013 onwards:

S.No	Elements	Allowed under the Impugned Order
1.	Interest on Loan	0.069
2.	Interest on Working Capital	0.062
3.	Secondary Fuel Consumption	0.024
4.	Increase in Capital Cost (Wharf wall & railway siding at Kakari)	0.007
Total		**0.162**

7.10. **ISSUES:**

In view of the aforesaid factual background, the following issues arise for consideration of this Tribunal in the present Appeal:

1. Is LAPL entitled to any relief under law due to New Coal Distribution Policy?

   1(a) Did the NCDP result in significant deviation with respect to coal and coal related logistics from the representations made in the bidding documents, and its impact?

1(b) Did the orders dated 19.10.2005 and 06.02.2006 alter the basis of bidding in any manner?

1(c) Is the relief granted in the Impugned Order sustainable in the facts of the case and in law?

2. Whether LAPL was entitled to any relief in relation to payment related defaults?

2(a) Was there a breach of the terms of the PPA by UPPCL with respect to payment and institution of Payment Security Mechanism?

2(b) If yes, was the State Commission justified in granting damages to LAPL in line with the principles set out in Section 56 of the Contract Act?

3. Can UPPCL be allowed to resile from the statements/representations made by it with respect to the effect of NCDP and payment related defaults on the project?

4. Whether regulatory power was available to the State Commission for grant of relief to LAPL in the facts of the case?

5. Was there due application of mind by the State Commission while passing the Impugned Order?

7.11 **ISSUE 1 : Is LAPL entitled to any relief under law due to NCDP?**

1(a) Did the NCDP result in significant deviation w.r.t coal and coal related logistics from the representations made in the bidding documents, and its impact?

This issue has been dealt with in three parts, viz. as under:

A. Specifications qua coal source and transportation in the bid documents;

B. Changes under NCDP constitute 'Change in Law';

C. Deviations caused due to NCDP and its impact on the project

A. *Specifications qua coal source and transportation in the bid documents:*

a) As per the Public Notice for inviting RFQ, the following clearances were obtained for the Anpara 'C' Project:

(1) …….

(4) Long term Coal Linkage by Ministry of Coal, Government of India with Northern Coal Fields available

b) Relevant clauses of RFP:

i) Para 2.9.14 of RFP Vol II (Interface requirements) requires LAPL to coordinate with fuel supplier and UPRUVNL for smooth operation of coal rakes on the MGR.

ii) Clause 1.3 of Part 3 of RFP Vol II – Coal Linkage/ Availability and Transportation – 4.5 million tons per annum, GCV at 3885 Kcal/kg and PLF at 80% from Khadia Expansion OCP of Northern Coalfields Ltd. The existing coal transportation system for Anpara 'A' and Anpara 'B' stations comprising of MGR system to be shared with Anpara 'C' project as well.

iii) Clause 1.3 – 1.6 of Part 4 of RFP Vol II – requires the successful bidder to transport coal by sharing the existing MGR system of UPRUVNL with Anpara A and B.

iv) The successful bidder was required to enter into a separate agreement for utilizing the shared facilities of existing power plants – Part V of RFP Vol I

c) The Seller / LAPL was obliged under the PPA to comply with the technical requirements and parameters specified in the RFP as regards its construction responsibilities provided in Article 5.1.1 of the PPA. In this regard, the definition of 'Technical Specification' given in the PPA is relevant which reads as under:

> *"**"Technical Specification"** means the technical requirements and parameters prescribed in relation to the Project, forming a part of the Construction Contract. **Provided that these shall always comply with the requirements of Paragraph 1 to 4 of Schedule 3 of this Agreement and Volume – II of RFP.**"*

Recital B to the PPA read with Article 3.6.2 clearly indicates that the obligations of the parties have to be determined in accordance with the terms and conditions of the PPA, the RFP and the RFQ read together. The relevant extracts of the PPA are reproduced below:

*"B. The Initial Equity Investors, having been selected pursuant to the aforementioned competitive bidding process have constituted the Seller who proposes to build, own, operate and maintain a 2 x 500 MW thermal power Project at village Anpara, District Sonebhadra, State of Uttar Pradesh ("Anpara C") for the purpose of selling all Available Capacity and despatched Electrical Output to the Buyers **on the terms and conditions contained in the Power Purchase Agreement ("PPA"), the RFQ and the RFP**."*

"3.6.2 *All Project Documents and amendments thereto from time to time, must comply with the requirements set forth in the RFQ and the RFP and, if no express*

requirements are so mentioned, must not be inconsistent with the contents of the RFP or the RFQ."

d) Uniqueness of the Anpara C project is summarized as follows:

i) 2x600 MW coal based thermal power plant has been built on only 256 acres of land, which is lower than the norms specified by CEA for similar power projects.

ii) Mine specific coal linkage (Khadia expansion Mine of NCL) and shared logistics (MGR) for movement of coal rakes with UPRVUNL's existing power stations of Anpara A &B.

iii) In view of limited area, coal unloading has been facilitated through track hopper by use of BOBR-N wagons.

iv) The project did not envisage raw coal storage and reclaiming coal for crushing.

***B. <u>Changes under NCDP</u>* <u>constitute 'Change in Law'*:*</u>**

The NCDP issued by Ministry of Coal, Government of India on 18.10.2007, issued after conclusion of bidding process and execution of PPA, in supersession of the then existing coal distribution policy, allowed Coal India Limited/its subsidiaries to supply coal under the fuel supply agreements from any source, including imported coal. As a result, NCL was no longer obligated to supply coal from the mine specified in the linkage granted to the project (i.e. Khadia Mines in the present case).

The Hon'ble Supreme Court in para 56 & 57 of *Energy Watchdog vs. Central Energy Regulatory Commission (2017) 14 SCC 80,* has held that changes in NCDP constitute change in law.

The Appellant in its Petition No. 891 of 2013 has taken a specific stand that NCDP constitutes change in law. Following is the extract of the pleadings in Petition No. 891 of 2013 for ready reference:

"H. Because New Coal Distribution Policy notified by the Government of India is a directive and comes within the definition of 'Change in Law' and 'Change in Law' comes within the definition of Indian Political Events in view of Clause 13.3.1(c) of the 'PPA'.

…

L. Because the 'PPA' specifically provides remedies to be resorted to for redressal of the grievance in view of 'Change in Law' and those provisions are contained in Clauses 14.1 to 18.2 of the 'PPA'."

C. <u>Deviations caused due to NCDP and its impact on the project</u>

a) LAPL had put up the Project in accordance with the RFP requirements and thus the coal handling system was rendered inadequate as the design of boilers, coal handling system and related logistics and infrastructure were configured as per the technical specifications mentioned in the RFP document. The fact that the project was constructed strictly as per the Technical Specifications provided in the RFP, has been independently examined and accepted by the Expert Committee appointed by the State Commission; Coal quantity supplied through MGR was limited to 4% during FY 2011-12 and at 13% for FY 2012-13 as against requirement of 100% from Khadia Mines through MGR as per RFP due to change in source of coal by NCL under the NCDP;

b) LAPL made substantial efforts to make up for the shortfall in linkage coal through procurement from alternate sources;

i) Coal procured from alternate sources could not be used effectively for making up shortfall of coal from Khadia Mines due to:

ii) Coal transported through BOXN wagons of railways and through road transportation could not be unloaded timely due to inadequacies in the plant design based on RFP specification;

iii) Non availability of Wagon Tippler necessitating manual unloading of coal from BOXN wagons;

iv) Limitation of Track Hopper size to allow placement of 59 wagons for unloading of coal due to which additional time was required for unloading;

v) No facility for unloading and handling coal transported by road and these were fed into the Track Hopper through dozers/ manually;

vi) Coal blending facility was not envisaged in the RFP which led to firing of imported and indigenous coal without blending causing flame stability problems

c) As a result of use of BOXN wagons of Indian Railways for transporting alternate coal, the time consumed for unloading of wagons into Track Hoppers took about 10 hours per rake consisting of 58-59 wagons as against 1.5 hours in case of MGR rakes consisting of 30 wagons;

d) Deviations from the RFP provisions in respect of coal availability and logistics adversely impacted the performance of the plant;

e) Since coal was not been transported through the BOBRN wagons in the MGR system, originally envisaged under the RFP, feeding of coal into the Plant was getting delayed even though LAPL had tied up and procured coal from alternate sources;

f) The non-availability of coal in a timely manner affected the availability/ average PLF of the Plant reducing the same to around 45%

g) This impact arising out of change in source of coal and coal transportation method had been highlighted by the Chairman, UPPCL vide his letter dated 10.03.2016 addressed to Coal India Limited for requesting "*full materialization of coal from Khadia mine through MGR system through BOBR wagons to M/s L.A.P.L as envisaged in the RFP/PPA*".

1(b) Whether the orders dated 19.10.2005 and 06.02.2006 alter the basis of bidding in any manner?

a. In this case, it is an admitted position that the bidding was carried out on the basis of Net Quoted Heat Rate ("**NQHR**"). According to para 4.2 of the Competitive Bidding Guidelines (**"CBG"**) issued by the Central Government, in case of long term procurement with specific fuel allocation (Case 2), procurers have been mandated to invite bids on the basis of capacity charges and net quoted heat rate. Further, Model RFP issued by the Central Government as part of Standard Bidding Documents under the bidding

guidelines, NQHR is used only where linkage is provided by Procurer.

Relevant part of the CBG and the RFP are extracted below:

***Competitive Bidding Guidelines*:**

"4.2. In case of long term procurement with specific fuel allocation (Case 2), the procurer shall invite bids on the basis of capacity charge and net quoted heat rate."

Model RFP :

"2.7.1.4 The Bidder shall inter-alia take into account the following while preparing and submitting the Financial Bid:-

1. The Bidder shall quote the Quoted Escalable Capacity Charge and Quoted Non-Escalable Capacity Charges. The Bidder shall also quote the following Quoted Energy Charges. In case of Quoted Escalable Capacity Charges, the Bidder shall quote charges only for the first Contract year after Scheduled COD of first unit.

a. UPPCL has placed heavy reliance on the orders dated 19.10.2005 and 06.02.2006 passed by the State Commission to contend that the State Commission had clarified at the time of approving of RFP that the fuel risk for the project shall be that of the Seller and not of UPPCL. These orders, therefore, according to UPPCL had the effect of amending the terms of the RFP and that the responsibility of procuring coal lies solely with LAPL.

b. The State Commission in its order dated 19.10.2005 has itself noted that UPRVUNL had invited competitive bids for site and fuel specific project. This finding by the State Commission shows that the Commission was aware that the present Project has been developed through Case 2 bidding route where the responsibility to provide fuel linkage lies with the power procurer (UPPCL) and not seller (LAPL).

c. The order dated 19.10.2005 was issued by the State Commission in a petition filed by UPRUVNL for approval of the RFP documents wherein one of the deviations sought in the RFP was Project specific clearances. Clause 3.2 of the CBG requires the procurer in a Case-2 bidding to complete certain preparatory activities, including environmental clearance and fuel linkage before issuing of RFP. In the context of such preparatory activities, the State Commission observed the following:

"The transfer of clearance in the present petition is a critical issue and the Commission considers it necessary that modalities for transfer of statutory licenses, clearances and fuel linkages to the successful bidder should be clearly laid down, since the proposal of the Petitioner has not satisfied the provisions of the Guidelines which requires the procurer to seek such clearances prior to the commencement of the bids."

The Commission further observed:

"……. Regarding coal linkage it is stated that long term coal linkage is granted by standing linkage committee and as per the letter from Ministry of Coal dated 9.3.03 furnished by UPRVUNL, the time granted by SLC for FSA with NCL was 31.12.03 as such, the prospective bidder would have to approach SLC for re-validation of the coal linkage."

Having regard to such aspects, the Commission arrived at the following conclusion:

"The Commission has considered above submissions of the Petitioner and bidders and allows 12 months time to the successful bidder, from the date of issue of letter of acceptance by the procurers, to comply with the conditions precedent and directs the Petitioner to own responsibilities on behalf of the buyers to help the successful

bidder in securing clearance from MOEF, FSA with NCL. The transfer of land for the project and housing of the staff shall be ensured to the prospective project company from GoUP free from all encumbrances within six months of issue of letter of acceptance by the procurers. Performance Bond by the successful bidder shall be submitted immediately after the issue of letter of acceptance by the procurers."

d. After dealing with the issue of project specific clearances, the following submissions were made by UPRUVNL:

*"**5.0 Fuel Linkage:** Regarding fuel linkage, it is seen that long term coal linkage for the project has been granted with the condition that FSA shall be concluded by 31.12.2003. UPRVUN was required to confirm the status of this linkage. Further, issues such as coal quality, pricing, time frame of supply, conditions of FSA have not been firmed up. In such a scenario, it was required to be considered whether the bidder could get fuel supply from any other source at lower price.*

Submissions on 4.8.05

The Petitioner has submitted that the Seller is responsible for obtaining its requirements of fuel for the Power Station. Therefore, the Bidder is free to get supply from any source. However, in order to facilitate the Seller, the GOUP on the specific request of the Seller, shall recommend transfer, in its name, of approvals/consents/authorisations, including those relating to fuel allocation and coal linkage, which have been issued in respect of the Project to any other entities."

On the above submissions, the State Commission held as follows:

*"**Other issues linked with FSA have already been discussed in the preceding paragraphs.**"*

It is seen from above that the order was not dealing with responsibility with regard to sourcing of coal for the project. It was concerned only with the transfer of project-related clearances that was required to be fulfilled by the procurer under para 3.2 of the CBG. Therefore, it is submitted that the order, did not alter the position regarding responsibility of fuel as the RFP issued on the basis of this order has provided the

specific details regarding coal source and transportation arrangement under Chapter 3 and 4 of Vol II of the RFP. Furthermore, it is submitted that the reliance placed by UPPCL on clarification with regard to fuel responsibility in the Review Order dated 06.02.2006 is misplaced because a plain reading of the clarification will show that the same relates to project specific clearance and not with sourcing of coal for the project. The relevant part is extracted herein under:

"It is clarified that in Para 10.1 (4.0) of order dated 19.10.2005, the project specific clearances i.e. MOEF and FSA with NCL have been made the responsibility of the seller by the Commission. ……..

….. UPRVUNL agreed to impart all possible help to the successful bidder in transfer of FSA and MOEF clearance."

e. If the contention of UPPCL regarding the scope and effect of these two orders on the RFP so as to make the risk of fuel as part of Seller's responsibility was to be accepted, it would result in changing the very nature of the bidding process where fuel would become the responsibility of the bidder. However, the bidding was carried out on the basis of NQHR even after incorporating the two orders dated 19.10.2005 and 06.02.2006. This clearly shows that the bidding proceeded in line with para 4.2 of the CBG where fuel is provided by the procurer. The stipulations with regard to fuel linkage, fuel source and coal transportation as specified in Part 3 of Volume II of the RFP were the guiding factors for the purpose of bidding, and the bidding did not proceed of fuel risk of Seller, as contended by UPPCL.

f. The rationale for carrying out bidding on NQHR basis is that once the linkage is provided by the procurer, the bidders are required to quote the net quoted heat rate as part of the bid, which will create the basis for comparing their relative efficiency of converting the heat generated from burning of coal into electrical energy. Therefore, where the bidding is carried out on NQHR basis, the fuel has to be necessarily identified and secured by the procurer through linkage. It is submitted that had the intent been to assign the responsibility of fuel on the bidder, the bidding could have never been carried out on NQHR basis.

g. Furthermore, the fact that fuel was the responsibility of UPPCL and not that of LAPL has been admitted by UPPCL itself. In the Fuel Policy Agreement signed by UPPCL with LAPL in accordance with Article 7.9.2 of PPA, UPPCL admits that: (i) the bidding process was based on existing long term linkage of 4.5 MTPA from Khadia mines (para 1.2); (ii) as per bid documents, the entire coal requirement for the Project was to be transported through augmentation of existing MGR for Anpara A & B (para 1.3); and (iii) there is a paradigm shift in the coal supply scenario from the time of bid submission, which has put strain on LAPL and that in the event of non-availability of coal despite all reasonable efforts by LAPL, it shall be compensated for reduction in availability or availability factor of the plant (para 1.4).

h. In its letter dated 10.03.2016 written by UPPCL to Coal India Ltd., UPPCL admits to the fact that: (a) LAPL was awarded Anpara C through Case 2 of CBG; (b) Availability of coal is the sole responsibility of procurer; (c) Ministry of Coal has

disallowed participation of Case 2 projects for coal block auction vide OM dated 26.12.2014; (d) LAPL was given coal linkage from Khadia extension mines and transportation of coal was to take place through existing MGR; and (e) NCDP has caused severe effect on operations of the project leading to PLF of 40% as against normative PLF of 80%.

i. Such contemporaneous stand of the UPPCL at the relevant time demonstrates UPPCL's understanding with which it had entered into a PPA with LAPL. The interpretation now sought to be given by UPPCL is clearly an afterthought and an attempt to wriggle out of its contractual obligations. It is further submitted that such a conduct by UPPCL is unfortunate, especially in light of the overwhelming documentary evidence and explicit admissions / acquiescence by UPPCL.

j. UPPCL has relied on Article 7.9 of the PPA to contend that fuel was the responsibility of seller. In this regard, it is submitted that Article 7.9 of the PPA has to be read in the context of the bidding process as well as other provisions of the PPA which, make it clear that the responsibility for availing fuel linkage was that of the procurer/UPPCL, while the responsibility of securing supply from the fuel supplier/NCL on the basis of linkage was with LAPL as the Seller. In this regard, it may be pointed out that 'Tariff' for supply of energy has been defined as that calculated in accordance with the Schedule 8 of the PPA. Clause 1.3 of Schedule 8 provides for computation of variable charge on the basis of *inter alia* NQHR quoted by the bidder as part of the bidding process. The financial bid form of LAPL dated

05.06.2006 has been included as part of Schedule 8, which sets out the year-wise NQHR bid of LAPL.

k. Further, Article 7.9 of the PPA also needs to be understood in the context of Fuel Policy Agreement adopted by the parties pursuant to Article 7.9.2 of the PPA. On a complete reading of all provisions of the Fuel Policy Agreement, it is clear that the bidding process had been conducted on the basis of coal linkage from Khadia mines and coal transportation by augmentation of existing MGR system. The Fuel Policy Agreement, taking note of the changes brought about by NCDP, nonetheless provided the mechanism for procurement of coal from sources other than Khadia mines.

l. It is thus clear from the above that Article 7.9 of the PPA did not in any manner deviate from the basic parameters under which the bidding was carried out and the contract was awarded namely, supply of 4.5MTPA coal from Khadia mines, the cost of which was to be recovered on the basis of quoted NQHR.

m. The reliance placed by UPPCL on the decision of Central Electricity Regulatory Commission in the case of GMR Warora Limited vs. Maharashtra State Electricity Distribution Company Limited (Order dated 01.02.2017 in Petition No. 8/MP/2014 to contend that coal was the responsibility of Seller/LAPL,is misconceived and irrelevant. The said judgment relates to a project bid out through Case 1 route as is noted at Para 61 of the judgment itself. The present case is admittedly of Case 2 bidding wherein, as submitted above, the obligation to provide

fuel linkage was cast upon the procurer/UPPCL. Hence, this judgment is of no assistance to UPPCL.

1(c) Is the relief granted in the Impugned Order sustainable in the facts of the case and in law?

a. As stated above, NCDP is 'Change in law' under the PPA as has been held by the Hon'ble Supreme Court and admitted by UPPCL in Petition No. 891 of 2013.

b. Article 14 of the PPA deals with Change in Law and provides for financial restitution of the party affected by the Change in Law event, to the same economic position as it was had the Change in Law had not taken place. Article 14 allows for Change in law allows for payments through monthly tariff payment to provide that Seller be put into the same financial position as it would have been but for the Change in Law.

c. Fuel Policy Agreement dated 28.09.2012 deals with the situation where coal is not available from Khadia mines and needs to be procured from alternate sources, and provides for:

   i. Pass through of coal cost for coal procured for alternate sources as part of energy cost;

   ii. In the event of non-availability of coal causing shortfall in generation from the plant, Seller/LAPL shall be compensated for the reduction in Availability or Availability Factor of the Power Station (clause 1.4)

d. Accordingly, the State Commission has granted the following relief to restore LAPL to the same economic position in accordance with Article 14 of the PPA read with Clause 1.4 of the Fuel Policy Agreement:

i. Lump sum amount of Rs.499.58 for loss in generation during the period from 10.12.2011 i.e. COD to 11.02.2013 (date of Termination Notice);

ii. Allowance of Rs. 0.024 per unit for higher consumption of Secondary fuel has been allowed for increased oil support;

iii. Allowance of Rs. 0.007 per unit towards capital cost for building of wharf wall;

iv. Allowance of Rs. 0.062 per unit for increased requirement of working capital due to coal procured from alternate sources including imported coal.

i. *Lump sum amount of Rs.499.58 for loss in generation during the period from 10.02.2011 i.e. COD to 11.02.2013 (date of Termination Notice)*

In the facts and circumstances as set out above, the plant could achieve generation to the extent of 40% as against the normative parameter of 80% due to coal logistic related issues arising on account of NCDP despite best efforts of LAPL in procuring coal from alternate source.

In this situation, the relief as indicated in para 3(b) above under the Fuel Policy Agreement read with Article 14 of the PPA, provided the remedy agreed between the parties. Accordingly, LAPL was entitled to the capacity charges by way of restitutive relief for loss of generation below 80% on account of aforesaid Change in Law.

ii. *Allowance of Rs. 0.024 per unit for higher consumption of Secondary fuel has been allowed for increased oil support:*

The allowance of higher consumption of Secondary fuel has been allowed for increased oil support because plant was running at sub-optimal PLF due to non-availability of coal.

iii. *Allowance of Rs. 0.007 per unit towards capital cost for building of wharf wall:*

Additional infrastructure of wharf wall was required to be created at a different site to allow unloading of coal through road transport and loading them into wagons for transportation through MGR. Such allowance against wharf wall on account of NCDP has been accepted by UPPCL by relying on the Expert Committee Report, at para E.3.4 of its affidavit dated 28.04.2017.

iv. *Rs. 0.062 per unit for increased requirement of working capital due to coal procured from alternate sources including imported coal:*

The RFP/PPA had envisaged coal cost at Rs.1045 per MT and escalation at 4% per annum considering supply of 100% coal from Khadia mines through MGR. However, there was an increased requirement of working capital due to coal procured from alternate sources including imported coal which have to be brought through non-MGR modes of transport. It is submitted that the requirement of increased working capital on account of alternate coal has been accepted by UPPCL on account of NCDP by relying on the Expert Committee Report, at para D.3.3 of its affidavit dated 28.04.2017.

e. UPPCL has contended that reliance on Clause 1.4 of the Fuel Policy Agreement is an afterthought as the issue of deemed fixed charges was raised

for the first time on 24.01.2013 even though the plant had started operation from 10.12.2011 and the FSA with NCL was signed on 28.04.2012. This submission is factually inaccurate and not borne out of records. It is submitted that the State Commission in its order dated 28.04.2014 has clearly noted the representations made by LAPL from time to time to UPPCL before issuing the Termination Notice and approaching the State Commission. The relevant portion of the Order reads as follows:

"***The Petitioner had duly and repeatedly vide its letters dated 07.04.2012, 03.07.2012 and 01.12.2012 informed the Respondents of the difficulties being faced by it on account of the aforesaid reasons and its inability to operate the Plant at the contractually stipulated Availability factor***. *The Petitioner had accordingly requested the Respondents to take immediate and necessary as required under the PPA. However, till date no response has been received from the Respondents in this regard."*

f. The affidavit dated 30.09.2016 filed by UPPCL in Appeal No. 173 of 2016 may be referred wherein UPPCL has admitted that:

i. recommendation of Expert Committee was not for compensating LAPL on 'cost plus basis' but to cover the loss of LAPL which it had suffered on account of reasons given in Termination Notice;

ii. the case of LAPL as contained in the Termination Notice was not for seeking Compensatory Tariff, not admissible to a generator under Section 63, but for

claiming what it should have received had provisions in RFP and PPA been compiled with.

The above-mentioned stand of UPPCL in its affidavit dated 30.09.2016 is of significant importance inasmuch as such stand was adopted after the Full Bench Judgment of this Tribunal dated 07.04.2016 in Appeal 100 of 2013 (Adani Matters) holding against the exercise of regulatory power by the Regulatory Commission.

7.12 ISSUE 2: Whether LAPL was entitled to any relief in relation to payment related defaults?

2(a) Was there a breach of the terms of the PPA by UPPCL w.r.t payment and institution of Payment Security Mechanism?

a. Article 10 of the PPA deals with 'Payment and Invoicing'. Article 10.3 ('*Payment of Invoices'*), Article 10.5 ('*Establishment of Buyer Standby Letter of Credit'*) and Article 10.6 ('*Default Contingency Account'*) of the PPA contain the provisions related to the monthly invoice payment procedure duly supported by payment security mechanism. The procedure as per PPA is as follows:

i. An amount payable under the invoice shall be paid immediately from available and freely transferrable cleared funds for value on or before the due date to the designated account of the payee.

ii. A Standby Letter of Credit (LC) shall be:

Opened six months prior to the required commercial operation date;

equal to 1.1 times of the monthly tariff payment calculated by averaging the succeeding monthly tariff payment in respect of six months period following the commercial operation date;

recalculated after six months of COD of Unit I equivalent to 1.1 times the monthly average tariff payment of preceding six months.

b. Article 10.8 of the PPA provides that in the event full payment is not made in respect of a Monthly Tariff payment in immediately available and freely transferable cleared funds for value on or before Due Date, the Seller shall then and only then have recourse to the said Buyers Standby Letter of Credit. Further, if full payment in respect of said Monthly Tariff payment is not available under the said Standby Letter of Credit either, then the Seller shall have the right to recourse to the Default Contingency Account for pending payment.

c. The position with respect to payment and payment security mechanism was as under as on the date of Termination as on 11.02.2013:

Requirement under the PPA	**Actual position**
Direct payment on due date through freely available funds	Payments are not made on due date; Outstanding dues: Rs. 526.00 Crs.
Standby Letter of Credit	LC issued by UPPCL was inadequate & not in compliance with PPA provision - LC issued only for Rs. 25 Crs. (manually revolved 2 times in a month)
Default Contingency Account	Default contingency accounts as required under the PPA have not been created by Buyers although the Default Contingency Agreement was signed on 12 Nov. 2006.

d. It is an admitted position of UPPCL that there were payment defaults on its part and the outstanding dues as on the date of issue of termination notice stood at Rs. 526 Crores. The relevant extracts are produced herein below:

"31. That it may be submitted here that the petitioners have been making sincere endeavours to clear all outstanding dues off the Respondent and had made payment off about Rs. 630.00 Crores between 1.1.2013 till 13.5.2013.

32. That it may be mentioned here that though the petitioners have cleared major portion of the outstanding bills and have also opened Payment Security Mechanism as required under the 'PPA', except a little short fall in outstanding payment which is also in process and because of which the Respondent is claiming violation of the provisions of the 'PPA', it is submitted that if any violation of the 'PPA', the remedy is already provided in Clause -18 of the PPA itself as such, on the said ground the Respondent could not have terminated the agreement without resorting to the procedure provided in the 'PPA'. ……

35. That when the notice of termination dated 24.1.2013 was given by the Respondent, the outstanding dues were about Rs. 526.00 Crores as stated by the Respondent in the termination notice itself. The petitioners have made sincere efforts to clear the dues and presently only outstanding payable amount is Rd. 117.00 Crores.

UPPCL's contention that payment security mechanism was in place is factually incorrect and misleading. It is reiterated that as per Article 10.8 of the PPA, Default Security Agreement is the payment security mechanism. It is further stated that the Default Contingency Agreement in this regard was also signed on 12 Nov. 2006. However, the said agreement required UPPCL and the distribution companies to *inter alia* follow-up activities in order to operationalize the said payment security mechanism e.g. establishment of Default Contingency Account, Sectional Contingency Accounts, Seller Account, Buyer Account etc.

Therefore, mere signing of the Default Contingency Agreement and opening of two Credit Accounts (which accounts were opened after the issuance of termination notice dated 11.02.2013 and the details whereof were never shared with LAPL) were not sufficient and UPPCL/ Discoms were required to tie up such accounts with the Sectional Contingency Accounts, which has not been done till date. Hence, UPPCL continues to be in violation of its material obligation under the PPA.

e. Hence, it is clear from the above that UPPCL and the distribution companies have been in material default of their payment obligations under the PPA, both in terms of institution of a payment security mechanism and in releasing timely and complete payments to LAPL, since execution of the PPA. This breach on UPPCL's part per force led to abysmal credit rating of Anpara C. Despite taking up the matter on regular basis with UPPCL, no relief was provided and LAPL was constrained to issue another notice of termination as per Article 15.4.6 (*'Termination Procedure for Buyer Events of Default'*) of the PPA on 11thFebruary, 2013.

Adverse Impact of the Payment related Defaults by UPPCL

f. As a direct result of the huge outstanding payments lying with UPPCL, coupled with non-establishment of payment security mechanism, LAPL suffered on account of:

- Erosion of Net Worth and Equity of LAPL
- Degradation of its Credit Ratings
- Higher Interest Rate on Working Capital
- Lowering of option for refinancing of debt

g. It is submitted that one of the fundamental premise of the bidding and the reason why LAPL could offer a very competitive tariff during the bidding was based on the strategy to refinance the project debt post COD on the strength of mine-specific linkage coal availability through MGR system and a robust payment security mechanism provided for in the RFP and PPA. Non-fulfilment of these commitments by UPPCL and consequent inability of LAPL to refinance the project debt denied the benefit of around 3% reduction in interest rate to LAPL.

h. The Expert Committee appointed by the State Commission examined the provisions of the PPA and the factum of difficulties claimed by LAPL and noted as under:

"5.2.7The Committee noted that while LAPL was already facing difficulties due to deviations in terms of coal supply & related logistics, large payment dues outstanding with UPPCL and non-establishment of payment security safeguards have further worsened the situation. Apart from adversely impacting the technical performance and ability to book and fully utilize the allocated quantity of linkage coal, LAPL's financial performance dwindled to a substantial extent, leading to accumulated losses to the tune of Rs 653 Crs from the time of COD till the date of notice of termination."

2(b) If yes, was the State Commission justified in granting damages to LAPL in line with the principles set out in Section 56 of the Contract Act?

a. As stated above, there has been a material breach w.r.t. payment related obligations by UPPCL.

b. UPPCL in its submissions before this Tribunal has argued that the State Commission has wrongly applied the principles of frustration contained in

Section 56 of the Indian Contract Act, 1872 since the PPA provided for force majeure, and where force majeure is provided the principles of frustration would not be applicable. Hence, any compensation granted to LAPL, according to UPPCL, on this ground is perverse in nature.

c. In the present case, the State Commission has taken note of the facts that non-payment of dues and failure to establish payment security mechanism constitutes violation of material obligations set out under the RFP and bidding documents based on which the contract was entered into.

d. As far as UPPCL's argument regarding non-applicability of Frustration is concerned, it is submitted that Force majeure is defined under Article 12.3 of the PPA. It does not include any event of default by UPPCL as an event of force majeure. In these circumstances, the State Commission could not be said to have acted perversely by applying Section 56 for grant of damages for default on the part of UPPCL. The following observation of the State Commission in the Impugned Order in fact suggests misrepresentation under Section 19 of the Indian Contract Act, 1872 by UPPCL and, accordingly, LAPL is entitled to damages arising from such misrepresentation:

"UPPCL did not open Letter of Credit and did not create any payment security mechanism obviously because they did not have the LC limits, enough revenue to provide escrow mechanism and make the full payment of energy bills. Inspite of this, UPPCL in the PPA has promised to establish the Letter of Credit and payment Security Mechanism, thus promising to do an impossible act and as LAPL (promisee) did not know this act to be impossible and unlawful, such promisor (UPPCL) must make compensation to such promisee (LAPL) for any loss which such promisee (LAPL) sustains through the non-performance of the promise."

e. The above quoted instances of failure on the part of UPPCL to act as per their promise under the RFP and PPA in fact, even otherwise, constitutes a clear case of breach for which, LAPL is entitled to damages in law.

f. It is respectfully submitted that the contention of UPPCL that the PPA provides for remedy for outstanding dues / non-payment / non-opening of LC and therefore, the contract could not have been frustrated as the relief was available to LAPL under the PPA, is misconceived and baseless. It is respectfully submitted that Article 15.2 (c) read with Article 10.3 of the PPA clearly postulate that non-payment of invoices within 90 days of the Due Date, when such outstanding payments could not be recovered either through Buyer Standby Letter of Credit or the Default Contingency Account, would constitute a Buyer Event of Default and would thereby entitle the Seller / LAPL to terminate the PPA. In the instant case it is an admitted case of UPPCL that it has failed to make payments on time and as on the date of issuance of termination notice i.e. 11.02.2013 the total outstanding dues stood at Rs. 526 Crores that could not be satisfied either through the Buyer Standby Letter of Credit or through the Default Contingency Account. In such a situation, remedy available to LAPL was to terminate the PPA, which they did vide their termination notices dated 10 December 2012 and the follow up notice dated 11 February 2013 under Article 15.4.6.Article 15.4.6 of the PPA reads as follows:

"*15.4.6: Within the period of five (5) days following the expiry of the Suspension Period or as soon as permitted as Article 5.1 of the Direct Agreement, whichever is later, unless the Parties have otherwise agreed that the circumstances giving rise to the Preliminary Termination Notice have ceased to exist and / or remedied or the non defaulting Buyers have made a payment representing the Payment Shortfall Default amount, the Seller may terminate this Agreement by giving a written notice (a "**Termination Notice**") to all the Parties and the Lenders' Representatives, whereupon, subject to the terms and conditions of Schedule 10, this Agreement shall terminate on the date of such Termination Notice."*

g. As seen from above, in case of termination of PPA, UPPCL is obliged to buy-out the plant in accordance with Schedule 10 of the PPA. It is important to underscore here that the fact that the PPA stands terminated has also been accepted by UPPCL in its Affidavit dated 30.09.2016 filed in Appeal No. 173 of 2016.

h. In the instant case, UPPCL had refused to exercise the buy-out option and instead expressed its intention to continue procuring power from Anpara 'C' Project, which is the second cheapest source of power in the State, in larger interest of the consumers of the State. Hence, refusal of UPPCL to buy-out the project as required under the PPA following its termination upon admitted event of default necessarily leads to frustration of the contract and entitles LAPL for damages in lieu of frustration as the State Commission has rightly granted under the Impugned Order. Further, in the circumstances, the finding of the State Commission as to the quantum of damages cannot be stated to be perverse. The measure of damages adopted by the State Commission is in accordance with the principles of Section 56 of the Indian Contract, 1872 and

in the given circumstances, LAPL is entitled to claim increase in tariff on account of frustration of contract resulting from a breach of material obligation on the part of UPPCL. It is important to underscore here that the refusal of UPPCL to Buy-out the plant as required under Article 15.4.6 read with Schedule 10 of the PPA following the termination of the PPA by LAPL (which termination has been admitted to be accepted by UPPCL in its affidavit 30.09.2016) had given rise to a very peculiar situation. Such situation has not been envisaged either in the PPA or the bid documents or in the CBG issued by the Central Government issued under Section 63 and hence, no solution for the same was provided in either of these documents. Therefore, arguendo and without prejudice, the State Commission had all the powers, including the regulatory powers to redress this peculiar situation and grant appropriate relief to LAPL which otherwise in law could not have been left remediless for no fault of its own.

7.13 ISSUE 3: Can UPPCL be allowed to resile from the statements/representations made by it w.r.t the effect of NCDP and payment related defaults on the project?

a. The stand of UPPCL presently adopted is diametrically opposite to the stand that had been taken by UPPCL in various documents / pleadings where UPPCL has accepted the difficulties caused to the Project on account of NCDP and payment related defaults, and was, therefore, agreeable to relief

granted by the State Commission within the framework of law. Some of such instances are as follows:

i. Para 1.1 to 1.4 of the Fuel Policy Agreement signed by UPPCL with LAPL on 28.09.2012, wherein UPPCL acknowledged that the bidding process was based on the existing long-term coal linkage of 4.5 MTPA coal from Khadia Expansion mine of NCL, and that the entire coal for this pit-head project was to be transported through MGR system equipped with track hopper connected with the MGR for unloading as well as feeding of coal. UPPCL also admitted at Para 1.4 that the there has been a "paradigm shift" in the coal availability / supply scenario from the time of bid submission to the actual operations of the plant which has put considerable strain on LAPL in meeting Target Availability due to coal logistics and boiler design related issues, and the Seller needs to be compensated for any shortfall in Availability.

ii. The Chairman, UPPCL vide letter dated 10.03.2016 itself admitted that availability of coal was the sole responsibility of the procurer viz. UPPCL and UP Discoms**.**

iii. Petition No.891 of 2013 filed by UPPCL wherein it has submitted that NCDP amounts to change in law under PPA and LAPL would be entitled to seek relief thereunder. It also accepts payment default of Rs. 526 Crores as on the date of Termination Notice.

iv. Vide letter dated 05.03.2014, UPPCL requested the State Commission to resolve the impediments being faced by LAPL wherein UPPCL categorically stated that they do not have any objection if the State Commission takes the decision to provide an increased tariff to LAPL as long as the solution carved out falls within the legal framework and is in the general interest of the people of U.P. UPPCL has contended that the letter dated 05.03.2014 was without prejudice. Assuming without admitting, that the letter sent by UPPCL was without prejudice, a bare perusal of the contents of the letter clearly reflects that UPPCL was agreeable to two things that: (i) the project is facing difficulties, and (ii)UPPCL has no objection if a relief for the same can be worked out within the framework of law.

v. UPPCL's unequivocal admission of its default in establishing 'Payment Security Mechanism' as recorded in Commission's order dated 23.11.2015.

vi. Affidavit dated 30.09.2016 filed before the Tribunal in Appeal No 173 of 2016 (which was after the Full Bench judgment of the Tribunal in Energy Watchdog case) whererin UPPCL stated the following:

(a) That it is misconceived to say that Order dated 23.11.2015, passed by the State Commission was outside the scope of the PPA.

(b) That the said order has been passed in the overall interest of the parties to the PPA and more so, in the interests of the consumers of Electricity in the State of U.P.

(c) That power purchased by UPPCL from LAPL is the second cheapest source of power in the state of U.P. after the power purchased from Sasan Power Ltd.

(d) That the State Commission has concerned itself to mitigating the financial hardship of LAPL because of non-performance of certain financial obligations by UPPCL in terms of RFP and PPA.

(e) Notice terminating the PPA given by LAPL was found to be valid by the State Commission and UPPCL was not exercising the Buy-Out option.

(f) The recommendation of Expert Committee was not for compensating LAPL on 'cost plus basis' but was essentially to cover the loss of LAPL which it had suffered on account of reasons given in Termination Notice.

(g) The case of LAPL as contained in the Termination Notice was not for seeking Compensatory Tariff, not admissible to a generator under Sec. 63, but the same was for claiming what it should have received had provisions of RFP and PPA been compiled with scrupulously.

vii. The requirement of increased working capital on account of coal procurement from alternate sources has been accepted by UPPCL on account of NCDP by relying on the Expert Committee report at para D.3.3 of its affidavit dated 28.04.2017 filed before the State Commission.

viii. The allowance against wharf wall on account of NCDP has been accepted by UPPCL by relying on the Expert Committee report at para E.3.4 of its affidavit dated 28.04.2017.

b. It is submitted that the above admissions of UPPCL have to be seen in light of the settled law as enunciated by Hon'ble Supreme Court that conduct of the parties as well as the correspondences exchanged would also be relevant factors in the matter of construction of a contract. Reference may be made to the observations of Hon'ble Supreme Court in this regard in its following judgments:

i. **Transmission Corpn. of Andhra Pradesh Ltd. v. GMR Vemagiri Power Generation Ltd., (2018) 3 SCC 716**

ii. Assam SEB v. Buildworth (P) Ltd., (2017) 8 SCC 146

iii. Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission, (2003) 8 SCC 593

In view of the above judgments, it can be seen that UPPCL by its own conduct and statements made from time to time has stated its understanding under the PPA with regard to the source and mode of transportation of coal for the Project, the payment related defaults, and the entitlement of LAPL for deviations from the term of the RFP, RFQ and PPA. Any attempt by UPPCL to renegade from such stated factual position is barred by the principles of approbation and reprobation. It is useful to refer to the following decisions of the Hon'ble Supreme Court in this regard:

iv. **Mumbai International Airport Pvt. Ltd. v. Golden Chariot Airport &Anr., (2010) 10 SCC 422**

v. **Rajasthan State Industrial Development & Investment Corporation &Anr. V. Diamond & Gem Development Corporation Ltd. &Anr., (2013) 5 SCC 470**

UPPCL has sought to defend and justify such varying stands and the admissions made by UPPCL by contending that any person is entitled in law to change his stand. In its support, UPPCL has relied upon the following decisions:

a) **M.P. Gopalkrishnan&Anr. V. State of Kerala &Ors. (2005) 11 SCC 45**

b) **P. Nallammal & Anr. V. State (represented by Inspector of Police) (1999) 6 SCC 559**

c) **Groupe ChimiqueTunisien SA v. Southern Petrochemicals Industries Corporation Limited (2006) 5 SCC 275**

The above judgments relied upon by UPPCL are not applicable to the facts of the present case. It is submitted that all of the above cases deal with the principle that there cannot be any estoppel against concession of law and that a party is entitled to change its stand on legal propositions. These judgments are therefore, not relevant and cannot be of any assistance to UPPCL to now resile from the position it had taken at all relevant times to admit the hardships caused to the Project due to deviation from the representations/ assurances under the bidding documents and the PPA. UPPCL by way of pleadings, contracts, and letters, have demonstrated their clear understanding of the scope and intent of the RFQ, RFP and PPA, that (i) coal for the Project shall be supplied from Khadia mines through MGR and that any deviation from this position would have an adverse impact on the operations of the Plant; and (ii)there have been

admitted defaults in relation to payment related assurances that have adversely affected LAPL's ability to re-negotiate and reduce its interest liabilities.

7.14 ISSUE 4: Whether regulatory power was available to the Commission for grant of relief to LAPL in the facts of the case?

a. At the outset, it is important to note that in the Impugned Order, the State Commission has granted relief in exercise of its adjudicatory powers under the terms of the contract. There are essentially two grounds under which relief has been provided to LAPL in the Impugned Order. Firstly, amounts payable in accordance with the provisions of the Contract Documents i.e. the PPA and Fuel Policy Agreement for loss arising out of change in law on account of NCDP. Secondly, the compensation payable due to non-payment of dues and default in establishing PSM as required under the PPA.

b. The Hon'ble Supreme Court in the *Energy Watchdog judgment (2017) 14 SCC 80* has clearly held that the general regulatory power of the Central / State Commission under Section 79(1)(b) / 86(1)(b), so far as tariff is concerned, is not taken away, in cases where the tariff has been adopted under Section 63 following the competitive bidding process.

c. In the Energy Watchdog case (supra), construction of Section 63 vis-à-vis other provisions of the Act was raised as a specific issue. While answering this issue, the Hon'ble Supreme Court noted the following at Para 19 of the judgment:

- *"Section 63 begins with a non obstante clause, but it is a non obstante clause covering only Section 62"*

- *"unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not "determine" tariff but only "adopts" tariff already determined under Section 63"*
- *"such "adoption" is only if such tariff has been determined through a transparent process of bidding"*
- *"this transparent process of bidding must be in accordance with the guidelines issued by the Central Government"*
- *"the appropriate Commission does not act as a mere post office under Section 63"*
- *"It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government"*
- *"Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4".*

d. The clause 4 of the Competitive Bidding Guidelines issued by the Central Government deals with "Tariff Structure". It lays down in minutes details all aspects relating to tariff, which can have impact on tariff e.g. capacity and energy components and their computations, fuel source, foreign exchange, transmission, availability etc.

e. The Hon'ble Supreme Court after taking into consideration the Competitive Bidding Guidelines, have observed in para 20 of the judgment as under:

"It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b)."

f. The Hon'ble Supreme Court, in para 20, has further posed the following question on the exercise of regulatory power by Commission vis-à-vis tariff adopted under Section 63:

"For another, in a situation where there are no guidelines ***or in a situation which is not covered by the guidelines****, can it be said that the Commission's power to "regulate" tariff is completely done away with?"*

The Hon'ble Supreme Court then answered this question in negative by holding as follows at Para 20:

- *"Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether."*
- *"In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff."*
- *"It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines."*
- *"As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."*

The Hon'ble Supreme Court has thus held that Section 63 cannot operate in a standalone manner de hors the general regulatory powers of the Commission. Further, since the general regulatory power contained in Section 79(1)(b) / 86(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff, therefore, the tariff adopted under Section 63 comes under the sweep of the State Commission's general regulatory power. However, as the Hon'ble Supreme Court has held, such regulatory power qua Section 63 has to be exercised in accordance with the Guidelines issued by the Central Government. It is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the

Commission's general regulatory powers under Section 79(1)(b) / 86(1)(b) can then be used.

g. The above decision of Hon'ble Supreme Court is in line with its earlier decision in **All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487 decided on December 8, 2016**. In this case also the Hon'ble Court has underscored the primacy and pervasiveness of Commission's general regulatory powers and held as follows:

"***31.*** *All this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act. This is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with Guidelines issued. If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest."*

In the above judgment, the Hon'ble Court observed that the approval of the Commission is mandatory where the tariff determined under Section 63 is subsequently increased or the tariff is amended outside the PPA. In view of the above, it is clear that the Hon'ble Supreme Court has emphasized that the scheme of the Electricity Act, 2003 and that of Section 63 envisages that tariff adopted under Section 63 through competitive bidding route can be amended or increased outside the PPA. However, any such increase or amendment to tariff

can only be with the permission of the Commission because it involves public interest.

h. It is a settled legal position that it is the ratio decidendi of a judgment and not the final order in the judgment, which forms a precedent. It is also an established legal principle that the ratio decidendi of a case is distinct from the relief granted. In this regard, Hon'ble Supreme Court has held as follows in the case of ***Islamic Academy of Education v. State of Karnataka,*** **(2003) 6 SCC 697 at page 771:**

*"**139.** A judgment, it is trite, is not to be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal. (See Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj [(2001) 2 SCC 721])" .*

i. The Appellant / UPPCL has heavily relied on the decision of this Tribunal in ***Nabha Power Ltd. v. PSPSCL (Judgment dated 17.05.2018 in Appeal No. 283 of 2015)***to contend that this Tribunal has considered the Energy Watchdog case while framing the issue on existence of general regulatory power to grant the compensatory tariff and answered it in the negative. UPPCL has vehemently relied upon paragraph 9.14 of the Nabha judgment in this regard. However, it is submitted that on a plain reading of the judgment, it is clear that the issue before this Tribunal was whether a relief in exercise of regulatory power can be given where the relief was sought on the basis of breach of a term of contract that the Tribunal found was neither expressed nor implied in the

contract. In the said case, the appellant – Nabha Power Ltd. sought compensation from the procurer / PSPCL for the latter's failure to off-take power in the manner such that the power plant could operate at normative PLF. However, this Tribunal at paragraph 9.2 of the judgment noted that Nabha Power had admitted that there is no specific provision in the PPA which stipulates that non-provision of the appropriate operating conditions by PSPCL to ensure the operation of the plant as a Base Load Plant within 'Supercritical Parameters' shall be treated as default on the part of the procurer and it would be liable to pay compensation for losses caused to Nabha Power. Having held so, this Tribunal refused to read in any implied term into the contract that runs against the spirit of agreed terms of the PPA. Accordingly, this Tribunal held that it cannot fashion a relief that is not stipulated in the PPA in exercise of its general regulatory powers.

j. The facts of the present case are clearly distinguishable from the facts in Nabha Power in as much as there was (i) a categorical assurance in the bid documents for supply of 100% coal from Khadia mines through MGR transportation system, and admitted difficulty faced in operation of the plant due to deviation from such assurance; and (ii) admitted non-payment of Rs. 526 Crores as on date of Termination of PPA, and continued non-compliance in setting up of complete payment security mechanism in accordance with the requirements of the PPA read with the Default Contingency Agreement.

k. Even though in the instant case the State Commission has granted relief in exercise of adjudicatory powers under Section 86(1)(f) and within the contract documents, in view of the law declared by the Hon'ble Supreme Court in Energy Watchdog case, that the State Commission is free to exercise its general regulatory powers in a PPA entered into following Section 63 bidding route, where the exceptions as set out in paragraph 20 of the Energy Watchdog judgment, namely, the absence of Guidelines or the Guidelines not providing for a particular situation, are applicable.

l. The ratio laid down in Energy Watchdog judgment has been followed by the Hon'ble High Court of Gujarat, in *Indian Wind Energy Association v. Gujarat Urja Vikas Nigam Ltd.* vide order dated 03.11.2017 and 14.11.2007. The relevant extract of the judgment dated 14.11.2017 is extracted herein under for the sake of brevity:

> "*[21] As power is exercised by the State Commission under Section 86 of the Act while passing impugned order dated 06.10.2017, we are of the view no error is committed by the State Commission, in as much as it is clearly held by the Hon'ble Supreme Court in the case of Energy Watchdog (supra) that where there are no guidelines framed at all or where the guidelines do not deal with a given situation, the Commission's power is not curtailed."*

m. Further, this Tribunal also relied upon the Hon'ble Supreme Court's judgment of Energy Watchdog in *JBM Solar Power Pvt. Ltd. v. Haryana Electricity Regulatory Commission & Anr.* dated 19.03.2018 and *Balarch Renewable Energy Pvt. Ltd. v. Haryana Electricity Regulatory Commission & Anr.* dated 27.03.2018.

n. The submission of UPPCL that above-referred judgments are not applicable to the present case since they relate to power procurement from renewable energy sources, for which no guidelines under Section 63 had been issued by the Central Government, is misconceived and incorrect. The said judgments deal with the availability of regulatory powers in both situations contemplated in Energy Watchdog judgment in para 20 namely, (i) when no guidelines are framed at all, and (ii) where guidelines do not deal with a given situation. The interpretation of the judgment of the Hon'ble Supreme Court in these cases will be equally applicable to both situations as the Court while passing their judgment has referred to both the situations.

o. It is pertinent to mention that the various provisions of the CBG relied upon by UPPCL namely clause 3.1, 4.2, 5.6(vi), 5.7 and 6.4 are not relevant for the present case as there is no dispute regarding such functions of the State Commission. However, these provisions do not address the situation arising in the present case due to deviation from the RFQ, RFP and PPA.

7.15 ISSUE 5: Was there due application of mind by the State Commission while passing the Impugned Order?

a. The Ld. Counsel for the Appellant has argued that the Impugned Order is not a reasoned/ speaking order and reeks of non-application of mind. The contention of UPPCL that there is no analysis or application of mind by the Ld. Commission is belied by a bare perusal of the Impugned Order wherein

Ld. Commission has noted material facts, framed issues and returned findings on those issues.

b. The Impugned Order is a well thought of and an order that follows an intelligent structure and scheme. The State Commission has faithfully and accurately captured all submissions made by the parties before it.

c. In view of the above, the Impugned Order cannot be labelled as a non-speaking order inasmuch as the State Commission has noted relevant facts, framed material issues, discussed facts and issues in law, and thereafter given its finding and conclusions followed by the allowable relief. It is well settled principle of law that reasons in an order or judgment need not run into pages and the briefest of reasons, which are indicative of application of mind, suffice the requirement of law.

d. The reproduction of pleadings in the Order passed by any Commission is necessary to ensure transparency by the State Commission while exercising its powers and discharging its functions ***(Section 86(3) of EA 2003).***

e. It is well settled that right to reasons is an indispensable part of sound judicial system. Reasons, howsoever brief, is indicative of application of mind.

(Jagtamba Devi vs. Hem Ram &Ors. (2008) 3 SCC 509 – Para 9 & 10; Shree Mahavir Carbon Limited vs. Om Prakash Jalan (Financer) & Anr. (2015) 12 SCC 653).

f. Further, the Supreme Court has held that the judicial prowess does not apply to Commissions with the same rigour as courts because the commissions are not manned by judicial persons but technical members.

(Ram and Anr. vs. State of Karnataka 2004 (7) SCC 796 – Para 6, Smt. Lalitha Poojarthi and Ors. v . State of Karnataka 2014 SCC Online Kar 12665)

g. Lastly, the contention of UPPCL that the State Commission has *without any application of mind has merely* accepted the recommendations of the Expert Committee and reiterated the relief earlier granted to LAPL vide order dated 23.11.2015, is misconceived and factually incorrect for the reasons that:

i. A sum of Rs. 282.56 crores recommended by the Expert Committee and earlier allowed by the State Commission on account of increase in interest during construction has been disallowed in the Impugned Order;

ii. On the basis of the Committee's recommendations, the State Commission had earlier allowed Rs. 282 crores to LAPL on account of variation in Foreign Exchange. However, the same has been disallowed on re-examination in the Impugned Order.

8. We have heard learned Counsel appearing for the Appellant(s) and the learned Counsel appearing for the Respondent at consideration length of time and we have gone through the written submissions carefully and evaluated the entire relevant material available on record. The

following common issues emerges in Appeal Nos. 336 of 2017 & 359 of 2017 for our consideration: -

Issue No. 1: Whether Lanco is entitled to any relief under law due to New Coal Distribution Policy (NCDP) resulting into deviation with respect to coal and coal related logistics from the representations made in the bidding documents?

Issue No.2: Whether Lanco is entitled to any relief in relation to payment related deviations by UPPCL with respect to payment and institution of payment security mechanism?

Issue No.3: Whether the regulatory powers were available to the State Commission for grant of relief to Lanco and the relief so granted in the impugned order is sustainable in the facts of the case and law?

Our findings and analysis :-

8.1 Issue No. 1:

The learned counsel for the Appellant Shri M.G. Ramachandran, contended that the exercise of general regulatory powers to grant such compensatory tariff is not available with the State Commission/Central Commission and this has been authoritatively laid down by the Hon'ble Supreme Court in Energy Watchdog Case (2017) 4 SCALE 580, followed by the Hon'ble Supreme Court itself in the decision dated 20.04.2017 in Civil Appeal Nos. 9643-44 of 2016- Sasan Power Limited –v- Central Electricity Regulatory Commission and

thereafter, followed by this Tribunal in Appeal No. 283 of 2015 in Nabha Power Limited –v- Punjab State Power Corporation Limited and Anr. decided on 17.05.2018. The principles laid down in Paras 18 and 19 of the Energy Watchdog Case is that the general regulatory power available to Central Commission under section 79 (or to the State Commissions under section 86) can be exercised in regard to matters which have not been covered in the guidelines and bidding documents provided under section 63 or when there are no guidelines at all. Accordingly, in matters specifically dealt in the guidelines and the bidding documents under section 63, including the PPA, there cannot be any exercise of general regulatory powers under section 79 or 86 to grant relief.

8.2 Following the Energy Watchdog case, the Hon'ble Supreme Court had rejected a similar claim of exercise of regulatory powers to grant compensatory tariff claimed by Sasan Power Limited vide Order dated 20.4.2017 passed in Civil Appeal Nos. 9643 and 9644 of 2016.In the Nabha Power Case (Supra), this Tribunal has rejected similar claim made by the generator applying the decision of the Hon'ble Supreme Court in Energy Watchdog Case.

8.3 The relief admissible for such change in law is the payment of difference in price of procurement of coal from alternate sources including imported coal and the price at which coal is available from the linked mines. Such differential amount is to be allowed to the generating company, subject to prudence check

by the Appropriate Commission. The above relief has not been denied by the Appellant. Such a consequence of the actual cost of coal procured from other sources was already anticipated and has been provided in the PPA itself in Article 1.1, defining Fuel Supply Agreement read with Articles 3.12 (p), 7.9, 7.10,13.3.3 and Schedule 8 to the PPA. In fact, the Appellant and Lanco executed a Fuel Policy dated 28.09.2012 in accordance with Article 7.9 of the PPA**,** specifically dealing with the issues related to the NCDP and the consequences and relief thereto to be provided to Lanco. In addition to the above, Lanco had signed the Fuel Supply Agreement dated 24.04.2012 with Northern Coalfields Limited (NCL) which also envisages supply of coal from sources other than Khadia mines, the transportation by road/rail, import of coal and increase in price of coal.

8.4 The basic premise on which the above effect of the change in law claim has been pursued by Lanco and allowed by the State Commission in the impugned order is allegedly that at the time of bidding and signing the PPA, there was an assurance of 100% coal availability from Khadia Mines of Northern Coalfields Limited (NCL) for the Project and therefore Lanco did not have to establish the infrastructure and equipments for procurement/import of coal in the project from other sources. The bid invited by the Appellant under the competitive bid process was not premised on the availability of coal from Khadia mines and the risk and responsibility for procuring of coal required from any source was

specifically stipulated to be of Lanco. Lanco was duly, sufficiently and unambiguously made known that fuel risks is of Lanco, there will be a need for Lanco getting coal from sources other than the Khadia Mines including coal imported from outside India and there will be rail/road transportation of coal (not entirely the use of MGR System). In the circumstances, Lanco was required to make arrangement for all infrastructure and plant and equipment to deal with sourcing of coal from other than Khadia Mines and its transportation by rail or road while constructing the power generating units.

8.5 Even assuming for the sake of arguments but not admitting that the coal was to be made available primarily from Khadia mines, the non-availability of the coal from the said mines either on account of NCDP or otherwise can have only the consequence of procurement of coal from other sources including imported coal and claim by the generating company for the payment of the actual cost of bring such coal to the project site for use in the power plant. In the present case, the PPA in Schedule 8 already provides for actual cost of coal procured to be allowed. The Fuel Policy also provides for the cost of linkage coal or from alternate sources being a pass through. Thus, financially, to the legally extent applicable, Lanco is fully protected. There is, therefore, no adverse financial impact to Lanco because of non-availability of coal from alternate sources. The reliefs granted by the State Commission has no nexus to the application of NCDP as change in law. In the light of the above provision

there cannot be any claim for under recovery of fixed charges, under recovery of Variable Charges and Compensation for Higher Secondary Oil Consumption, allegedly on account of less coal availability from Khadia Mines. The coal issue raised by Lanco had therefore no relation whatsoever to the issue of Change in Law decided by the Hon'ble Supreme Court in regard to NCDP. In the decision of the Hon'ble Supreme Court in Energy Watchdog Case what has been considered is the shortage in the availability of coal from the linked sources, namely, in the quantum as per the Letter of Linkage or Letter of Assurance given and the inability of the Coal Company to sign the FSA to the full extent due the reason of change in the NCDP. Such a situation does not arise in the present case. In fact, the present case of Lanco is Case 2 Competitive Bid Process where the energy charges are allowed on the basis of a formula contained in Schedule 8 of the PPA and the bid process was only to decide on the quoted capacity charges and net quoted heat rate (NQHR). The coal price, from coal sources other than Khadia mines, inclusive of the purchase cost as well as the coal transportation and unloading charges is allowed on actual basis. There is, therefore, no impact on Lanco in so far as the change in the source of coal availability. The claim of Lanco, in the present case for increased capacity charges or additional capital cost over and above the quoted capacity charges is totally misplaced. The increase in capacity charges claimed had nothing to do with the energy charges payable. The

capacity charges were quoted by Lanco as per its decision at the time of the submission of the bid. It was for Lanco to factor all the relevant aspects. Thus, it was not open to Lanco to claim any additional capacity charges except for force majeure/the Indian Political Event as provided in Articles 12 and 13 or Change in Law as provided in Article 14 of the PPA.

8.6 ***Per contra,*** the learned counsel for Respondent, Shri S.B. Upadhyay for Lanco submitted that as per the RFP Coal linkage /availability and transportation of 4.5 MTPA, GCV at 3885 Kcal/Kg. and PLF at 80% from Khadia expansion OCP of NCL were obtained by the Appellant for Anpara C project as represented in the Public Notice during invitation of RFQ. Besides, existing coal transportation system for Anpara A & Anpara B Thermal stations comprising MGR system was to be shared with Anpara C project. He further contended that the successful bidder was required to enter into the separate agreement for utilising the shared facilities of existing power plants and Lanco was to comply with the technical requirements and the parameters specified in the RFP as regards to construction responsibility provided in Article 5.1.1 of the PPA. Keeping these aspects in view, the Anpara C project was constructed and commissioned with a unique features as given below :-

a. 2x600 MW coal based thermal power plant has been built on only 256 acres of land, which is much lower than the norms specified by CEA for similar power projects.

b. Mine specific coal linkage (Khadia expansion Mine of NCL) and shared logistics (MGR) for movement of coal rakes with UPRVUNL's existing power stations of Anpara A &B.

c. In view of limited area, coal unloading has been facilitated through track hopper by use of BOBR-N wagons.

d. The project did not envisage raw coal storage and reclaiming coal for crushing.

(ii) The Learned counsel for the Respondent further submitted that the NCDP was issued by Ministry of Coal, Government of India after conclusion of bidding process and execution of PPA. The changes under NCDP allowed Coal India Limited and its subsidiaries to supply coal under the fuel supply agreement from any source including imported coal. As a result NCL was no longer obligated to supply coal from the mine specified in the linkage granted to the Anpara C project i.e. Khadia Mines.

The Appellant in its Petition No. 891 of 2013 has taken a specific stand that NCDP constitutes change in law. Following is the extract of the pleadings in Petition No. 891 of 2013 for ready reference:

"H. Because New Coal Distribution Policy notified by the Government of India is a directive and comes within the definition of 'Change in Law' and 'Change in Law' comes within the definition of Indian Political Events in view of Clause 13.3.1(c) of the 'PPA'.

…

L. Because the 'PPA' specifically provides remedies to be resorted to for redressal of the grievance in view of 'Change in Law' and those provisions are contained in Clauses 14.1 to 18.2 of the 'PPA'."

(iii) Further the counsel for the Respondent submitted that Lanco had set up the project strictly in accordance with the RFP requirement and thus, the coal handling system was rendered inadequate as the design of wallets coal handling system, related logistics and infrastructures configured as per the technical specifications mentioned in the RFP document. The coal quantity settled through MGR system was limited to only 4% during Financial Year 2011-12 and to 13% for Financial Year 2012-2013 as against the represented requirement of 100% from Khadia Mines through MGR. It has further been highlighted by the learned counsel that though Lanco made substantial efforts to make up for the shortfall linkage coal through procurement from the alternate sources but the coal transported through BOXN wagons of railways and road transportation could not be unloaded timely due to inadequacies in the plant design base of RFP specifications. Further, a number of other logistics emerged to be lacking at the site which were not at all planned through RFP documents with a presumption that the existing MGR system at Anpara A & B would be utilised by Anpara C project. All these factors relating to coal and its logistics affected the average PLF of the plant reducing the same to around 45%.

(iv) The learned counsel further submitted that the impact arising out of changed source of coal and coal transportation methods had been highlighted by the Chairman UPPCL vide his letter dated 10/3/2016 addressed to Coal India Limited requesting "*Full materialisation of coal from Khadia Mines through MGR system through BOBR wagons to Lanco as envisaged in the RFP/PPA"*.

(v) The counsel for the Respondent contended that as per Para 4.2 of the Competitive Bidding Guidelines issued by the Central Government in case of long term procurement of power with specific fuel allocation (case 2), the procurers have been mandated to invite bids on the basis of capacity charges and net coated heat rate. The Appellant has placed heavy reliance on the orders dated 19/10/2005 and 6/2/2006 passed by the State Commission to contend that the fuel risk for the project was that of a seller and not of UPPCL. It is the contention of the learned counsel of Lanco that these orders of the State Commission were not dealing with the responsibility with regard to sourcing of coal for the project and these orders did not alter the position regarding the responsibility of fuel as the RFP was issued on the basis of these orders which provide the specific details regarding the sourcing of coal and transportation arrangement under the Chapter 3 and 4 of Vol II of the RFP. It is further to be noted that the rationale for carrying out the bidding of net coated heat rate basis is that once the linkage of coal is provided by the procurer, the bidders are required to quote the net coated heat rate as part of the bidding which will

create the basis for comparing their relative efficiencies of converting heat generated from burning of coal into electric energy. Furthermore, the fact that fuel was the responsibility of UPPCL and not that of LAPL has been admitted by UPPCL itself. In the Fuel Policy Agreement signed by UPPCL with LAPL in accordance with Article 7.9.2 of PPA, UPPCL admits that: (i) the bidding process was based on existing long term linkage of 4.5 MTPA from Khadia mines (para 1.2); (ii) as per bid documents, the entire coal requirement for the Project was to be transported through augmentation of existing MGR for Anpara A & B (para 1.3); and (iii) there is a paradigm shift in the coal supply scenario from the time of bid submission, which has put strain on LAPL and that in the event of non-availability of coal despite all reasonable efforts by LAPL, it shall be compensated for reduction in availability or availability factor of the plant (para 1.4).

(vi) The RFP/PPA had envisaged coal cost at Rs.1045 per MT and escalation at 4% per annum considering supply of 100% coal from Khadia mines through MGR. However, there was an increased requirement of working capital due to coal procured from alternate sources including imported coal which have to be brought through non-MGR modes of transport. The requirement of increased working capital on account of alternate coal has been accepted by UPPCL on account of NCDP by relying on the Expert Committee Report, at para D.3.3 of its affidavit dated 28.04.2017.

(vii) UPPCL has contended that reliance on Clause 1.4 of the Fuel Policy Agreement is an afterthought as the issue of deemed fixed charges was raised for the first time on 24.01.2013 even though the plant had started operation from 10.12.2011 and the FSA with NCL was signed on 28.04.2012. This submission is factually inaccurate and not borne out of records. The State Commission in its order dated 28.04.2014 has clearly noted the representations made by LAPL from time to time to UPPCL before issuing the Termination Notice and approaching the State Commission. The relevant portion of the Order reads as follows:

*"**The Petitioner had duly and repeatedly vide its letters dated 07.04.2012, 03.07.2012 and 01.12.2012 informed the Respondents of the difficulties being faced by it on account of the aforesaid reasons and its inability to operate the Plant at the contractually stipulated Availability factor**. The Petitioner had accordingly requested the Respondents to take immediate and necessary as required under the PPA. However, till date no response has been received from the Respondents in this regard."*

(viii) The affidavit dated 30.09.2016 filed by UPPCL in Appeal No. 173 of 2016 may be referred wherein UPPCL has admitted that:

(i) recommendation of Expert Committee was not for compensating LAPL on 'cost plus basis' but to cover the loss of LAPL which it had suffered on account of reasons given in Termination Notice;

(ii) the case of LAPL as contained in the Termination Notice was not for seeking Compensatory Tariff, not admissible to a generator under Section 63, but for claiming what it should have received had provisions in RFP and PPA been compiled with.

(iii) The learned counsel vehemently submitted that the order impugned passed by the State Commission is strictly in consonance with relevant provisions of Electricity Act and Regulations. The State Commission has after thorough evaluation of the material on records by assigning valid and cogent reasons passed the impugned order. Therefore, interference of this Tribunal does not call for.

Our finding and analysis:-

8.7 After considering the rival contentions of the learned counsel for the Appellant and the Respondent, we now examine this issue on its merit. The changes under NCDP allowed Coal India Limited and its subsidiaries to supply coal under the Fuel Supply Agreement from any source including the imported coal. As a result, NCL was no longer obligated to supply coal from the mine specified in the linkage granted to the Anpara C Project of Lanco i.e. Khadia Mines. The NCDP, inter-alia, resulted into making the agreed coal logistics for handling of coal through MGR system existing under Anpara A&B power stations considerably redundant. Keeping in view the coal transportation from Khadia Mines through the operative MGR system and identified coal linkage

from Khadia Mines, the Anpara C 2 x 600 MW Thermal Power Plant was built on only 256 acres of land which is considered much lower than the norms of land requirement specified by Central Electricity Authority for similar power projects. Due to the limited space available, the project did not envisage raw coal storage and re-claiming coal for crushing besides a number of other loading and unloading facilities. It would thus appear that the change in law not only altered the coal linkage but also made the planned system of transportation, loading, unloading etc. redundant requiring additional infrastructure for making coal available for the plant for its operation.

8.8 We also note that the RFP/PPA had envisaged coal cost of Rs.1045 per MT and escalation @4% per annum considering supply of 100% coal from Khadia Mines through MGR already existing. Admittedly, due to procurement of coal from alternate sources including imported coal increased the requirement of working capital on account of alternate modes of transport other than MGR. These facts were acknowledged by both, the Appellant as well as the Respondent and keeping the factual problems in view, adequate provisions were made in the Fuel Policy Agreement relating to the payment of deemed fixed charges. Based on the admissions and submissions of both the parties on this aspect arising on account of change in law, the State Commission found just and right to consider the impact of such changes on the operation of the plant.

8.9 In view of all these facts and circumstances of the case, as mandated under Section 97 of the Electricity Act, 2003, the State Commission with the consent of both the parties constituted a High Level Committee (Expert Committee) to examine various problems and bottle necks and to recommend suitable remedial measures for the same. The Expert Committee examined and analysed various impediments in the sustainable operation of the plant and came out with a detailed report suggesting several measures for bringing back the plant on track. It is relevant to note that the Appellant vide its affidavit dated 30/9/2016 also admitted that the recommendations of the Expert Committee was not for compensating Lanco on cost plus basis but to cover the losses of Lanco which it had suffered on account of reasons given the notice. Additionally, the Appellant also admitted that the case of Lanco was not for seeking compensatory tariff not admissible to generator under Section 63, but for claiming what it should have received at provisions of RFP and PPA been compiled with.

8.10 In view of the foregoing reasons, we opine that the NCDP notified by the Government of India became a directive and falls within the definition of Change in Law which in turn, comes within the definition of Indian political events in view of Clause 13.3.1(C) of the PPA. As the PPA specifically provides remedies for redressal of the grievances in view of change in law and these provisions are contained in Clause 14.1 to 18.2 of the

PPA. The above was also pleaded by the Appellant in Petition No. 891 of 2013. We accordingly consider a view that Lanco is entitled to appropriate relief on account of impacts of the NCDP resulting into consequential major deviations relating to coal and coal related logistics. The extent of relief considered by the State Commission after applying prudence check to the recommendations of the Expert Committee appears to be just and fair for which cogent reasons have been enshrined in the Impugned Order.

9. Issue No. 2

9.1 The learned counsel for the Appellant submitted that the State Commission holding that the PPA entered into between the Appellant and Lanco got frustrated as the Appellant had offered a payment security mechanism, letter of credit and dues payment, knowing fully well that it was impossible for the Appellant to fulfil, is far-fetched, incomprehensible and perverse. The Appellant has been purchasing electricity from different sources and the issue of the Appellant deliberately signing the PPAs with different generators with the knowledge that it will not fulfil the payment obligation is preposterous.

9.2 The counsel further submitted that, this is amply clear from the fact that as on the date of the passing of the impugned order, namely after more than 9 years of the signing of the PPA, there was no outstanding dues from the Appellant to Lanco. Further, during the course of these 9 years, the PPA has been actually

implemented with generation and supply of power from the project, which is contrary to the PPA being frustrated at the time of signing itself.

9.3 The learned counsel further argued that, another irrefutable evidence of the perverse finding on the payment security mechanism, letter of credit, outstanding dues is that these were raised before the Expert Committee and the decision of the Expert Committee was not that the same lead to frustration under section 56 of the Indian Contract Act, 1872. The Expert Committee had concluded that these aspects are covered by the remedies provided under the PPA namely Article 4.9 dealing with third party sales. The relevant extracts from the Expert Committee report quoted in the impugned order is as under:

"Payment and Payment Security Mechanism:

The Committee recommends that payment and payment security mechanism as mandated under RFP/PPA should be implemented by UPPCL. In case of non-compliance of the same by UPPCL within a definite time frame, the Committee recommends that Hon'ble UPERC to allow LAPL for 3rd Party sale of power and issue standing directions to grant open access, as required."

Based on the above, in the earlier order dated 23.11.2015, the State Commission did not grant any relief on account of any matters concerning the alleged non-establishment of payment security mechanism.

9.4 The learned counsel further advanced the arguments that there is no justification for the State Commission to have evolved a new concept of frustration under section 56 of the Indian Contract Act, 1872 to grant reliefs to

Lanco. The basic scope and effect of section 56 of the Indian Contract Act, 1872 has been misapplied by the State Commission. Section 56 of the Indian Contract Act, 1872 deals with impossibility of performance. The issue is whether the PPA entered into was impossible to perform. The answer is obviously '**NO',** as the PPA has been performed and the direction in the impugned order is also to perform the PPA and pay higher tariff. [It is incomprehensible and unknown to any principle of law that the PPA which is held to be frustrated for alleged payment security issue can be said to be capable of being performed with higher tariff being paid]. The two are oxymoron. If the PPA is to be performed as decided by the State Commission with increased tariff, the PPA cannot be said to be impossible to perform in the first instance to term it as frustrated.

9.5 The counsel vehemently contended that, in any event, payment security and payment issues are the obligation on the part of the Appellant as per the provisions of the PPA and would constitute to be an event of default and not a frustrating event under section 56 of the Indian Contract Act, 1872 or Force Majeure/ Indian Political Event under Articles 12 and 13 of the PPA. In fact, the PPA having dealt with Force Majeure/ Indian Political Event, the invocation of section 56 of the Indian Contract Act, 1872 does not arise at all in view of the settled principles of law laid down by the Hon'ble Supreme Court in the following cases:

(a) The Hon'ble Supreme Court in Satyabrata Ghosh –v- Mugneeram Bangur (AIR 1954 SC 44)

(b) The Hon'ble Supreme Court in the case of Energy Watchdog case, referring to Satyabrata Ghose,

(c) In the case of Naihati Jute Mills Ltd. v. Khyaliram Jagannath AIR 1968 SC 522, the Hon'ble Supreme Court was pleased to hold as under:

"12. It is not hardship or inconvenience or material loss which brings about the principle of frustration into play. There must be a change in the significance of obligation that the thing undertaken would if performed, be a different thing from that which was contracted for.

……

17……..As Lord Sumner in Bank Lime Ltd. v. Capel (A) Co. Ltd. [1919] A.C. 435 said :-

"Where the contract makes provision (that is, full and complete provision, so intended) for a given contingency it is not for the court to import into the contract some other different provisions for the same contingency called by different name."

18. In such a case the doctrine of discharge by frustration cannot be available, nor that of an implied term that the existing state of affairs would continue at the date of performance. The reason is that where there is an express term the court cannot find on construction of the contract an implied term inconsistent with such express term.

9.6 The learned counsel further submitted that nothing has been shown by Lanco as to how the allotted non-establishment of Payment Security Management has caused prejudice to Lanco average additional tariff needs to be given. It is to place on record that barring some delays the appellant has made all the payments to Lanco including delayed payment surcharge.

9.7 The payment security mechanism was established as per Article 10.9 of the PPA clearly stipulates that the Default Contingency Agreement is the only

payment security mechanism and the buyer standby letter of credit is merely a standby payment mechanism. The Default Contingency Agreement dated 11.01.2007 in accordance with the PPA were signed by the four distribution companies in Uttar Pradesh with Lanco and the Central Bank of India.

9.8 The learned counsel further contended that, the State Commission is wrong in construing that the non-opening of the Letter of Credit or non-timely payments constituted an important event for Lanco to perform. The non-opening of the Letter of Credit or non-establishment of the payment security mechanism (even assuming but not admitting), cannot lead to the grant of additional tariff or increased tariff. There is no nexus between the above aspects of payment security mechanism or the Letter of Credit to the grant of additional tariff. There is no provision in the PPA for allowing such amount in excess of the quoted tariff on account of any issue being raised on the payment security mechanism. Above all, the issue of frustration of contract was never raised by Lanco in the earlier proceedings. In the impugned order, the State Commission has itself held that new issues cannot be raised however, has allowed substantial relief of Rs. 0.069 per unit to Lanco for the duration of the PPA from 12.02.2013 on account of alleged default in non-establishment of

9.9 ***Per contra,*** learned counsel for the Respondent has submitted that the Article 10.8 of the PPA provides that in the event full payment is not made in respect of a Monthly Tariff payment in immediately available and freely transferable

cleared funds for value on or before Due Date, the Seller shall then and only then have recourse to the said Buyers Standby Letter of Credit. Further, if full payment in respect of said Monthly Tariff payment is not available under the said Standby Letter of Credit either, then the Seller shall have the right to recourse to the Default Contingency Account for pending payment.

9.10 He further contended that it is a demitted position of UPPCL that there were payment defaults on its part and the outstanding dues as on the date of issue of termination notice stood at Rs.526 crores. UPPCL's contention that payment security mechanism was in place is factually incorrect and misleading. It is reiterated that as per Article 10.8 of the PPA, Default Security Agreement is the payment security mechanism. He further stated that the Default Contingency Agreement in this regard was also signed on 12 Nov. 2006. However, the said agreement required UPPCL and the distribution companies to *inter alia* follow-up activities in order to operationalize the said payment security mechanism e.g. establishment of Default Contingency Account, Sectional Contingency Accounts, Seller Account, Buyer Account etc.

9.11 The learned counsel further emphasised that, therefore, mere signing of the Default Contingency Agreement and opening of two Credit Accounts (which accounts were opened after the issuance of termination notice dated 11.02.2013 and the details whereof were never shared with LAPL) were not sufficient and UPPCL/ Discoms were required to tie up such accounts with the Sectional

Contingency Accounts, which has not been done till date. Hence, UPPCL continues to be in violation of its material obligation under the PPA.

9.12 It is the express contention of the Counsel that UPPCL and the distribution companies have been in material default of their payment obligations under the PPA, both in terms of institution of a payment security mechanism and in releasing timely and complete payments to LAPL, since execution of the PPA. This breach on UPPCL's part per force led to abysmal credit rating of Anpara C. Despite taking up the matter on regular basis with UPPCL, no relief was provided and LAPL was constrained to issue another notice of termination as per Article 15.4.6 (*'Termination Procedure for Buyer Events of Default'*) of the PPA on 11thFebruary, 2013.

9.13 The learned counsel further highlighted that as a result of the huge outstanding payments lying with UPPCL coupled with non-establishment of security management Lanco suffered on multiple accounts such as erosion of net worth and equity, degradation of its credit ratings, higher interest rate on working capital, lowering of option for refinancing of debt, etc.

9.14 Further, one of the fundamental premise of the bidding and the reason why LAPL could offer a very competitive tariff during the bidding was based on the strategy to refinance the project debt post COD on the strength of mine-specific linkage coal availability through MGR system and a robust payment security mechanism provided for in the RFP and PPA. Non-fulfilment of these

commitments by UPPCL and consequent inability of LAPL to refinance the project debt denied the benefit of around 3% reduction in interest rate to LAPL.

9.15 The Expert Committee appointed by the State Commission examined the provisions of the PPA and the factum of difficulties claimed by LAPL and noted as under:

"5.2.7 The Committee noted that while LAPL was already facing difficulties due to deviations in terms of coal supply & related logistics, large payment dues outstanding with UPPCL and non-establishment of payment security safeguards have further worsened the situation. Apart from adversely impacting the technical performance and ability to book and fully utilize the allocated quantity of linkage coal, LAPL's financial performance dwindled to a substantial extent, leading to accumulated losses to the tune of Rs 653 Crs from the time of COD till the date of notice of termination."

9.16 UPPCL in its submissions before this Tribunal has argued that the State Commission has wrongly applied the principles of frustration contained in Section 56 of the Indian Contract Act, 1872 since the PPA provided for force majeure, and where force majeure is provided the principles of frustration would not be applicable. Hence, any compensation granted to LAPL, according to UPPCL, on this ground is perverse in nature. The facts in the case are otherwise as under:

(a) In the present case, the State Commission has taken note of the facts that non-payment of dues and failure to establish payment security mechanism constitutes violation of material obligations set out under the RFP and bidding documents based on which the contract was entered into.

(b) As far as UPPCL's argument regarding non-applicability of Frustration is concerned, the Force majeure is defined under Article 12.3 of the PPA. It does not include any event of default by UPPCL as an event of force majeure. In these circumstances, the State Commission could not be said to have acted perversely by applying Section 56 for grant of damages for default on the part of UPPCL. The following observation of the State Commission in the Impugned Order in fact suggests misrepresentation under Section 19 of the Indian Contract Act, 1872 by UPPCL and, accordingly, LAPL is entitled to damages arising from such misrepresentation:

"UPPCL did not open Letter of Credit and did not create any payment security mechanism obviously because they did not have the LC limits, enough revenue to provide escrow mechanism and make the full payment of energy bills. Inspite of this, UPPCL in the PPA has promised to establish the Letter of Credit and payment Security Mechanism, thus promising to do an impossible act and as LAPL (promisee) did not know this act to be impossible and unlawful, such promisor (UPPCL) must make compensation to such promisee (LAPL) for any loss which such promisee (LAPL) sustains through the non-performance of the promise."

Our findings & analysis :-

9.17 We have considered the contentions of the learned counsel for the Appellant and the Respondent relating to the issue of payment security arrangement and the impact arising out of non establishment of the same. While the Appellant has maintained its argument that there is no justification for the State Commission to have evolved a new concept of frustration in Section 56 of the Indian Contract Act, 1872 to grant relief to Lanco which deals with impossibility of performance. The counsel for the Appellant cited that this has been settled by the Hon'ble Supreme Court in the following cases:

(a) The Hon'ble Supreme Court in Satyabrata Ghosh –v- MugneeramBangur (AIR 1954 SC 44)

(b) The Hon'ble Supreme Court in the case of Energy Watchdog case, referring to Satyabrata Ghose,

(c) In the case of Naihati Jute Mills Ltd. v. Khyaliram Jagannath AIR 1968 SC 522, the Hon'ble Supreme Court was pleased to hold as under:

"12. It is not hardship or inconvenience or material loss which brings about the principle of frustration into play. There must be a change in the significance of obligation that the thing undertaken would if performed, be a different thing from that which was contracted for.

…….

17……..As Lord Sumner in Bank Lime Ltd. v. Capel (A) Co. Ltd. [1919] A.C. 435 said :-

"Where the contract makes provision (that is, full and complete provision, so intended) for a given contingency it is not for the court to import into the contract some other different provisions for the same contingency called by different name."

18. In such a case the doctrine of discharge by frustration cannot be available, nor that of an implied term that the existing state of affairs would

continue at the date of performance. The reason is that where there is an express term the court cannot find on construction of the contract an implied term inconsistent with such express term.

9.18 The learned counsel appearing for the Appellant placed reliance on the judgments of Hon'ble Supreme Court to substantiate his submission. The learned counsel for the Appellant contended that, the payment security mechanism was established as per Article 10.9 of the PPA that normally stipulates that the default contingency agreement is the only payment security mechanism and the buyer standby Letter of Credit (LOC) is merely a standby payment mechanism. As such the decision of the State Commission is wrong in construing that the non-opening of LOC or non-timely payment constituted an important event for Lanco to perform. The relief granted by the State Commission as Rs.0.069 per unit to Lanco for the duration of PPA from 12/02/2013 on account of alleged default of non establishment of payments security mechanism is, therefore, erroneous. On the other hand, the learned counsel for the Respondent reiterated that as a result of huge outstanding payments coupled with non-establishment of payments security mechanism, Lanco suffered on multiple accounts such as erosion of network and equity, degradation of its credit ratings, higher interest rate on working capital, lowering of option for re-financing of debt etc. We note that based on the analysis and recommendations of the Expert Committee, the State Commission has considered the facts arising out of non-payment of dues and failure to

establish payment security mechanism in a judicious manner. We, accordingly, consider that there was a failure on the part of the Appellant as far as timely payment of dues as well as establishment of payment security mechanism are concerned and the State Commission has decided the issue in just and equitable manner. The State Commission after critical evaluation the material on records and after considering the submission of the counsel for both the parties by assigning valid reasons had decided the matter strictly in accordance with law. Therefore, interference by this Tribunal may not be justifiable nor we find any legal infirmity in the impugned order.

10. Issue No. 3 :-

10.1 The learned counsel Mr. M.G. Ramachandran appearing for the Appellant submitted that exercise of Regulatory Powers to grant compensatory tariff is erroneous and contrary to the decisions of the Hon'ble Supreme Court and this Tribunal.

10.2 The exercise of general regulatory powers to grant such compensatory tariff is not available with the State Commission/Central Commission and this has been authoritatively laid down by the Hon'ble Supreme Court in Energy Watchdog Case (2017) 4 SCALE 580, followed by the Hon'ble Supreme Court itself in the decision dated 20.04.2017 in Civil Appeal Nos. 9643-44 of 2016-Sasan Power Limited –v- Central Electricity Regulatory Commission and thereafter,

followed by this Tribunal in Appeal No. 283 of 2015 in Nabha Power Limited –v- Punjab State Power Corporation Limited and Anr. decided on 17.05.2018.

10.3 The learned counsel further contended that the principles laid down in Paras 18 and 19 of the Energy Watchdog Case (quoted above) is that the general regulatory power available to Central Commission under section 79 (or to the State Commissions under section 86) can be exercised in regard to matters which have not been provided in the guidelines and bidding documents provided under section 63 or when there are no guidelines at all under section 63. Accordingly, in matters specifically dealt in the guidelines and the bidding documents under section 63, including the PPA, there cannot be any exercise of general regulatory powers under section 79 or 86 to grant relief.

10.4 He pointed out that the reliance placed by Lanco on the decision of the Hon'ble Supreme Court in All India Engineering Federation v Sasan Power Limited (2017) 1 SCC 497 to suggest that the regulatory powers can be exercised to grant compensatory tariff is totally misconceived. The relevant paras, namely, **Para 30 and 31 at Page 44**of the said judgment are to be read together. They read as under:

*"**30.** A perusal of the CERC tariff adoption order in the present case dated 17-10-2007 makes it clear that the tariff is adopted by the Commission only because the competitive bidding process which has been undertaken is in accordance with the Guidelines so issued.*

***31.** All this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately*

payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act. This is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with Guidelines issued. If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest."

10.5 In the above case, the matter related to declaration of Commercial Operation Date (COD) and conditions attached thereto and not to the exercise of Regulatory Powers to grant compensatory tariff. The said decision dealt with the interpretation and application of the provisions of the PPA entered into and the validity of the waiver claimed by the generator based on the alleged conduct of the Procurer. It was held that even if the Procurer by his conduct said to have waived any condition of the PPA entered into pursuance to a Competitive Bidding Process under Section 63 of the Act, the same is not valid unless it is approved by the Appropriate Commission, taking into account the public interest. In this regard reference may be made to the decision of the All India Engineering Federation v Sasan Power Limited (2017) 1 SCC 497 which reads as under:

"25. *It is thus clear that if there is any element of public interest involved, the court steps in to thwart any waiver which may be contrary to such public interest."*

10.6 The above five decisions relied on by Lanco are clearly not on the aspects of the exercise of regulatory power to grant compensatory tariff when there are

guidelines and bidding documents and therefore have no application to the present case.

10.7 Lanco has proceeded on the basis that it is the Appellant's contention that no regulatory power can be exercised by the Appropriate Commission in regard to tariff determination under Section 63 of the Electricity Act, 2003 and that the Appropriate Commission acts only as a post office. This is factually incorrect. The Appellant never argued either before the State Commission or before this Tribunal that Section 79/86 of the Electricity Act, 2003 has no application at all to the bidding process under Section 63 or that the State Commission should act only as a post office. These are being wrongly attributed to be the submissions of the Appellant.

10.8 The learned counsel further contended that, another dd important aspect is to be considered that wherever the guidelines notified by the Central Government under Section 63 intended to give the powers to the appropriate Commission, it has been strictly recognised and provided for in the guidelines. The guidelines and bidding documents including the PPA specifically deals with quoted tariff, force majeure, capacity charges, energy charges, Indian Political Event, change in law, payment security and consequences etc. without any stipulation as to the exercise of regulatory powers by the Appropriate Commission.

10.9 The guidelines and the PPA, as a part of bidding documents, having duly provided the specific aspects to be dealt in accordance therewith without contemplating any exercise of regulatory power in regard to the same, the circumstances, envisaged in Para 19 of the Energy Watchdog case for exercise of regulatory powers in the absence of guidelines or that the guidelines do not deal with the subject, does not arise. As such, the claim made by Lanco in regard to the availability of exercise of regulatory powers in support of compensatory tariff or the decision made by the State Commission in the present case in regard to the continued availability of regulatory powers to grant compensatory tariff over and above the tariff determined under section 63 are erroneous and are liable to be rejected.

10.10 The counsel vehemently contended that in any event, the stand taken by Lanco and the State Commission on the exercise of general regulatory powers to grant compensatory tariff and the decision on application of change in law, force majeure/frustration of contract is ambivalent and incomprehensible. In the circumstances, the impugned order is liable to be set aside and case remanded for reconsideration specifically under the terms of the PPA without being influenced by the notion that the State Commission has the regulatory power to give compensatory tariff. In regard to the above, the reference may be made to the following decisions of the Hon'ble Supreme Court on the proposition that the judgment given by a judicial/quasi-judicial body needs to be

comprehensible, dealing with the respective contentions of the parties and that it should be a reasoned and speaking order:

10.11 The learned counsel for the Appellant further contended that it is well settled that there cannot be any relief granted to a party on the grounds of equity hard sit, viability and similar other considerations and that the relief is to be within the scope of the agreements between the parties i.e. for Power Purchase Agreement. The State Commission has acted contrary to the basic principle that if in a contract the parties had agreed on the implications of an event, the relief is necessarily confined to what the parties had agreed. It is not open to the Court or Judicial Authority to re-write the contract for the party or to provide a relief other that those given in the contract on grounds on grounds of alleged equity or justice or public interest etc. In this regard, reference may be made to the Hon'ble Supreme Court in Naihati Jute Mills –v- Khyaliram Jagannath AIR 1968 SC 522.

10.12 The counsel further submitted that, in the present case, even assuming that the entire claim made by Lanco as to the non-availability of coal from the Khadia mine, non-establishment of payment security mechanism and non-payment of money from UPPCL to Lanco in time are correct, the remedies, if any, is provided under the PPA read with the Fuel Policy, namely:

a. To procure coal from other sources and claim the actual cost of coal;

b. To seek regularization of the payment security mechanism; and

c. To seek delayed payment surcharge in terms of Article 10 of the PPA

10.13 The learned counsel emphasised that PPA does not envisage any change in the quoted tariff, directly or indirectly. None of the elements applicable for modification in a tariff determination process under Section 62 can be considered in dealing with a quoted tariff in a tariff based competitive bidding process under Section 63. The State Commission has proceeded to create a fundamentally new contract with new implications than what has been provided in the PPA.

10.14 The learned counsel has further brought out that another contention raised by Lanco is that the public interest will suffer if power available from their project is not supplied on account of Lanco becoming financial unviable. This cannot be a liberal contention as a similar contention was raised in the case of All India Power Engineers Federation v/s Sasan Power Limited (2017) 1 SCC 487, wherein the Hon'ble Supreme Court did not grant any relief to Sasan Power Limited. Para 9 of the judgment reads as under:

> ***"9.*** *As against this, Shri Chidambaram and Shri Sibal, learned Senior Counsel appearing on behalf of Sasan Power Ltd., have argued that as against 69 and 70 paise per unit for electricity supplied under the PPA, the procurers were in fact procuring electricity at much higher rates.*

10.15 ***Per contra,*** learned counsel for the Respondent submitted that admittedly, NCDP has been classified as change in law as has been held by the Hon'ble

Supreme Court in its judgment and also, admitted by UPPCL in Petition No. 891 of 2013.

(a) Article 14 of the PPA deals with Change in Law and provides for financial restitution of the party affected by the Change in Law event, to the same economic position as it was had the Change in Law had not taken place. Article 14 allows for Change in law allows for payments through monthly tariff payment to provide that Seller be put into the same financial position as it would have been but for the Change in Law.

(b) Fuel Policy Agreement dated 28.09.2012 deals with the situation where coal is not available from Khadia mines and needs to be procured from alternate sources, and provides for:

(i) Pass through of coal cost for coal procured for alternate sources as part of energy cost;

(ii) In the event of non-availability of coal causing shortfall in generation from the plant, Seller/LAPL shall be compensated for the reduction in Availability or Availability Factor of the Power Station (clause 1.4)

(c) The State Commission has, accordingly, granted the following relief to restore LAPL to the same economic position in accordance with Article 14 of the PPA read with Clause 1.4 of the Fuel Policy Agreement:

(i) Lump sum amount of Rs.499.58 for loss in generation during the period from 10.12.2011 i.e. COD to 11.02.2013 (date of Termination Notice);

(ii) Allowance of Rs. 0.024 per unit for higher consumption of Secondary fuel has been allowed for increased oil support;

(iii) Allowance of Rs. 0.007 per unit towards capital cost for building of wharf wall;

(iv) Allowance of Rs. 0.062 per unit for increased requirement of working capital due to coal procured from alternate sources including imported coal.

(d) UPPCL in its submissions before this Tribunal has argued that the State Commission has wrongly applied the principles of frustration contained in Section 56 of the Indian Contract Act, 1872 since the PPA provided for *force majeure*, and where force majeure is provided the principles of frustration would not be applicable. Hence, any compensation granted to LAPL, according to UPPCL, on this ground is perverse in nature.

(e) In the present case, the State Commission has taken note of the facts that non-payment of dues and failure to establish payment security mechanism constitutes violation of material obligations set out under the RFP and bidding documents based on which the contract was entered into.

(f) As far as UPPCL's argument regarding non-applicability of "Frustration" is concerned, it is submitted that Force majeure is defined under Article 12.3 of the PPA. It does not include any event of default by UPPCL as an event of force majeure. In these circumstances, the State Commission could not be said to have acted perversely by applying Section 56 for grant of damages for default on the part of UPPCL. The following observation of the State Commission in the Impugned Order in fact suggests misrepresentation under

Section 19 of the Indian Contract Act, 1872 by UPPCL and, accordingly, LAPL is entitled to damages arising from such misrepresentation:

"UPPCL did not open Letter of Credit and did not create any payment security mechanism obviously because they did not have the LC limits, enough revenue to provide escrow mechanism and make the full payment of energy bills. Inspite of this, UPPCL in the PPA has promised to establish the Letter of Credit and payment Security Mechanism, thus promising to do an impossible act and as LAPL (promisee) did not know this act to be impossible and unlawful, such promisor (UPPCL) must make compensation to such promisee (LAPL) for any loss which such promisee (LAPL) sustains through the non-performance of the promise."

10.16 At the outset, it is important to note that in the Impugned Order, the State Commission has granted relief in exercise of its adjudicatory powers under the terms of the contract. There are essentially two grounds under which relief has been provided to LAPL in the Impugned Order. Firstly, amounts payable in accordance with the provisions of the Contract Documents i.e. the PPA and Fuel Policy Agreement for loss arising out of change in law on account of NCDP. Secondly, the compensation payable due to non-payment of dues and default in establishing PSM as required under the PPA.

10.17 The Hon'ble Supreme Court in the *Energy Watchdog judgment (2017) 14 SCC 80* has clearly held that the general regulatory power of the Central / State Commission under Section 79(1)(b) / 86(1)(b), so far as tariff is concerned, is not taken away, in cases where the tariff has been adopted under Section 63 following the competitive bidding process.

10.18 In the Energy Watchdog case, construction of Section 63 vis-à-vis other provisions of the Act was raised as a specific issue. While answering this issue, the Hon'ble Supreme Court noted the following at Para 19 of the judgment:

- *"Section 63 begins with a non obstante clause, but it is a non obstante clause covering only Section 62"*
- *"unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not "determine" tariff but only "adopts" tariff already determined under Section 63"*
- *"such "adoption" is only if such tariff has been determined through a transparent process of bidding"*
- *"this transparent process of bidding must be in accordance with the guidelines issued by the Central Government"*
- *"the appropriate Commission does not act as a mere post office under Section 63"*
- *"It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government"*
- *"Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4"*

10.19 The clause 4 of the Competitive Bidding Guidelines issued by the Central Government deals with "Tariff Structure". It lays down in minutes details all aspects relating to tariff, which can have impact on tariff e.g. capacity and energy components and their computations, fuel source, foreign exchange, transmission, availability etc.

10.20 The Hon'ble Supreme Court after taking into consideration the Competitive Bidding Guidelines, have observed in para 20 of the judgment as under:

"It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the

Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b).”

10.21 The Hon'ble Supreme Court, in para 20, has further posed the following question on the exercise of regulatory power by Commission vis-à-vis tariff adopted under Section 63:

“For another, in a situation where there are no guidelines ***or in a situation which is not covered by the guidelines****, can it be said that the Commission's power to “regulate” tariff is completely done away with?”*

The Hon'ble Supreme Court then answered this question in negative by holding as follows at Para 20:

- *“Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether.”*
- *“In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff.”*
- *“It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines.”*
- *“As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.”*

Our findings and analysis :-

10.22 This issue relates to the availability of regulatory powers to the State Commission for grant of relief to Lanco and whether the relief so granted by the Commission in the impugned order is sustainable in the facts of the present case and law. The rival contentions of the Appellant and the Respondent are

cited in the foregoing paras here in above and we now take up the evaluation of this issue on merit. Both the parties have kept reliance on the judgement of the Hon'ble Supreme Court in Energy Watch Dog case (2017) 4 SCALE 580. While the Appellant has interpreted the authority laid down by the Hon'ble Supreme Court in the above case under para 18 and 19 to arrive at a conclusion that the exercise of general regulatory powers to grant compensatory tariff is not available with the State Commission / Central Commission in the matters falling under Section 63 of the Electricity Act. We place reliance on the judgment of the Apex Court, the relevant portion of the judgment reads as thus:-

"It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."

10.23 To substantiate his submissions, the learned counsel for the Appellant placed reliance on the judgements related to Sasan Power Limited (Supreme Court) and Nabha Power Limited (APTEL). The learned counsel for the Respondent emphasized that Article 14 of the PPA is for change in law and provides for financial restitution of the party affected by the Change in Law event, to the same economic position as it was had the Change in Law had not taken place. Besides, Fuel Policy Agreement dated 28/09/2012 stipulates the situation

where fuel is not available from Khadia Mines and needs to be procured from alternate sources and provides for pass through of coal cost, compensation for shortfall in generation for the reduction in availability factors etc. Accordingly, the State Commission has considered to grant relief to restore Lanco to the same economic position in accordance with Article 14 of the PPA read with Clause 1.4 of the Fuel Policy Agreement pertaining to loss in generation during the period from 10/12/2012 to 11/02/2013, the allowance for higher consumption of secondary fuel for increased oil support, allowance for capital cost for building of wharf wall, allowance for increased requirement of working capital due to procurement of coal from alternate sources including imported coal, etc. The learned counsel for the Respondent has cited that the Hon'ble Supreme Court in the Energy Watch Dog case has clearly held that general regulatory powers of the Central/State Commission under Section 79(1)(b)/ 86(1)(b) is concerned, is not taken away even in cases where the tariff has been adopted under Section 63 following the competitive bidding process. We find that there is substance in the submission made by the learned counsel regarding Section 63 of the Electricity Act as held in paragraph 19 of the judgement by the Apex Court.

10.24 It has been categorically held by the Hon'ble Supreme Court in para 20 of the judgment in Energy Watch Dog case that:

"It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This

regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b).”

“For another, in a situation where there are no guidelines ***or in a situation which is not covered by the guidelines****, can it be said that the Commission's power to “regulate” tariff is completely done away with?”* (emphasis added)

“Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether.”

- *“In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff.”*

- *“It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines.”*

- *“As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.”*

10.25 We are of the considered view, based on the findings of the Apex Court cited hereinabove, that the general regulatory powers of the Central/State Commission are not done away in its entirety and can be exercised in the exceptional circumstances where there are no guidelines or in a situation which is not covered by the guidelines. As in the present case, such a change in law impacting several consequential issues is required to be dealt by the State Commission as an unforeseen event and to be decided by striking a judicious

balance between the generator and the Discom/consumers. The State Commission has analyzed the issues in detail based on the report/recommendations of the Expert Committee and decided the matter after applying prudence check. We further consider the judgement of this Tribunal in Nabha Power Limited V/s. PSPCL case dated 17.05.2018 in Appeal No. 283 of 2015. The above case was primarily for granting compensation for increased SHR as per the new guidelines/amendments of the Government of India/CERC. Vide this judgement, the Tribunal had taken a stand that under case 2 bidding, the SHR was one of the critical parameters for bid evaluation and any margin/compensation thereon was not envisaged in bidding documents and concluded PPA. It was further decided by this Tribunal that the cited guidelines/amendments relating to compensation of SHR and other parameters resulting due to part load operation cannot be applied retrospectively to old plants and are meant for new power plants coming after notification of the said documents. The above case did not involve a change in law as in this case and was confined to non-achieving operating parameters due to part/varying load operation of the super critical units.

10.26 The Appeal No. 359 of 2017 has been filed for adjudication on behalf of consumer of the State and need to be decided keeping the justice and equity in mind for ultimate interest of the generators as well as distributors and consumers. While in past, the sole factor for consumer interest was considered

to be cheaper power but with the change in supply vs. demand pattern, the same is not limited now to that alone and the interest of distribution companies and in turn, consumers lie in availability of reasonably affordable power in reliable and quality manner besides being sustainable in long run. We accordingly, conclude that the decision of the State Commission is covered under the ambit of legal framework as well as the long term consumer interest.

11. **Summary of findings**:-

11.1 In view of our findings and analysis of the issues involved in the instant appeals, we arrive at a fair conclusion that the core issue is primarily a result of change in law pertaining to NCDP which, inter-alia, disturbed the basic fabric of the contract between the parties. The change in law impacted the several consequential issues which were not anticipated / provided for in the biddings documents and the concluded PPA. Taking cognizance of the views of the Appellant and the Respondent, the State Commission considered that both the parties have contemplated for the operation of Anpara 'C' project to continue being one of the cheapest source of power for the State of Uttar Pradesh. Specifically, keeping this in view, the State Commission, in line with the findings of the Hon'ble Supreme Court in its judgment in *Energy Watchdog –v- Central Electricity Regulatory Commission* case has evolved a compensatory mechanism for restoration of the economic position of Lanco under the periphery of law, based on the analysis and recommendations of an Expert

Committee constituted by it. The Appellant has, on a number of occasions, acknowledged the need for helping out Lanco so as to run its plant for the ultimate benefit of the public of the State at large. However, the Appellant maintained that the measures for financial restoration / compensation should lie under the legal and judicial framework.

11.2 Bearing these factors in mind, the State Commission has applied proper prudence over the recommendations of the Expert Committee for various compensations and has allowed only reasonable propositions so as to strike a judicious balance between the generator and the distributor / consumers. We have noted the basic representations made during the bidding process and those actually realsied during construction and / or operation of the plant. The problems relating to the coal and its logistics coupled with payments of dues and establishment of payment security mechanism etc. started since beginning of the operation of the plant resulting into several financial implications on the generator / Respondent.

After thorough evaluation of the oral and documentary evidence available in the file and taking into consideration the submission of learned counsel appearing for both the parties, we are of the considered view that, the State Commission after critical evaluation the entire relevant material on records by assigning valid and cogent reasons, has passed the well considered order. Therefore, we hold that the issues raised in the present appeals are devoid of

merits. Accordingly, the impugned order passed by the State Commission deserves to be upheld.

ORDER

For the forgoing reasons, as stated above, we are of the considered view that the issues raised in the present appeals being Appeal No. 336 of 2017 and 359 of 2017 are devoid of merits. Hence the Appeals filed by the Appellants are dismissed. The impugned order passed by Uttar Pradesh Electricity Regulatory Commission dated 16.08.2017 in Petition Nos. 871 of 2013 and 891 of 2013 is hereby upheld.

In view of the above, IA Nos. 895 of 2017, 551 of 2018, 435 of 2018 and 785 of 2018 in Appeal No. 336 of 2017 and IA No. 897 of 2017 in Appeal No. 359 of 2017, the prayer sought in the instant applications do not survive for consideration and hence stand disposed of as having become infructuous.

No order as to costs.

Pronounced in the Open Court on this **07th day of September, 2018.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

Js