

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO. 279 of 2015 & IA No.871 of 2018

Dated : 18th January, 2019

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

IN THE MATTER OF:

M/s ACB (India) Limited
(Formerly Known
M/s Aryan Coal Beneficiation Private Limited)
7th Floor, Corporate Tower,
Ambience Mall, NH-8,
Gurgaon-122001,
Haryana
Versus

- Appellant

1. Gujarat Electricity Regulatory Commission
6th Floor, GIFT ONE,
Road 5C, Zone 5, GIFT City,
Gandhinagar-382355
Gujarat, India.

2. Gujarat Urja Vikas Nigam Ltd.,
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara-390007.
Gujarat

3. Power Grid Corporation of India Limited,
B-9, Qutub Institutional Area,
Katwaria Sarai, New Delhi-110016.

4. ABB India,
17th Floor, OMEGA Building
Bengal Intelligent Park,
Sector V, Salt Lake City,
Kolkata-700091.

- Respondents

Counsel for the Appellant : Mr. Matrugupta Misra
Mr. Lakhyajit Singh B.

Counsel for the Respondent(s) : Mr.C.K. Rai
Mr. Sachin Dubey for R-1

Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Ms. Poorva Saigal
Mr. Ashwin Ramanathan
Mr. Shubham Arya for R-2

Mr. Jitender Kumar for R-4

J U D G M E N T

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

1. The Appellant, M/S ACB (India) Limited, assailing the correctness of the impugned order dated 04.08.2015 in Petition No. 1405 of 2014 on the file of Gujarat Electricity Regulatory Commission (hereinafter called the 'State Commission') for refund of liquidated damages has challenged that the State Commission without appreciating the factual position of the matter and the legal intricacies involved has dismissed the petition on the pretext of the same being devoid of merit vide the impugned order.

1.1 The Appellant being aggrieved by the impugned order is filing the present appeal to challenge the reasons and findings of the State Commission.

2. Brief Facts of the case:-

2.1 The Appellant is a company incorporated under the Companies Act, 1956 having its registered office at C-102, New Multan Nagar, Rohtak Road, New Delhi-110056. The Appellant installed a 2 x 135 MW Power project at Chakabura, Madhya Pradesh. The Power generated from this station was to be transmitted through 400 KV D/C Twin moose dedicated transmission line and to be connected at 765/400 KV Sipat Pooling Station.

2.2 The Gujarat Electricity Regulatory Commission (herein “Respondent No. 1”/ “Respondent Commission”) is the State Electricity Regulatory Commission constituted under section 82 of the Electricity Act, 2003 (herein “EA, 2003”).

2.3 The Respondent No. 2 herein is a company incorporated under the companies Act, 1956 having its registered office at Sardar Patel Vidyut Bhavan, Race Course, Vadodra, Gujarat-390007. The Respondent No. 2 is a deemed Power Trading licensee and is purchasing and selling power on behalf of the distribution licensees in the State of Gujarat.

- 2.4** The Respondent No. 3 is a company registered under the Companies Act, 1956, having its registered office at B-9, Qutab Institutional Area, Katwaria Sarai, New Delhi-110016, it is the Central Transmission Utility and engaged in Bulk transmission of power. It supervises, develops, coordinates and controls inter-State Transmission system.
- 2.5** The Respondent No. 4 is an engineering company engaged in power and automation technologies, which enables the power utilities and industry consumers in transmitting electricity. The Respondent No. 4 is having its office at the address given in the cause title.
- 2.6** The Appellant has set up a Power Project at Chakabura, Chhattisgarh of 2X135 MW and another Power Project at Ratiza of 2X50 MW. The power from both the power projects were to be transmitted from Chakabura through 400 KV D/C Twin Moose dedicated transmission line and to be connected at 765/400 KV SIPAT Pooling station.
- 2.7** GUVNL had initiated a competitive bidding process according to the Competitive Bidding Guidelines, for supply of power on a long term basis. Pursuant to the bidding process the Appellant applied and was selected as the Selected Bidder for the sale and supply of electricity in bulk to GUVNL. Consequently the Appellant and GUVNL entered into a Power Purchase Agreement on 26.02.2007 (hereinafter referred to as the 'PPA') for the supply of 200 MW power at the delivery point from its

2X125 MW Coal based Power Project located at Chakabura. The Appellant was required to evacuate power and deliver the power at a delivery point, i.e. Sipat Pooling Station of Respondent No. 3. The likely date of commissioning of the said pooling station was stated by the Respondent No. 3 to be end of 2010/ early 2011, however there was a delay in grant of Open Access for evacuation of power from the generating station of the Appellant through 765/400 KV pooling station at Sipat.

2.8 The Appellant was to deliver power at the delivery point i.e. Sipat pooling station. The commissioning date was scheduled on 25.02.2010 and 25.08.2010 for both Units I and II, respectively. The Appellant on 21.07.2008 wrote a letter to GUVNL intimating that PGCIL has considered and finalized the open access for evacuation of power from generating station of the Appellant through 765/ 400 KV pooling station at Sipat, commissioning schedule of which would be by the end of 2010/ early 2011 and requested GUVNL for extension of time of scheduled COD accordingly. The Appellant had also brought to the notice of GUVNL the letter dated 15.07.2008 issued by PGCIL in this regard.

2.9 In the light of the above circumstances GUVNL vide letter dated 05.08.2008 granted extension to the Appellant for achievement of COD up to 25.02.2011 for both the units. GUVNL further stated that in the

event commissioning of Sipat pooling station is delayed beyond that, then COD of both the units of the Project shall be extended up to 30 days from the date on which Open Access/ transmission facilities for evacuation of power is made available, i.e. commissioning of Sipat Pooling Station.

2.10 The Appellant on 04.05.2009 issued a letter addressed to PGCIL, stating that PGCIL has granted open Access from Sipat Pooling Station vide Letter No. C/ ENG/SEF/W/06/ARY dated 16.03.2009 for evacuating power from its 2X135 MW Power plant at Chakabura and vide letter no. C/ENG/ SEF/W/06/ SCPL dated 16.03.2009 for evacuating power from its 2X50 MW power project at Ratiza through 400KV D/C Twin Moose dedicated Transmission line and shall be connected at 765/400 KV Sipat Pooling Station.

2.11 On 18.06.2009, the Appellant and PGCIL executed an Agreement for undertaking the “Turnkey execution of 2 Nos. 400 KV extension bays at WR Pooling point of Power grid (Project)” for evacuation of power from Chakabura power project on cost plus basis on behalf of the Appellant. PGCIL was required to call for the bid, finalization of bid and also conclude the contract of construction of the extension bays. The consultancy fee payable to PGCIL was fixed at 15% of the actual

executed cost of the project. PGCIL was obliged to intimate the successful commissioning of the Project and test charging of bays to the Appellant, and within 30 days of such intimation, a completion certificate shall be issued by the Appellant, in absence of issuance of completion certificate within 30 days, it will be presumed that the completion has taken place.

2.12 Under the above agreement, PGCIL was obliged to design, engineering, procurement, handling, storage, erection, testing and commissioning and works incidental thereto for the implementation of the project. PGCIL was further under obligation to ensure expedite supply of all materials and equipment in lying with the agreed contract program and supervision of all activities.

2.13 In furtherance to the agreement, the Appellant had on 8.06.2009 and 19.06.2009 duly paid 15% initial advance of the estimated project cost and 15% towards consultancy fee respectively.

2.14 Further vide letter dated 20.02.2010 issued by the Appellant to PGCIL, it was brought to the notice of the addressee that as per the discussion between the parties the supply of the material for the execution of the work to be undertaken under the agreement, was to be made by the Appellant and accordingly the terms of the agreement and the consultation fee was needed to be revised. The Appellant further

requested for the adjustment of the initial payment made by the Appellant towards the project cost. The Appellant further issued a letter dated 13.05.2010 to PGCIL regarding the revision of scope of work and fees and refund of payments made.

2.15 Appellant had in furtherance to the agreement dated 18.06.2009 floated a tender for undertaking the project work and accordingly engaged ABB Limited (hereinafter referred to as 'ABB'), the Respondent no. 4 herein. Pursuant to the bid and tender negotiation, the Appellant issued Letter of Award to ABB for Design, Engineering, Manufacture, Testing and supply for construction of 2 No 400 KV Bays at WR Pooling Station, Sipat (Bilaspur). The scope of work was as per tender specification of PGCIL, and it was also agreed that ABB shall comply with the agreement dated 18.06.2009 executed between PGCIL and the Appellant. Technical specification/ Technical document issued by PGCIL to ABB for construction of 765/ 400 KV WR were to be treated as part of the LOA. ABB was to procure material from PGCIL approved vendor for the execution of the project. The completion time was scheduled when the entire scope of work along with the completion of 400 KV Bays at PGCIL, WR pooling station at Bilaspur, or June 2011 whichever is earlier, on receipt of commercially and technically clear and firm order.

2.16 On 26.04.2011 GUVNL in response to Appellant's letter dated 14.04.2011 wherein the Appellant has indicated that COD shall be achieved by February 2012 and in the meantime interim arrangement would be made through LILO of Korba-Bhatpara 400 KV Single Circuit line for power supply on interim connectivity/short term open access basis. GUVNL vide its letter dated 26.04.2011 agreed to off take varying quantum of power to the extent of short term open access granted by RLDC till the grant of long term open access is made available by CTU. However upon commissioning of the Sipat Pooling station, the Appellant shall be required to supply power to GUVNL as per the PPA. GUVNL had also communicated that Appellant shall become liable to pay liquidated damages if the Appellant shall not commence supply of power as per the provisions of the PPA beyond 30 days from the date of commissioning of Sipat Pooling Station.

2.17 On 17.02.2012 the Appellant received an e-mail from PGCIL wherein it was stated that as per the connection agreement the Appellant was to connect to the pooling station near Bilaspur in February 2012 and accordingly commercial operation of Bilaspur pooling station was planned w.e.f 01.03.2012. It was further stated that the commissioning of Appellant's 400 KV D/C line is targeted to be commissioned by end of March 2012. PGCIL requested the Appellant to expedite the

commissioning in order to match the commissioning of Bilaspur Pooling Station.

2.18 In response to the above e-mail, the Appellant has issued a letter to PGCIL on 18.02.2012. It was pointed out by the Appellant that initially contract was awarded by the Appellant to PGCIL as EPC contract for Engineering, Inspection and Supervision of the work for erection of 2 No. 400 KV Bays for 400 KV D/C dedicated transmission line from the generating station switchyard to the Sipat Pooling Station to PGCIL vide LOA No. PGCIL/DEPOSIT WORK/2010-11/919 dated 13.05.2010. However subsequently PGCIL directed the Appellant to place direct order for the material but supervision work was to be done by PGCIL. Accordingly ABB was awarded the contract to execute the work, as the same contractor was involved in executing work of 765/400 KV Sipat pooling station. The bays were assured to be completed by June 2011 matching with the commissioning of the Sipat Pooling Station. The Appellant in this letter further pointed out that M/s. ABB being the common contractor for both for the Appellant and PGCIL, was directed to deploy all its manpower for the charging of 765 KV bays of PGCIL and the transformers of PGCIL, for which the erection work of the Appellant was being delayed. Even the space for the bays had not been cleared due to PGCIL store at some places. Further, ABB informed that most of

the material and major foundations have been casted. The erection of 400 KV bays shall be taken up after the charging of the 400 KV bus and it shall be possible to be completed only during the first fortnight of May, 2012. The mail received from PGCIL stated that the COD of the 765/400 KV Pooling Station Bilaspur was planned to be achieved w.e.f. 01.03.2012. The Appellant requested PGCIL to depute Supervisor to ensure that erection work of the 2 No. of 400 KV bays by M/s. ABB matched with the commissioning of the Sipat Pooling Station as per the provision of the contract awarded to M/s ABB by the Appellant.

2.20 On 02.03.2012, a meeting was held to review the development of the Project, the meeting was also attended by ABB and PGCIL, based on the meeting it was inferred that the bays will be charged by 30th April, 2012.

2.21 GUVNL issued a letter dated 20.03.2012 to the Appellant, thereby stated that PGCIL vide its letter dated 13.03.2012 informed GUVNL that the COD of Bilaspur pooling station was under implementation, which was likely to be commissioned along with 765/400 KV 2*1500 MVA ICTS and LILO of 765 Sipat – Seoni S/c line by the end of March 2012. Therefore it was requested by GUVNL to expedite the commissioning of 400 KV D/c line for evacuation of contracted capacity to GUVNL as per the PPA. Further the Appellant was asked to provide status report of

synchronization of Unit 2 of the Power Project, since GUVNL had extended the COD upto 30 days from the date of open access or availability of the transmission facility i.e. commissioning of the Bilaspur Pooling Station and liquidated damages shall be made payable if the Appellant did not commence supply of contracted capacity beyond 30 days from commissioning of Bilaspur Pooling Station.

3. Facts in Issue :-

3.1 PGCIL vide letter dated 02.04.2012 declared that the following elements under WRSS-X had been put to regular operation under WR, which would be under commercial operation w.e.f. 01.04.2012:

- 765/ 400 KV Bilaspur pooling station (near Sipat) along with LILO of Sipat-Seoni Ckt-I with 3x80 MVAR Switchable line reactor 3x80 MVAR bus reactor;
- 765/ 400 KV, 1500 MVA ICT-I & II.

Accordingly, PGCIL further stated that monthly transmission charges of the systems would be payable by the concerned DICs w.e.f. 01.04.2012 as per CERC Regulation.

3.2 GUVNL issued a letter dated 12.04.2012 to PGCIL wherein it referred to PGCIL's letter dated 13.03.2012 in which PGCIL had conveyed that

COD of Bilaspur pooling station was under implementation and the commissioning of the same was scheduled for end of March 2012. In respect of the above fact GUVNL stated that PGCIL had granted LTOA to the Appellant for 200 MW quantum of power to be transmitted from Chhattisgarh to Gujarat from the date of commissioning of Bilaspur pooling station as per the PPA. GUVNL requested PGCIL to confirm as to whether LTA granted to the Appellant has become effective from 01.04.2012 or not. In case the same was not effective, PGCIL was requested to clarify as to the delay in effecting the LTA was due to PGCIL or on account of Appellant's default in laying 400 KV D/c line from its power project to the Sipat pooling station.

- 3.3** GUVNL vide its letter dated 24.05.2012 addressed to the Appellant stated that the Appellant has started giving power from its Unit I to GUVNL through interim arrangement w.e.f. 02.01.2012. The Appellant was requested to furnish status for commissioning of 400 KV D/c line and to expedite the commissioning of line since PGCIL had already declared COD since 01.04.2012. In the light of the above GUVNL further requested the Appellant to convey status of synchronization of Unit-2 of the Power Project and liquidated damages would be made payable unless the COD was achieved within the extended period of time.

3.4 On 31.05.2012 the Appellant issued a letter to PGCIL, wherein the attention of PGCIL was drawn to letter dated 18.02.2012 issued by the Appellant, requesting PGCIL to expedite the erection work of 2 no of bays which was executed under the supervision of PGCIL, so that the commissioning of the bays would match the commissioning of Sipat Pooling station. The Appellant further stated that PGCIL was yet to supply one T2D Tower at site due to which the erection of the last gantry of the bays could not be erected by ABB. For such delay the Appellant failed to string the last section from the terminating tower to the sub-station gantry. Such dereliction in supplying the T2D tower was also brought to the notice of PGCIL earlier. Though the Appellant had already completed the erection of transmission lines and requested the Chief Electrical Inspector to inspect the same, the Chief Electrical Inspector intimated that he would come to inspect once both the transmission line and the bays together. The Appellant had commissioned its Unit 1 of 2x135 MW TPS in December 2011 and the Unit 2 was also synchronized and the same was scheduled to be commissioned within a week time. However in the absence of LTA the Appellant had shown its inability to evacuate the full capacity through interim LILO arrangement. Therefore the Appellant requested PGCIL to expedite the supply the tower and make necessary arrangement for completion of the work for erection of 2 no. bays, which were under the supervision of PGCIL.

Further PGCIL was requested to intimate the likely dates for availability of long term open access and the same could also be informed to GUVNL.

3.5 GUVNL vide its letter dated 02.06.2012 further requested PGCIL to clarify as to whether the LTA to the Appellant was commenced w.e.f. 01.04.2012. In case the same was not made effective, GUVNL requested PGCIL to clarify as to the delay was attributable to the Appellant or PGCIL. In this letter GUVNL brought to the notice the PPA executed, the supply of 100 MW power by the Appellant to GUVNL through LILO of 400 KV S/c Korba-Bhatpara w.e.f. 02.01.2012 and also the failure on the part of PGCIL to respond to its letter dated 12.04.2012. GUVNL indicated that even though PGCIL had declared COD of the Sipat Pooling Station w.e.f. 01.04.2012, GUVNL till date could not get the full contracted capacity. In such circumstances GUVNL had to bear the cost of the short term open access charges for availing the power through interim LILO arrangement over and above the transmission tariff of 765/400 KV Bilaspur pooling station through PoC charges. In respect of the financial implications of GUVNL, it requested PGCIL to respond to its letter.

3.6 The Appellant vide letter dated 11.06.2012 brought to the notice of GUVNL that the work of erection of 400 KV D/c dedicated transmission

line from Appellant's generating station switchyard to WR pooling point was completed. The last shut down for crossing of 400 KV D/c Transmission line of CSPTCL was availed on 18/19th April, 2012. However the stringing in the last span from terminating tower of the transmission line near WR Pooling Point to the gantry at WR Pooling station Bilaspur was pending due to non-availability and erection of tower by PGCIL, which is within the scope of PGCIL. Further one section of the bay was not erected due to non-erection of tower. The Chief Electrical Inspector was also scheduled to visit the transmission line for inspection on 11.06.2012. Unit – 2 was already synchronized on 31.03.2012 at 14.13 hrs and GUVNL was getting infirm power from the same. The Unit 2 was scheduled to be commissioned within few days. PGCIL failed to communicate the tentative date for grant of Long term open access to the Appellant. The Appellant further assured that it would declare the commissioning of UNIT 2 from the interim arrangement through LILO subject to availability of corridor and the same supply would switch over to WR pooling Point Bilaspur after the grant of LTOA by PGCIL. Since the commissioning of both the units would be achieved within the extended time, liability towards liquidated damages would not be applicable.

- 3.7** The inspection of electrical installation related to 400KV D/c line between switchyard of 2x135 MW Karaipali Power Project and Bharari switch yard of PGCIL dist. Kurba, Chhattisgarh was conducted by the Superintending Engineer & Electrical Inspector, government of India and a report was given on 12.06.2012.
- 3.8** In response to the letter dated 11.06.2012, GUVNL issued a letter on 15.06.2012 to the Appellant, inter alia stated that it agreed in extension and linking of the COD for supply of contracted capacity with the date of the availability of open access i.e. commissioning of pooling station near Sipat. Since PGCIL had already declared COD of the Sipat Pooling Station w.e.f. 01.04.2012, the Appellant was requested to collect a written communication from PGCIL regarding any work pending on their part to make open access operation and confirmation of the date of commencement of LTA, and till the same was received, GUVNL stated that liquidated damages would become liable to pay liquidated damages as per the provisions of the PPA beyond 30 days from commissioning of Bilapur Pooling Station.
- 3.9** Upon compliances of certain irregularities, the Superintending Engineer & Electrical Inspector to Government of India, had conveyed its approval for the energisation of Electrical Installation related to 400 KV D/c line between Switchyards of 2X135 MW Kasaipali Power Project, Kasaipali

and Bharari Sitchyard of PGCIL (Bilaspur Pooling Station), subject to consistent compliance of CEA (Measures Relating to Safety and Electrical Supply) Regulations, 2010 by the Appellant.

3.10 The Appellant vide an e-mail dated 29.06.2012 sent the record note of discussion held on 14.06.2012 to review the completion of 2 No. of Bays and ABB had mentioned that T2D tower from Lanco could not be diverted due to dimensional difference of PGCIL-IPPL Tower and the same was intimated to PGCIL vide e-mail. In the light of the above the Appellant requested for expediting the dispatch of T2D tower ordered by PGCIL and completion of pending works on the 400 KV Bus.

PGCIL vide its letter dated 29.06.2012 informed the Appellant that the non-delivery of T2D tower is not attributable to it but to M/s. Essar Power. Further it was informed that one line gantry of Appellant's portion was ready from last two weeks and the Appellant was yet to connect the dead end tower. The same line bay as per PGCIL could take the present generation load.

In response to the above mail PGCIL vide mail dated 29.06.2012 stated that it had already been informed to ABB that the tower meant for M/s Lanco can very well be used for M/s Essar Bay Tower. It may be mentioned that the work for Essar Power Bays was also in the scope of

PGCIL as EPC contract and the T2D tower meant for Essar Bays was to be procured by PGCIL.

3.11 The Appellant vide letter dated 27.07.2012 informed PGCIL that one T2D tower was received by it at the site on 24.07.2012 and accordingly it requested PGCIL to expedite the erection of the same. Upon completion of the erection work the Appellant and ABB could only complete the stringing in the last span and in the last section of the 400 KV bay, respectively. It is submitted that the Appellant has made all efforts possible for the commissioning of 2 nos. of 400 KV bay for evacuation of power through Sipat pooling station. The shut-down for the commissioning of two nos. of bay had been approved for 07.08.2012 to 09.08.2012.

3.12 The Superintending Engineer and Electrical Inspector, Government of India, vide letter dated 30.07.2012 accorded its approval for energisation of electrical installation related to 2 nos. 400 KV line bays of the Appellant at the Bilaspur pooling station, subject to consistent compliance of CEA (Measures Relating to Safety and Electric Supply) Regulations, 2010 by the Appellant.

3.13 GUVNL vide its letter dated 31.07.2012 to the Appellant stated that, no response was received on its part from PGCIL or the Appellant

pertaining to its previous communications made to the respective parties for giving clarification regarding the status of commencement of long term open access. The present letter was in the nature of a reminder to the Appellant for conveying the status report or to produce a written communication to that effect from PGCIL.

3.14 An e-mail communication dated 11.09.2012 was sent by CM (Mo-1) WRLDC, Mumbai, to PGCIL wherein WRLDC had requested PGCIL to indicate the date of commencement of LTA to the Appellant for scheduling power from the Appellant under long term arrangement. In response to the mail PGCIL stated that the LTA of the Appellant could be started w.e.f. 08.09.2012, the date of commissioning of 1 ckt of 400 KV ACB-Bilaspur line. It further stated that billing shall have to be done from the said date which would be raised in the month of October 2012.

3.15 The Appellant issued a letter on 20.09.2012 to PGCIL intimating the establishment of connectivity from its 2 x 135 MWs power plant with the commissioning of 400 KV D/C dedicated transmission line from its TPS to 765/ 400 KV WR pooling station at Bilaspur along with commissioning of two nos. of bays at Bilaspur grid substation (Circuit 1-08.09.2012 and Circuit 2-11.09.2012). Accordingly, the interim LILO connectivity with 400 KV D/C Korba-Bhatapara transmission line of PGCIL was simultaneously disconnected and 400 KV Korba-Bhatapara transmission

line was resorted to its original position. The Appellant further intimated that Unit 1 of its TPS achieved COD on 13.12.2011 and Unit 2 on 21.06.2012. The power was being scheduled under short term open access till 12.09.2012 and it requested PGCIL to intimate the date of commencement of LTA at the earliest.

In response to the above letter PGCIL vide letter dated 25.09.2012 stated that the complete transmission system from Appellant's TPS to WR pooling station at Bilaspur was commissioned on 11.09.2012 and the LTA was effective from 12.09.2012.

3.16 The Appellant informed GUVNL vide its letter dated 27.09.2012 the date of commencement of LTA and also enclosed letter dated 25.09.2012 issued by PGCIL communicating the date of commencement of LTA. The same information was given by the Appellant pursuant to the communications made by GUVNL from time to time and also in compliance with the provisions of Article 5.3.1 of the PPA. In the light of the above facts the Appellant requested GUVNL to refund Rs. 5.20 crores deducted towards liquidated damages from the energy invoice from the month of July 2012 along with applicable interest. The Appellant further requested GUVNL to confirm that the PPA would be effective from 12.09.2012.

3.17 GUVNL vide its letter dated 04.10.2012 rejected the request made by the Appellant and stated that no communication was made to it by PGCIL or the Appellant regarding the delay in commencement of LTA. Therefore, the refund of liquidated damages does not arise at all. GUVNL further requested the Appellant to collect the clarification from PGCIL as sought by it in its previous letter dated 02.06.2012.

3.18 The Appellant vide its letter dated 15.06.2013 had enumerated the factual development occurred periodically in the transaction in question. The Appellant stated in seriatim the efforts taken by it in implementing the project and also the provisions of the PPA. Therefore, there was no default on the part of the Appellant in delivering power to GUVNL at Bilaspur pooling station of PGCIL. Further, the LTA was commenced on 12.09.2012 and accordingly the COD was to be shifted to 30 days thereafter. Despite that GUVNL had deducted liquidated damages for 52 days i.e. from 01.05.2012 to 21.06.2012, since allegedly Bilaspur Pooling Station was declared as commissioned on 01.04.2012 and the Appellant was to deliver power to GUVNL after 30 days from such date i.e. 01.05.2012 till 21.06.2012 which was the date on which the Unit-II achieved COD. However, the liquidated damages recovered by GUVNL were illegal and contrary to the provisions of the Indian Contract Act. The Appellant had sold all infirm power and remitted GUVNL their share

which amounts to a sum of Rs. 7.4 crores only from Unit-I. Further, during the period from 01.05.2012 to 21.06.2012, a sum of Rs. 3.26 crores was deducted by GUVNL towards its share of infirm power. Therefore, GUVNL did not incur any loss or damages during or before the said 52 days. Admittedly, the Appellant had on its own synchronized its Units through LILO and spent approximately Rs. 2.10 crores towards erection of LILO link. The Appellant accordingly requested GUVNL to refund the liquidated damages so deducted along with interest.

3.19 In response to the above letter GUVNL vide its letter dated 04.07.2013 rejected the averments made by the Appellant in the above letter. GUVNL had refused to take into consideration the sharing of revenue towards injection of infirm power into the grid to the claim of damages. As per GUVNL liquidated damages were claimed under Article 4.6 of the PPA, whereas the right to avail infirm power was governed by Article 11 and Schedule VII of the PPA. GUVNL had accordingly rejected the claim of the Appellant for refund of liquidated damages. Being aggrieved by such erroneous conduct of GUVNL, the Appellant has preferred the present petition.

3.20 Being aggrieved by the illegal and arbitrary conduct of GUVNL the Appellant preferred a petition under Section 86(1)(f) of the Electricity Act, 2003. After hearing the parties on merits and on perusal of documents,

the Respondent Commission without appreciating the factual matrix of the case, the merits of the case in favour of the Appellant and the relevant question of law, dismissed the petition of the Appellant vide impugned order dated 04.08.2015 and erroneously held that the Liquidated Damages recovered by GUVNL is legal and valid in terms of the PPA.

4. Questions of Law:-

The Appellant has raised following question of law:-

- (A) Whether the Respondent Commission failed to consider the factual submissions and the arguments advanced on the principle of law while passing the impugned order?
- (B) Whether the Respondent Commission failed to appreciate the letters and communications exchanged between the parties from time to time which conclusively substantiate that the delay caused in operationalization of the LTA is attributable to PGCIL?
- (C) Whether the Respondent Commission has failed to interpret the true meaning and scope of the principle laid down by the Hon'ble Supreme Court of India in Kailash Nath Associates Vs. Delhi Development Authority, reported in (2015) 4 SCC 136 while passing the impugned order?

- (D) Whether the Respondent Commission is right in stating that the principle laid down in Kailash Nath Associates case is not applicable in the facts and circumstances of the present case?
- (E) Whether the Respondent Commission has erroneously upheld the recovery of Liquidated Damages by GUVNL without enquiring into the actual loss or damages suffered by GUVNL during such 52 days period?
- (F) Whether the interpretation of Article 4.6.1 of the PPA which specifies the amount of compensation payable, by itself takes away the parameters to be taken into consideration by an adjudicatory body while deciding on the legality of liquidated damages to be recovered under section 74 of the Indian Contract Act, 1872?
- (G) Whether the Respondent Commission at all taken into consideration the infirm power supplied by the Appellant and the amount of money deducted by GUVNL towards its share from the sale of infirm power?
- (H) Whether the provision of Article 4.6.1 of the PPA is amenable to drawing an exception to the principle enunciated under Section 74 of the Indian Contract Act, 1872?
- (I) Whether the words and phrases used under Article 4.6.1 of the PPA is to be read and interpreted in a manner nullifying the meaning and intent of

the expression “whether or not actual damage or loss is proved to have been caused thereby” and “reasonable compensation not exceeding the amount so named, as the case may be, the penalty stipulated for” used under Section 74 of the Indian Contract Act, 1872?

- (J) Whether the Respondent Commission has failed to read the PPA in entirety and made an effort to interpret the PPA in a manner which renders the clauses of PPA redundant and unenforceable?
- (K) Whether the impugned order is erroneous being violative of the principle of law and being passed without paying any heed to the facts and circumstances giving rise to the dispute between the parties?

5. Mr. Matrugupta Mishra, learned counsel appearing for the Appellant has filed his written submission as follows:-

A. The Respondent Commission failed to consider the factual submission in form of letters and communication exchanged between the party which conclusively establishes that the delay in operationalization of the LTA was attributable to PGCIL.

- Initially the Appellant executed a ‘Turnkey Agreement’ dated 18.06.2009 whereunder PGCIL was to design, erect, procure and commissioning etc, of 2 Nos. 400 kv extension bays at WR Pooling Point, however, subsequently the contract was awarded to ABB to undertake the scope of work under the supervision of PGCIL. However, due to the delay in the commissioning of the

Sipat Pooling Station, GUVNL was pleased to grant an extension for COD of the TPS upto 30 days from the date on which the open access/ transmission facilities for evacuation of power was made available to the Appellant vide its letter dated 05.08.2008. GUVNL made it categorically clear that the extension of COD goes beyond 30 days from the date of LTA granted to the Appellant becomes operationalized. It is evidently clear of the fact the LTA became operationalized w.e.f. 12.09.2012 as communicated by PGCIL in its reply before the Respondent Commission. The Respondent Commission while passing the impugned order failed to take into consideration the above fact of operationalization of LTA on 12.09.2012 which is supposed to be the triggered point for computing 30 days as contemplated under the letter dated 05.08.2008. A bare perusal of the letter would suffice that GUVNL at that point with its wit and wisdom rightly stated that the computation of 30 days would start from the date on which the open access/transmission facilities for evacuation of power from the Appellant's TPS to GUVNL's delivery point is made available. Hence, the liability of the Appellant could only be triggered on the availability of the transmission system to the Appellant for evacuation of power from its TPS. This has nothing to do with the commissioning of Sipat Pooling Station.

- The whole controversy in hand is whether due to default on the part of PGCIL the open access was not made available to the Appellant or not. Reference may be made to the letter dated 15.06.2012 read with other letters issued by GUVNL from time to time to the Appellant wherein the Appellant was requested to

obtain a written communication from PGCIL regarding any work pending on their part to make open access operation and confirmation of the date of commencement of LTA. Therefore, the whole argument of GUVNL that imposition of LD under Article 4.6.1 of the PPA is independent to the conduct of PGCIL, is an afterthought. Not only the above letter but reference may also be made to the letter dated 12.04.2012 and the subsequent letters wherein GUVNL has categorically asked PGCIL to communicate as to the date on which the LTOA qua the Appellant is getting operationalised.

- Hence, the letter dated 25.09.2012 issued by PGCIL to the Appellant communicating the effective date i.e. 12.09.2012 on which the LTA of the Appellant is operationalized, is sufficient to answer the clarification being sought by GUVNL from PGCIL from time to time. Therefore, the aforementioned letter has to be read with the letter dated 15.06.2012 and 12.04.2012, as the response to the clarification raised by GUVNL from PGCIL.
- Further, GUVNL has agreed vide its letter dated 15.06.2012, 31.07.2012 and 04.10.2012 that upon obtaining the communication from PGCIL by the Appellant, no liquidated damages shall be imposed. This gives rise to the proposition that when a party imposing a contractual liability on the other party, has made such liability contingent upon the clarification as to whether the delay for which the LD is set to be imposed, is caused by the other party or a third party. In such scenario whether in the absence of a written communication of causing delay by the third party, would ipso facto, make the other party

liable for such LD, even when there is sufficient documentary proof to corroborate that the LTA is operationalized w.e.f. 12.09.2012.

- PGCIL, not being privy to the PPA, may choose not to respond to the communications made by GUVNL from time to time. However, such failure on the part of PGCIL, cannot translate into liability on the part of the Appellant. Reference may be made to the email communication issued by WRLDC (a statutory body) dated 11.09.2012 addressing PGCIL, enquiring the date of commencement of LTA to the Appellant. What more evidence GUVNL requires to satisfy itself as to the requirement of its letter dated 05.08.2008.
- Appellant's failure to obtain clarification from PGCIL, as required by GUVNL, cannot become the basis of imposition of a contractual liability under the PPA, whereas there is sufficient documentary proof adduced by the Appellant to GUVNL, in support of both the reason behind delay in operationalization of LTA and the date of commencement of operationalization of LTA being 12.09.2012.
- Further, Article 4.5.1 (c) of the PPA is relevant to note which gives extension of time to the generator when there is delay in provision of open access or transmission facilities for reasons solely attributable to the CTU.
- The LTA was made effective w.e.f. 12.09.2012 by PGCIL, for which reference may be made to the written submission made by PGCIL before the Respondent Commission at page 405

read with letter dated 25.09.2012 at page 308. For ascertaining the reason for such delay, reference may be made to the email issued by WRLDC to PGCIL at page 306, letter dated 27.07.2012 by the Appellant to PGCIL requesting for installation of T2D tower at page 302, the email communication dated 29.06.2012 at page 301 whereby PGCIL itself communicated that the tower meant for Lanco can be used in place of M/s. ESSAR's bay, letter dated 29.06.2012 at page 300, email dated 29.06.2012 at page 299, letter dated 31.05.2012 at page 290 and letter dated 18.02.2012 at page 276.

- The Appellant was always ready for evacuation of power from its respective Units. The dedicated transmission line was ready for evacuation, however, due to delay on the part of PGCIL, the bays could not be commissioned earlier, for which the Appellant had to transmit power under STOA through laying down LILO lines by incurring an additional cost of Rs. 2.10 Crores. Therefore, the delay was caused due to the conduct of PGCIL and the Appellant would have been put to benefit if the bays would have commissioned earlier than the date on which the same were actually commissioned.
- GUVNL vide its letter dated 05.08.2008 at page 249, gave extension in achieving COD, upto 30 days from the date on which open access/ transmission facilities for evacuation of power is made available i.e. commissioning of Sipat Pooling Station. As on 31.03.2012, PGCIL wrote to the constituents that the Bilaspur s/s shall be ready on 31.03.2012. As per the situation on grounds only two number 1500 MVA, 765/ 400 kV

transformers along with reactors were charged at 765 kV level only. Since the balance work on the 400 kV bus was incomplete and other protection and commission works were incomplete, even the charged transformer which were charged on 31.03.2012, were disconnected on the next day to facilitate execution of balance work.

- Since the 400 kV bus was not ready, the Bilaspur s/s was not complete to the extent to provide connectivity to the Appellant and other DICs and was not ready for evacuating the LTA quantum of the Appellant, hence, for the purpose of reckoning the date of readiness as per the GUVNL scheduled delivery date extension, at best 30 days shall have to be reckoned from 12.09.2012 as reflected from the letter dated 25.09.2012 issued by PGCIL to the Appellant.
- The Appellant has been writing to GUVNL to get the site inspection by deputing their technical personnel to verify the readiness of the Bilaspur S/s but they did not opt for the same. PGCIL had never responded to GUVNL letters (refer to letters dated 12.04.2012, 02.06.2012, 15.06.2012 and 31.07.2012) asking for clarification as to whether the delay in providing LTOA to the Appellant was on account of delay on the part of the Appellant or PGCIL.
- PGCIL allowed the LTA to the Appellant w.e.f. 12.09.2012 and never required the Appellant to pay the POC charges from 01.04.2012. Had PGCIL Bilaspur s/s been ready on 01.04.2012 to evacuate the Appellant's power, the Appellant would have been billed from 01.04.2012 as per the BPTA read with LTA

and the provisions of Sharing Regulations, 2010. As the only point to be decided is on what date PGICL s/s was ready to provide connectivity to the Appellant notwithstanding the commissioning of the Appellant's plant or its dedicated transmission line. The liquidated damage shall become leviable after 30 days from the date on which the readiness of Bilaspur s/s to the extent of providing connectivity of 400 kv is established.

B. The Respondent Commission failed to take into consideration the relevant provisions of the PPA.

- The PPA executed between the Appellant and GUVNL consisted of relevant articles that are necessary for adjudicating the present issue by this Tribunal.
- A bare perusal of sub-article (c) of Article 4.5.1 clearly established that GUVNL is entitled to extend the COD because of delay in provision of open access or transmission facilities for reasons solely attributable to the CTU. Hence, the date on which LTA was made effective or operationalized qua the Appellant becomes important and relevant for the Appellant to start its obligation under the PPA. PGCIL vide its letter dated 25.09.2012 granted LTA to the Appellant which was made effective from 12.09.2012 since the pooling station at Bilaspur was commissioned on 11.09.2012. Therefore, the triggering date has to be 30 days from 12.09.2012 instead of 01.05.2012 as wrongly and arbitrarily interpreted by GUVNL. Besides, the delay caused in commissioning of two nos. of 400 KV bays for

evacuation of power from TPS to the Sipat Pooling Station, was done at the instance of PGCIL. The Respondent Commission could have inferred the reason for such delay from the letter and communications made between the Appellant, ABB and PGCIL regarding T2D tower construction and stringing of the last span of the dedicated transmission line. The Appellant cannot be held responsible for the dereliction of the obligation on the part of PGCIL.

C. The Respondent Commission failed to apply the principle laid down in *Kailash Nath Associates v. Delhi Development Authority and Another*.

- Without prejudice to the above, the Appellant makes the following submissions, assuming without admitting its liability to pay LD to GUVNL. The Hon'ble Supreme Court in *Kailash Nath Associates v. Delhi Development Authority and Another*, reported in (2015) 4 SCC 136 made a thorough observation upon the applicability of compensation in the form of Liquidated Damages as provided under Section 74 of the Indian Contract Act, 1872.
- A perusal of the observations made by the Hon'ble Supreme Court in para 43 of the judgment, makes it abundantly clear that in a contract, where liquidated damages have been named, the party complaining for the breach of contract can receive only a reasonable compensation which is genuine pre-estimate of damage fixed by both the parties and found to be such by the court. The Respondent Commission while passing its impugned

order, did not give any heed to the law which is settled by the Hon'ble Supreme Court of India.

- For that in the present case, the Appellant had synchronized its units and supplied power to GUVNL through LILO method on 13.09.2011 and 31.03.2012 from its unit I and II, respectively. It is pertinent to mention that GUVNL had incurred no loss whatsoever due to delay in availability of LTA. Apart from that, GUVNL has neither given any account for actual loss incurred nor given any basis on which the liquidated damages amount was deducted.

5.1 In the light of above facts and circumstances, the appeal is liable to be allowed and a specific direction be made to GUVNL for refund of Rs. 5.2 Crores illegally and arbitrary deduced towards LD along with interest.

Additional Submissions of the Appellant:-

5.2 In order to deal with the abovementioned issues, the Appellant herein would like to bring to the notice of this Tribunal the letter dated 05.08.2008 issued by GUVNL to the Appellant, whereby GUVNL expressly granted extension for the achievement of COD and further stated that the COD of both the units of Appellant's generating plant could be extended by another 30 days from the date on which open access/transmission facilities for evacuation of power is made available i.e., commissioning of Sipat Pooling Station. The relevant portion of the

abovementioned letter is extracted herein for the ready reference of this

Hon'ble Tribunal:

“Since, M/s Aryan Coal Benefication Pvt Ltd is unable to achieve the original Schedule Commercial Operation date on account of delay in getting Open Access/Transmission facilities for evacuation of power from M/s ACBPL generating station for onward supply to GUVNL’s delivery point, GUVNL hereby grants the extension of Commercial Operation date for the present up to 25/2/2011 for both the units of Power Project and in case the commissioning of Sipat Pooling station is delayed beyond that also then COD is extended up to 30 days from the date on which open access/transmission facilities for evacuation of power as stated above is made available i.e. Commissioning of Sipat Pooling Station.”

A perusal of the above letter clearly shows that the Respondent No.2/GUVNL not only granted COD to the Appellant but also acknowledged the fact that there was a delay on the part of Respondent No.3/PGCIL in commissioning the transmission facility i.e., Sipat Pooling station required by the Appellant for evacuation of power from its generating plant and also for operationalization of its LTA. This letter is the genesis and an important document in the present case, since, the future correspondence and factual scenario, is required to be tested on the four corners of this letter issued by GUVNL.

5.3 It is submitted that the Appellant achieved the COD of its Unit I on 13.12.2011. Accordingly, the Appellant started supplying power to the Respondent No.2/GUVNL through LILO which was interim arrangement

proposed and constructed by the Appellant since the Sipat Pooling Station was not ready. It is an admitted fact the Appellant has been evacuating power to GUVNL under short term open access (STOA) which shows that the Appellant has made his best efforts to comply with the PPA executed between the Appellant and the Respondent No.2/GUVNL. The LILO was proposed and constructed by the Appellant at a cost of Rs. 2.1 Crores. Admittedly, there was no obligation on the part of the Appellant to evacuate power through LILO under the PPA, the Appellant on its own constructed LILO and supplied power to GUVNL well before time.

5.4 Further, the Appellant would like to apprise this Tribunal to the letter dated 02.04.2012 whereby allegedly PGCIL wrote to the constituents declaring COD of the Bilaspur Pooling station and stated that the transmission charges will be w.e.f. 01.04.2012. However, on that day PGCIL only commissioned certain assets, not the entire pooling station and admittedly no invoice for LTA charges was raised by the Respondent No.3/PGCIL with effect from the aforesaid period against the Appellant.

5.5 Thereafter, in order to clarify whether the delay was on the part of Appellant or not, the Respondent No.2/GUVNL wrote a series of letters to both the Appellant and Respondent No.3/PGCIL asking for the

aforesaid clarification. The first letter was issued by GUVNL to Respondent No.3/PGCIL on 12.04.2012 to confirm whether the LTOA granted to the Appellant had become effective from 01.04.2012 or not. If not, then clarify whether the delay was caused on account of the Appellant or PGCIL. It is pertinent to mention that there was no clarification granted by the Respondent No.3/PGCIL to the aforesaid letter issued by GUVNL.

- 5.5** Subsequently, on 31.05.2012, the Appellant issued an e-mail to the Respondent No.3/PGCIL requesting PGCIL to respond to the letter issued by GUVNL on 12.04.2012 regarding status of the commissioning of 400 kV bays at Bilaspur Pooling station. However, no response was made by PGCIL to the aforesaid letter.
- 5.6** Thereafter, GUVNL once again wrote a letter to Respondent No.3/PGCIL on 02.06.2012 asking for clarification whether the delay in LTA was on account of the Appellant or PGCIL.
- 5.7** On account of no response by Respondent No.3/PGCIL to the series of letters issued by the Appellant as well as GUVNL, the Appellant issued a letter to GUVNL on 11.06.2012 clarifying that the delay was caused on account of non-availability of tower and failure to erect, by PGCIL and there was no delay on the part of the Appellant. Further, the Appellant intimated GUVNL that Respondent No.3/PGCIL is yet to grant LTOA to

the Appellant for which the Appellant had already requested the Respondent No.3/PGCIL vide its letter dated 31.05.2012 to intimate the likely date by which the LTOA will be granted.

5.8 In response to the abovementioned letter, GUVNL vide its letter dated 15.06.2012 accepted the request made by the Appellant and agreed for extension of COD with the date on which open access is available and also requested to collect the written communication from PGCIL regarding any work pending. The relevant portion of the abovementioned letter is extracted herein for the ready reference of this Tribunal:

“In this regard, it is to inform you that GUVNL has agreed for extension and linking of the Commercial Operation Dates for supply of contracted capacity under the PPA with the date on which Open Access is available i.e. Commissioning of pooling station near Sipat. PGCIL has already declared the 765/400 KV Bilaspur Pooling Station under Commercial Operation w.e.f. 1.04.2012 through letter dated 2nd April, 2012.

In view of the above, you are once again requested to kindly collect written communication from PGCIL regarding any work pending on their part to make open access operation and confirmation of the date of commencement of LTA and till the same is not received by GUVNL, liquidated damages shall become applicable as per the provisions of PPA beyond 30 days from commissioning of Bilaspur Pooling Station.”

5.9 Thereafter, on 21.06.2012, unit II of the Appellant's project achieved its COD. On 25.09.2012, Respondent No.3/PGCIL issued a letter to the

Appellant granting LTOA to the Appellant w.e.f. 12.09.2012. Hence, the above letter clearly established the fact that the complete transmission system was only commissioned on 11.09.2012 and LTA was made effective from the next date i.e., 12.09.2012. Thus, there was no reason for the GUVNL to impose Liquidated damages upon the Appellant.

5.10 A perusal of the above read with letters dated 05.08.2008, 12.04.2012 and 02.06.2012 would demonstrate that GUVNL has given an extension of 30 days from the date on which open access/ transmission facilities for evacuation of power as stated above is made available i.e. commissioning of Sipat Pooling Station. Notwithstanding the communications made by statutory authority (WRLDC) and the letter dated 25.09.2012 issued by PGCIL, GUVNL erroneously considered 01.04.2012 as the date of commissioning of Sipat Pooling Station, in gross departure from its own communications as referred above, which reckons 30 days from the date on which open access/ transmission facilities is operationalized. The following documents are required to be referred to:

a. as per the BPTA executed between the Appellant and PGCIL dated 03.04.2009 the long-term access whereby the Appellant will be entitled to evacuate/ supply power to GUVNL by utilizing the transmission network of PGCIL shall be operationalized upon fulfilment of the following:-

- i. commissioning of a 400 kV dedicated transmission line between the generating plant of the Appellant till WR Pooling station near Sipat; and
 - ii. establishment of 400/ 765 kV, 3x1500 MVA WR Pooling Station near Sipat and LILO of 765 kV Sipat – Sconi 2x S/c at WR Pooling Station.
- b. PGCIL vide its letter dated 02.04.2012 declared commissioning of certain assets with effect from 01.04.2012. Neither any transmission charges were levied nor the entire asset was commissioned. Thereafter, PGCIL vide its letter dated 25.09.2012 declared the LTOA to be operationalized w.e.f. 12.09.2012 after commissioning of the remaining assets and the dedicated transmission line of the Appellant;
- c. reference can also be made of the email dated 11.09.2012 issued by WRLDC to PGCIL for confirming the date of commencement of LTA to the Appellant so that the scheduling from the Appellant can be commenced under long term. In response to the above email PGCIL informed that the LTA can be started w.e.f. 08.09.2012 and the billing shall be done from the same date;
- d. PGCIL vide its letter dated 29.06.2018 has clarified the entire scenario by referring to the BPTA in the manner mentioned in Point no. (a) above. Thereafter, it clarified as follows:

“Subsequently, the 765/400 Kv, 2x1500 MVA Bilaspur Pooling Station along with LILO of Sipat- Seoni 765 kV 2xS/c lines at Bilaspur Pooling Station was commissioned on 01.04.2012 and 3rd 765/400 kV, 1x1500 MVA ICT at Bilaspur Pooling Station, was commissioned on 01.08.2012. However, since the dedicated line (mentioned at (i) above was commissioned on 11.09.2012, the LTOA was made effective on 12.09.2012.”

5.11 Hence, the confusion or the lack of clarity with regard to operationalization of LTA and commissioning of Sipat Pooling station, has come to a rest by virtue of the letter dated 29.06.2018 issued by PGCIL, which was not objected to by GUVNL. The affidavit filed by PGCIL before Ld. GERC stands clarified vide letter dated 29.06.2018. Therefore, the commissioning of Sipat Pooling station is achieved on 01.08.2012 and the LTOA is operationalized on 12.09.2012. Assuming that the delay was caused due to the commissioning of dedicated transmission line, the 30 days is required to be reckoned from 01.08.2012. GUVNL could only impose Liquidated Damages upon the Appellant after the lapse of 30 days from 01.08.2012 i.e., after 01.09.2012. However, the Appellant has been scheduling power to GUVNL before the commencement of the Sipat Pooling Station as COD of 1st unit achieved in Dec.'2011 i.e 100 MW power was scheduled 4 months even prior to commissioning the first batch of assets of Bilaspur Pooling Station and the 2nd unit was synchronised on 31st March'2012

and infirm power injected into the Grid up to the date of commissioning of 2nd unit on 21.06.2012 benefiting GUVNL much more than the LD of Rs.5.2 Cr. thus no loss accrued to GUVNL, which shows that the Appellant has been making best possible efforts to comply with the PPA and supply the power as per the PPA. Hence, there was no justified reason for GUVNL to impose penalty upon the Appellant and the same shall be returned in the interest of justice. Therefore, the question of imposing Rs. 5.2 Crores LD does not arise at all.

5.12 The LILO for evacuation of power from the Appellant's plant was established in August 2011 because of which the Appellant was able to avail the Start up power for testing and pre-commissioning of the generating plant. Accordingly, Unit-I of the generating plant of the Appellant was synchronized on or about October 2011 and was subsequently commissioned on 13.12.2011. thereafter, Unit II was commissioned on 21.06.2012. If the LILO would not have been arranged by the Appellant, then the Appellant would have drawn the start up power from the Bilaspur Pooling Station which as per the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 would be admissible only after 6 months after the date of synchronization. Thus, assuming the Bilaspur Substation was commissioned on

01.04.2012, the Appellant would not have been able to commission unit I at least 5-6 months from the date of commissioning of Bilaspur Substation. Hence, the Appellant acted in a bona fide manner, irrespective of the fact that the LILO arrangement for supplying power to GUVNL was at a cost of Rs. 2.1 crore and the same has never been asked by the Appellant by way of compensation. Hence, GUNVL could avail cheap power at Rs. 1.90/ kWh at least one year in advance. It may be mentioned that GUVNL deducted 7.4 Cr. from the Energy Bills on account of infirm power injected into grid during Sep'2011 to Dec.'2011 and April'2012 to June'2012 which was much more than the LD of Rs.5.2 Cr. and would not have been possible in case ACBIL has not made efforts to get the LILO connectivity which was beyond the provision of PPA. Therefore, the question of any damage or loss being incurred by GUVNL, does not arise.

6. Mr. C.K. Rai, learned counsel for the Respondent No.1 has filed his written submission as follows:-

6.1 The Appellant had awarded the work of dedicated transmission line from the Appellant's plant to Sipat Pooling Station first to PGCIL and later on at the request of the PGCIL, the work was awarded to ABB Limited.

6.2 The supervision work and materials of the dedicated transmission line was required to be provided by the PGCIL. Some of the material of the dedicated transmission line required to be provided by the PGCIL to the Appellant, which is essential as the dedicated transmission line will become the part of grid system once the long term open access is availed by the Appellant. Therefore, the crucial material for the transmission system is required to be proper and should be able to fulfil the reliability and security criteria when the grid operation is to be carried out.

6.3 The Appellant vide its letter dated 31st May, 2012 informed to PGCIL that one T2D tower which was within the scope of PGCIL was not supplied at the site by the PGCIL due to which the erection of last gantry of the bay was pending and due to such delay the Appellant failed to string the last section from the terminating tower to the sub-station gantry. The Appellant requested PGCIL to expedite the same and the Appellant had also requested PGCIL to grant the long term open access. The Appellant had in its email dated 31 May 2012 requested the PGCIL

to inform the status of commissioning of 400 KV bays at Bilaspur Pooling Station. However, the PGCIL had not clarified the same. Appellant and ABB Limited had informed to PGCIL on 29.6.2012 that T2D tower could not be diverted from Lanco due to dimensional difference of PGCIL's IPPL tower and requested PGCIL to expedite the dispatch of T2D tower ordered by PGCIL for completion of pending work on the 400 KV transmission system. That PGCIL vide its letter dated 29.6.2012 communicated to Appellant that non delivery of T2D tower was attributable to M/s. Essar Power Limited.

6.4 The T2D tower finally arrived at the site on 24.7.2012. Thereafter the 400 KV D/C dedicated transmission line from the project to 765/400 KV WR Pooling Station was commissioned along with commissioning of 2 Nos. of bays at Bilaspur Grid Substation on 8.9.2012 (Circuit – I) and on 11.9.2012 (Circuit – II) and the PGCIL granted the LTA to the Appellant with effect from 12.9.2012 which is confirmed by the PGCIL vide its letter dated 25.9.2012.

6.5 In the said letter it was admitted by the PGCIL that complete transmission system for evacuation of power from ACB TPS to WR

Pooling Station at Bilaspur was commissioned on 11.09.2012 and the long term open access became effective from 12.09.2012. On the other hand, the contention of the Respondent, GUVNL is that the delay in the construction of dedicated transmission line is attributable to the Appellant and the Appellant is not eligible to get any relief in extension of SCOD due to such delay.

6.6 The agreement between PGCIL/ABB and the Appellant for construction of transmission line from the appellant plant to 765/400 KV Sipat S/S is different and distinct from the PPA executed between the Appellant and GUVNL which provides for execution of the project by the Appellant in time and supply the power also in time. It was obligation of the Appellant to construct the dedicated transmission line and inject the power from the power project into the grid as per the terms of the PPA.

6.7 The Article 4.1 of the PPA states that it is the seller's responsibility to execute the project in timely manner so as to enable achievement of COD of each of the units and the Contracted Capacity as a whole, no later than its SCOD and such that as much of the Contracted Capacity as can be made available through the use of Prudent Utility Practices will be made available reliably to meet the Procurer's scheduling and

dispatch requirements throughout the term of the Agreement but under no event earlier than 48 months from effective date. The seller was required to obtain the necessary consents, if any, in this regard. The seller was also required to construct the transmission line to facilitate the evacuation of power from the plant to the delivery point. Thus, it is an obligation on the part of the seller to construct the project along with the dedicated transmission line for evacuation of power in time.

- 6.8** It is undisputed between the parties that the PGCIL has declared the Commercial Operation Date of the 765/400 KV Bilaspur Pooling Station (near Sipat) along with LILO of Sipat – Seoni Ckt – 1 with 3x80 MVAR Switchable Line Reactor, 3x80 MVAR Bus Reactor and 765/400 kV, 1500 MVA ICT - I & II as 1.04.2012 vide its letter dated 02/04/2012.
- 6.9** As per the aforesaid letter, the PGCIL conveyed that the monthly transmission charges were payable by concerned DICs from 1st April 2012 as per the CERC (Sharing of Inter-State Transmission charges and losses) Regulations, 2010. Thus, the PGCIL started levy of transmission charges from 1.04.2012 to all DICs including the Respondent No.1.

6.10 With respect to submission of the Appellant that Bilaspur Pooling Station (near Sipat) was declared commissioned for commercial operation from 1.04.2012 but no transmission charges was levied by the PGCIL and no explanation was given by the PGCIL for the same, it is submitted that the subject matter of the dispute is pertaining to levy of liquidated damages by the Respondent GUVNL on the Appellant as he could not supply the power from 1.04.2012 on declaration of Bilaspur Pooling Station (near Sipat) achieving the commercial operation which is a different subject matter than levying of transmission charges by the PGCIL on the Appellant.

6.11 The PGCIL in its letter dated 25.09.2012 to the Appellant conveyed regarding the commissioning of the complete transmission system from the Appellant's plant to WR Pooling Station at Bilaspur on 11.09.2012 and declared that the long term open access is made effective from 12.09.2012.

6.12 From the above letter it is clear that complete transmission system for evacuation of power from ACB TPS to Western Region Pooling Station at Bilaspur was commissioned on 11.09.2012. Therefore, the long term

Open Access of the Appellant became effective from 12.09.2012. As stated in earlier para, the GUVNL in its letter 5.8.2008 agreed that if the Appellant is unable to achieve the SCOD on account of delay in getting Open Access/transmission facilities for evacuation of power from Appellant's plant for onward supply to GUVNL's delivery point, the SCOD would be extended. Hence, for any delay in the long term Open Access granted by the PGCIL or the transmission facilities made available for evacuation of power, the Appellant is eligible to extend the SCOD as agreed by the respondent GUVNL up to 30 days from the date on which Open Access or transmission facilities is made available i.e. Commissioning of Sipat Pooling Station. As the Bilaspur Pooling station (near Sipat) achieved the COD on 1.4.2012, the delay in grant of Open Access by the PGCIL from 12.9.2012 has no relevance, for extension of the COD of the Appellant Plant.

6.13 So far as the contention of the Appellant that the delay in commissioning of transmission lines from its power plant to PGCIL Sipat Pooling Station is not attributable to the Appellant and that the Appellant cannot be penalized for it, it is submitted that the delay in construction of the

transmission lines from the Appellant's station to Sipat Pooling Station was the sole responsibility of the Appellant, who was executioner of the lines and such execution is governed by the agreement of the Appellant with the ABB/ PGCIL and it has no linkage with the PPA between the Appellant and the Respondent/GUVNL and therefore the Appellant is not eligible to get any relief for the same in the present case.

6.14 From the aforesaid facts it is clear that the delay in supply of power by the Appellant up to contracted capacity with the Respondent from 1.05.2012 (i.e. 30 days after the declaration of commercial operation of Bilaspur Pooling Station (near Sipat) by PGCIL) to 12.09.2012 is attributable to the Appellant and therefore, the Appellant is liable to pay liquidated damages as per the provisions of the PPA.

6.15 As per the aforesaid clause, if, the unit of the power plant does not achieve the Scheduled Commercial Operation Date other than for the reasons specified in Article 4.5.1 the Seller shall pay to the Procurer the liquidated damages for such delay in achieving SCOD and formula to evaluate the liquidated damages is specified in Article 4.6.1 of the PPA. Accordingly, the liquidated damages is required to be paid by the Seller

to the Procurer at the rate of Rs. 10,000/MW/day for delay in case of achieving SCOD of the plant for initial 60 days. Thereafter, the Seller is required to pay the liquidated damages to the Procurer at the rate of Rs.15000/MW/day for the delay period more than 60 days.

6.16 With respect to contention of the Appellant that in case there is default on the part of the Appellant then the liquidated damages is payable under Article 4.5.1 read with Article 4.6.1 and 4.6.5. It is necessary to peruse Article 4.5.1 and Article 4.6.5 of the PPA also.

6.17 As per the aforesaid Article, in the event of the Seller being prevented to perform its obligations as per Article 4.1.1.(b) of the PPA by the stipulated date or due to delay in Commercial Operation by it's Scheduled Commercial Operation Date due to Force Majeure Event or the Seller being prevented from performing its obligations under Article 4.1.1.(b) by the required date because of delay in provision of open access or transmission facilities for reasons solely attributable to the CTU or Seller arranges to supply the contracted power to the Procurer from alternate sources at the Quoted Tariff, in that case the Seller is eligible to reduce the liability as per Article 4.6.5 of the PPA.

6.18 The fact that the said lines were delayed is also confirmed by the PGCIL and the Long-Term Open Access was granted by PGCIL from 12.09.2012. Therefore, the Appellant is liable to pay liquidated damages in terms of the Article 4.6.1 of the PPA to the Respondent. The claim of the Appellant is devoid of merit and the same is liable to be rejected.

6.19 The contention of the Appellant that the liquidated damages are not payable by it on the ground that the Respondent has not shown that it has suffered any damages is also not tenable as the said contention is against the provisions of Section 74 of the Indian Contract Act, 1872.

6.20 The scope and meaning of this provision has been summarized by the Hon'ble Supreme Court of India in a recent judgment in *Kailash Nath Associates v Delhi Development Authority*, 2015 SCC (4) SCC 136.

6.21 In the present case the parties have agreed to the compensation amount in the Article 4.6.1 of the PPA, which specifies the amount of the compensation payable by the Seller in case of non supply of power to the Procurer. The decision referred by the Appellant is not applicable to the facts and circumstances of the present case.

6.22 The contention of the Appellant that it had injected infirm power into the transmission system from a much earlier date i.e, since 13.09.2011 from 1st unit and since 31.03.2012 from 2nd unit and that had paid to the Respondent GUVNL the sum received by the Appellant on account of sale of infirm power is of no relevance so far as imposition of liquidated damages is concerned. It is submitted that supply of infirm power into the grid and payment of the amount received from such power to the Respondent GUVNL is different and distinct issue than the levy of liquidated damages by the Respondent GUVNL. It is pertinent to mention here that liquidated damages is imposed by the Respondent GUVNL for non supply of power from the COD of the Bilaspur Pooling Station (Near Sipat).

7. Mr. M.G. Ramachandran, learned counsel appearing for the Respondent No.2 has filed his written submission as follows:-

7.1 Propositions on behalf of the Respondent No. 2:

- a. As per the PPA, the Appellant is liable to pay liquidated damages as specified in Article 4.6.1 if the Appellant does not achieve the Scheduled Commercial Operation Date within the specified time. The only exception is if there was a delay due to delay in provision of

open access and transmission facilities solely attributable to the Central Transmission Utility (CTU).

- b. The extension had been granted by the Respondent No. 2 upto the commissioning of the Sipat Pooling Station which was to be done by CTU. The Sipat Pooling Station was ready on 01.04.2012. Therefore, after such date, the Appellant was not entitled to extension of time.
- c. The construction or commissioning of the dedicated transmission system from the generating station to the Sipat Pooling Station and the bays at the Sipat Pooling Station were the sole responsibility of the Appellant and not the CTU, in regard to the scope of work envisaged to be done by CTU as per the provisions of the PPA. This notwithstanding that the Appellant had entered into a contractual arrangement with Powergrid Corporation in relation to the dedicated transmission line and bays.
- d. The delays in such construction or commissioning of dedicated transmission line and bays is a bilateral contractual matter between the Appellant and Powergrid and the same would not entitle the Appellant to any extension of scheduled commercial operation date or exemption from payment of liquidated damages under the PPA with the Respondent No 2.

- e. The fact that the Appellant had granted a sub-contract for construction of dedicated transmission line to the Powergrid does not mean that the dedicated transmission line is part of the transmission facilities of Powergrid in its status as CTU. Powergrid in regard to the dedicated transmission line etc. has been acting as a contractor/consultant of the Appellant and not in its capacity as the CTU.
- f. The liquidated damages specified in Article 4.6.1 are a genuine pre-estimate of the damages and has been specifically agreed to by the Appellant and the Respondent No. 2 under Articles 4.6.4 and 18.13 and therefore it is not necessary for the Respondent No. 2 to prove any actual loss. There is a legal injury to the Respondent No 2 on account of the delay

Detailed Submissions

7.2 In the year 2006, the Respondent No. 2 initiated a competitive bidding process under Section 63 of the Electricity Act, 2003. The bids were invited for supply of power to Gujarat. The Appellant had participated in the bid for supply of 200 MW from its 2 X 135 MW generating station of the Appellant in the State of Chhattisgarh and was successful.

7.3 The PPA dated 26.04.2007 was entered into between the Appellant and Respondent No. 2 for generation and supply of 200 MW. The rights and obligations of the parties are governed only by the terms of the PPA. It is not open to the Appellant to claim any relief de-hors the PPA.

7.4 Article 18.4 of the PPA inter alia reads as under:

“18.4 Entirety

18.4.1 This Agreement and the schedules are intended by the Parties as the final expression of their agreement and are intended also as a complete and exclusive statement of the terms of their agreement.

18.4.2 Except as provided in this Agreement, all prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement or the sale or purchase of Electricity Output and Contracted Capacity under this Agreement to the Procurer by the Seller shall stand superseded and abrogated.”

7.5 The undisputed aspects agreed in the PPA are as under:

- a) The delivery point for supply of electricity by the Appellant to the Respondent No. 2 is at the CTU-GETCO periphery in the State of Gujarat.
- b) The obligation to procure the transmission facilities prior to the Delivery Point was that of the Appellant and the obligation to procure transmission facilities after the Delivery Point was that of the Respondent No. 2 ;

- c) The 'Scheduled Commercial Operation Date' for the generating station of the Appellant was 36 months from the date of the PPA for the first unit and 42 months from the date of the PPA for the second unit.
- d) The Appellant was required to execute the project to achieve the Commercial Operation Date and supply of Contracted Capacity no later than the Scheduled Commercial Operation Date (Article 4.1.1(b)).

Re: Extension of Scheduled Commercial Operation Date for the Appellant's generating station

- 7.6** As per the PPA, the Appellant was entitled to extension of time in Scheduled Commercial Operation Date for delay in provision of open access and transmission facilities for reasons solely attributable to the Central Transmission Utility (CTU).
- 7.7** If the open access is delayed for reasons not solely attributable to the CTU, the same is not covered by Article 4.5.1(c) and there would be no extension of time for Scheduled Commercial Operation Date.
- 7.8** It was the responsibility of the Appellant to coordinate with the CTU and other authorities to procure the interconnection and transmission facilities up to the delivery point (Article 4 of the PPA). It is not disputed that the open access for supply of electricity by the Appellant was granted by the CTU from its 765/400 KV transmission pooling station at

Sipat (near Bilaspur) i.e. Bilaspur (Sipat) Pooling Station to the CTU-GETCO interconnection point in the State of Gujarat.

7.9 The Appellant was however required to construct and commission the dedicated transmission system from its generating station to the Bilaspur (Sipat) Pooling Station of CTU so that the Appellant could connect to the Pooling Station. The system included a 400 KV transmission line and 2 nos of 400 KV line bays to connect at the Bilaspur (Sipat) Pooling station.

7.10 The above was the sole responsibility of the Appellant being dedicated transmission line to be constructed under Section 10 of the Electricity Act, 2003:

“10. Duties of generating companies-(1) Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie –lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made thereunder.”

7.11 Thus, there were two different systems which were to be ready:

- a) Bilaspur (Sipat) Pooling Station and the transmission facilities from Bilaspur (Sipat) Pooling Station to the CTU-GETCO interconnection point in State of Gujarat – which was the responsibility of CTU.

b) Dedicated transmission line and bays from the generating station of the Appellant upto the Bilaspur (Sipat) Pooling Station which was the responsibility of the Appellant.

7.12 The dedicated transmission system is not part of the inter-state transmission system or transmission facilities of the CTU. Thus any delay in construction of dedicated transmission line is attributable to the Appellant and is not covered by the Article 4.5.1(c). On the other hand, the delays in transmission facilities solely by CTU from Bilaspur (Sipat) Pooling Station is covered under Article 4.5.1(c).

7.13 The construction and commissioning of the Bilaspur (Sipat) Pooling Station which was the responsibility of CTU was indicated by CTU to be by end 2010/early 2011 by letter dated 15.07.2008. This was subsequent to the Scheduled Commercial Operation Date as per the PPA.

7.14 The Appellant vide letter dated 21.07.2008 to Respondent No. 2 sought for extension of scheduled date of commercial operation for the above delays by CTU. The extension was sought by the Appellant on the basis of the above communication of the CTU and based only on the delay in commissioning of Bilaspur (Sipat) Pooling Station.

7.15 The Respondent No. 2 vide letter dated 05.08.2008 accepted the request for extension under Article 4.5.1(c) until 25.02.2011 at that time. The Respondent No. 2 also envisaged that there may be further delay in commissioning of the Bilaspur (Sipat) Pooling Station and granted extension until 30 days from the commissioning of the Bilaspur (Sipat) Pooling Station. The above communication was only with reference to the delays in commissioning of Bilaspur (Sipat) Pooling Station by CTU in the discharge of its functions under section 38 of the Electricity Act.

7.16 The above stand that the extension was granted only till the commissioning of the Bilaspur (Sipat) Pooling Station was clearly understood and acknowledged by the Appellant also which is clear from the communication dated 14.04.2011:

“Kindly refer your letter No. GUVNL/COM/CFM(Trading)/042 dtd. 05.08.2008 wherein GUVNL has granted the extension of Commercial Operation Date for our 2 X 135 MW TPS upto 25.02.11 or in case the commissioning of Sipat Pooling station is delayed beyond that also then the COD was extended upto 30 days from the date on which Open Access/transmission facilities for evacuation of power is made available i.e. commissioning of Sipat Pooling station.

Since the commissioning of Sipat Pooling Station delayed, the provisions of the PPA shall be effective after the extended COD i.e. after commissioning of Sipat Pooling Station.”

(Emphasis Supplied)

7.17 In the said letter, the Appellant specifically relied on the delay in commissioning of Bilaspur (Sipat) Pooling Station and there was no

issue of delay in completion of the dedicated transmission line being considered as a reason for extension. The Appellant had also sought certain clarification from the Respondent No. 2 in the said letter.

7.18 The Respondent No. 2 responded to the letter dated 14.04.2011 from the Appellant on 26.04.2011. The Respondent No 2 while providing for various clarifications, inter alia, reiterated the earlier stand and stated that the liquidated damages would be applicable in case the Appellant does not commence supply of power within 30 days from the date of commissioning of the Sipat Pooling Station :

7.19 The Respondent No. 2 on 20.03.2012 inter alia reiterated that the liquidated damages would be applicable in case the Appellant does not commence the supply of contracted capacity as per the provisions of the PPA within 30 days from the commissioning of the pooling station.

7.20 The contention of the Appellant that the extension was granted by the Respondent No. 2 till the dedicated line and bays were constructed and completed is therefore misplaced and contrary to the clear understanding between the parties from the beginning and accepted and acknowledged by the Respondent No. 2. The extension was granted only if the commissioning of the Bilaspur (Sipat) Pooling Station was delayed as the said pooling station was the responsibility of the CTU and

the extension was for 30 days after the commissioning of the Bilaspur (Sipat) Pooling Station. The Appellant itself having understood and acknowledged the above, the contention of the Appellant now being raised is an afterthought once it was clear that the Appellant was not ready despite the Pooling Station being ready.

7.21 The emphasis sought by the Appellant on the term 'open access/transmission facilities being made available' used in the communication by the Respondent No. 2 does not assist the Appellant's case. At the outset, the communication of the Respondent No. 2 has to read as a whole and the facilities referred therein was the Bilaspur (Sipat) Pooling Station. In any event, the open access/transmission facilities has to be read as per Article 4.5.1(c) of the PPA which clearly refers to the facilities of the CTU. The dedicated transmission line and bays of the Appellant cannot be considered as part of the open access/transmission facilities of the CTU. The Bilaspur (Sipat) Pooling Station (transmission facilities of the CTU) was available as on 01.04.2012.

7.22 The Bilaspur (Sipat) Pooling Station was commissioned on 01.04.2012 and the same was notified on 02.04.2012 by the CTU. Further this was

stated specifically in the Reply Affidavit filed by CTU before the State Commission :

“9....

vi. POWERGRID commissioned the Sipat Pooling Station w.e.f. 01.04.2012 as part of the System Strengthening Scheme in Western Region.”

7.23 Therefore, as per the terms of the PPA and above communications between the Appellant and the Respondent No. 2, the extended Scheduled COD was 30 days from 01.04.2012 i.e. 01.05.2012.

7.24 The Letter dated 29.06.2018 of Powergrid now relied on by the Appellant for the first time in Appeal does not deal with the commissioning of the Bilaspur (Sipat) Pooling Station and does not refer to or in any manner contradict the above statement made on affidavit by it before the State Commission. The readiness of one of the ICTs in the Pooling Station would not delay the commissioning of the Pooling Station itself and it is clear that the pooling station itself had been commissioned as on 01.04.2012. This is also clear from the fact that second unit of the Appellant was commissioned on 21.06.2012 and started scheduling power i.e. much prior to the readiness of one of the ICT (01.08.2012). Therefore the commencement of supply of power by the Appellant was not delayed by any delay by CTU. Further the CTU/Powergrid had also in Letter dated 29.06.2012 clarified that the line bay could take the

present generation load. The present generation load as on 29.06.2012 was after the commissioning of both units (and therefore the power plant) of the Appellant. This makes it clear that there was no relevance to the ICT commissioned on 01.08.2012 to the commissioning of the power project of the Appellant. In view of the above, the delay until 21.06.2012 is due to the Appellant and not due to CTU.

7.25 In any case, it is submitted that since the Appellant was not ready to operationalize the open access due to non readiness of its dedicated transmission system, the delay cannot be said to be “solely attributable” to the CTU as required under Clause 4.5.1(c). When the Appellant itself had delayed the dedicated transmission line, the Appellant cannot rely on any alleged delay by CTU to claim extension. In fact, the delay in the ICT, if any, by CTU was due to the delays by the Appellant which had failed to carry out its scope of work. Further the Appellant cannot rely on its own default to claim that the open access was not operationalized. The Letters by Respondent No. 2 had specifically queried whether the delay was due to the Appellant or CTU and it is clear that the same was due to the Appellant. Even as per Appellant, the Appellant’s dedicated transmission system had not been ready on 01.05.2012 or even on 01.08.2012 and was ready only on 11.09.2012. The Appellant itself on 20.09.2012 wrote to CTU to intimate that the connectivity by the

Appellant (dedicated transmission line and bays) was ready as on 11.09.2012 and requested for Long Term Access. Even as per CTU in its letter dated 25.09.2012, the reason the long term open access was effective on 12.09.2012 was because the Appellant had completed the dedicated transmission system on 11.09.2012. Thus the Appellant itself had been in default/delay and therefore there can be no extension of time granted to the Appellant under Clause 4.5.1. In this regard, the Respondent No. 2 had communicated the same to the Appellant vide Letter dated 04.10.2012.

7.26 As submitted hereinbefore, the Appellant was required to construct the dedicated transmission line and facilities from the generating station to interconnect with the Pooling Station. The Appellant entered into an Agreement dated 18.06.2009 with Power Grid Corporation of India Limited (Powergrid) for turnkey execution of the 400 Kv bays on behalf of the Appellant i.e. part of the dedicated transmission system. The said Agreement was executed by the Powergrid as a Consultant and the works were to be undertaken by Powergrid on behalf of the Appellant. The Powergrid was to invite bids and finalise contractor as well as ensure supervision of all activities .

7.27 In terms of the above, the Agreement was between the Appellant as the Owner and Powergrid as a Consultant and the works in relation the

dedicated transmission line were undertaken by Powergrid on behalf of the Appellant and as a contractor of the Appellant. The activities of Powergrid under this agreement was not in the discharge of its statutory function as the CTU, nor were they regulated by the Central Commission including the charges that Powergrid was entitled to levy for undertaking the contract work. The agreement in this regard between Power Grid and the Appellant was like any other contract between an employer and the contractor and the same had no implication to the contract entered into and the obligations assumed by the Appellant to the Respondent No. 2.

7.28 The Agreement between Powergrid and the Appellant provided for a time schedule of 24 months from the date of agreement or release of advance whichever is later i.e. 18.06.2011. The Appellant awarded a Contract for the 2 number of 400 KV bays to M/s ABB Limited, the Respondent No. 4 on 28.05.2010.

7.29 However as on 01.05.2012, the dedicated transmission system of the Appellant was not completed and the Appellant could not commence supply of power.

7.30 The transmission line was approved for energisation by the Central Electricity Authority only on 25.06.2012. The approval for the

energisation of the 2 numbers of 400 KV line bays of the Appellant were granted by the Central Electricity Authority on 30.07.2012. Both the approvals were granted in the name of the Appellant and not in the name of the CTU. This was because the construction and commissioning of the bays was the obligation and responsibility of the Appellant, which was delayed.

7.31 Further the complete transmission system from the Appellant's generating station to the Pooling Station was commissioned only on 11.09.2012 and longterm open access was effected from 12.09.2012. This was confirmed by the CTU vide letter dated 26.09.2012:

"This is with reference to your letter Ref No. ACBIL/PGCIL/12-13/1441 dated 20.09.12 regarding the above mentioned subject. In this regard we would like to mention that since the complete transmission system from ACB TPS to WR Pooling Station at Bilaspur was commissioned on 11.09.12, Long Term Open Access is effective from 12.09.2012."

7.32 It appears that there were certain issues between the Appellant and Powergrid as a contractor and also M/s ABB as the equipment supplier. Even assuming but not admitting that there was a delay by Powergrid, the same was a delay by the consultant/contractor of the Appellant and not as CTU. Article 4.5.1 only recognizes delays by CTU and not by contractor of the Appellant. The delays in performance of any contractor or agent of the Appellant cannot be considered as justification for delay by the Appellant in its Agreement with the Respondent No. 2. This is clear from Article 12.4 of the PPA wherein delays in performance of any contractor, sub-contractor or their agents are considered as Force Majeure Exclusions. The principle that the delays or defaults of the

contractor of a party cannot be passed on to the other party has also been settled by the Hon'ble Tribunal in various cases:

a. Power Grid Corporation of India Limited v. Central Electricity Regulatory Commission and Ors dated 13.08.2015 in Appeal No. 281 of 2014:

9.3.....Thus, the delay is on account of the contractor hired by the Appellant/petitioner. We further approve the view adopted by the Central Commission that the beneficiaries cannot be saddled with cost as result of the default of the contractor.....

b. Maharashtra State Power Generating Company Limited v. Maharashtra Electricity Regulatory Commission and Ors dated 18.10.2012 in Appeal No.161 of 2011.

59. Summary of Our Findings

.....

(2) The Appellant cannot be permitted to avoid the application of the operational norms mandated by the Regulations on the ground of failure or inaction of its contractor. The deviation in operational performance parameters due to contractor's default could not be considered as uncontrollable factor for passing on the consequential cost to the consumers."

7.33 Merely because Powergrid was the contractor of the Appellant as opposed to another private party being the contractor would not mean that any delays in execution of the contract would become a delay attributable to CTU. Powergrid in regard to the dedicated transmission line is to be treated as any other Contractor/Consultant of the Appellant i.e. to be considered as extraneous to the contract between the Appellant and the Respondent No. 2.

7.34 As per Article 4.5.1, the Appellant had to produce a certificate authenticating that the delay in provision of open access or transmission facilities *solely due to the CTU*. Upon the commissioning of the Bilaspur (Sipat) Pooling Station on 01.04.2012, the Respondent No. 2 had repeatedly vide Letters dated 12.04.2012, 02.06.2012 and 15.06.2012 sought confirmation whether the delay was on account of CTU or on account of Appellant. As against which the CTU has stated that the Long Term Open Access was effected from 12.09.2012 since the dedicated transmission system of the Appellant was commissioned on 11.09.2012. Thus there was no certificate from the CTU that the delay was due to the CTU and in fact the letter from CTU confirmed that the delay was due to the delay in the Appellant's line and bays. In fact CTU before the State Commission had filed a reply stating that the Bilaspur (Sipat) Pooling Station was commissioned on 01.04.2012. Even in the Letter dated 29.06.2018 now relied on by the Appellant, there is no such certification and in any case does not controvert the fact that the Bilaspur (Sipat) Pooling Station was commissioned on 01.04.2012. The Letter also does not state that the delay was solely due to CTU.

7.35 The pooling station of CTU had been commissioned on 01.04.2012. Thereafter until September 2012, there was delay in the completion and commissioning of the dedicated transmission line and the bays to be constructed at the Bilaspur (Sipat) pooling station for interconnection of the line of the Appellant with the Sipat pooling station of CTU. Both the dedicated transmission line and the construction of the bays was the sole responsibility of the Appellant. Powergrid in regard to the said dedicated line and bays, was only acting as the contractor/consultant of the Appellant and not as the CTU. The above is clear from the Agreement (quoted above) of the Appellant with Powergrid itself wherein

the Appellant is the **Owner** and Powergrid is the **Consultant** and undertaking the action on behalf of the Owner. It is for this reason that the Appellant also did not obtain the certificate required under Article 4.5.1 proviso which specifies that in case the delay in open access requires extension of time, the certificate to the effect that the delay is solely attributable to the CTU is required.

7.36 In the facts and circumstances mentioned above, the Appellant was not entitled to any extension of Scheduled Commercial Operation Date under Article 4.5.1 beyond 01.05.2012 i.e. 30 days after the commissioning of the Bilaspur (Sipat) Pooling Station.

Re: Contention of the Appellant that the Bilaspur (Sipat) Pooling Station was not ready as on 01.04.2012 based on Additional Documents produced for the first time in Appeal

a) At the outset it is submitted that the contentions sought to be raised by the Appellant by way of an Application for additional documents cannot be considered at this appellate stage as the issue has been raised for the first time in Appeal and the additional documents have been produced for the first time in Appeal

7.37 The Appellant has for the first time in Appeal raised an issue that the Bilaspur (Sipat) Pooling Station of the CTU was not ready. The contention was not raised before the State Commission. Such a contention therefore cannot be allowed to be raised for the first time in Appellate proceedings. The Appellant was required to take all grounds in the original petition and cannot be permitted to raise new grounds for the first time at the Appellate stage.

7.38 It is a well settled principle that new grounds and new material/facts cannot be introduced for the first time in appeal proceedings, when these grounds and facts were not originally raised in the original Petition. In this regard the Answering Respondent crave leave to refer to the following decisions:

a. State of Maharashtra V. Hindustan Construction Company Limited (2010) 4 SCC 518

b. M.P. Shreevastava vs. Mrs. Veena (24.08.1966 - SC) : AIR 1967 SC 1193

c. Karpagathachi and Ors. vs. Nagarathinathachi (10.03.1965 - SC) : AIR 1965 SC 1752

7.39 The Application filed by the Appellant is contrary to the principles of Order XLI Rule 27 of Code of Civil Procedure. The Appellant is further seeking to produce additional evidence, which was not present before the State Commission. The Appellant has claimed that it has now been able to obtain new documents. It is stated that the above statement of the Appellant is incorrect and contrary to the record. The Additional Evidence sought to be furnished by the Appellant relate to the period of 2012. The Letter sought to be furnished is in response to the Letter written by the Appellant on 06.06.2018. Apparently the Appellant had requested a clarification after downloading information as to the date of commissioning. Therefore it is clear that such information could have

been sought from Powergrid during the proceedings before the State Commission. Since the information was sought only on 06.06.2018, the same was given on 29.06.2018. This does not mean that the information was available to the Appellant only on 29.06.2018. The Appellant had not shown due diligence in downloading the information prior to filing of the Petition before the State Commission or during the pendency of the proceeding or even at the time of filing of the appeal.

7.40 The sub-Rule (1)(aa) of Rule 27 of Order XLI of CPC requires the party to establish that the evidence was not within his knowledge or could not be produced at the time of passing of the Order by the State Commission notwithstanding exercise of due diligence. The Appellant has not produced any evidence to show that it had exercised any due diligence to obtain the information. In fact Powergrid was a party before the State Commission and had filed a Reply before the State Commission stating that the Bilaspur (Sipat) Pooling Station was ready on 01.04.2012. The Appellant could have sought directions to seek any further information or clarification but the Appellant chose not to. If the Appellant had exercised due diligence, it would have received the information earlier and could have filed the same before the State Commission. The Appellant has not even alleged that the information

could not have been known with exercise of due diligence at the time of passing of the order by the State Commission.

7.41 It was not the stand of the Appellant that the Bilaspur (Sipat) Pooling Station of Powergrid was not ready but that the open access could not be operationalized due to the non readiness of dedicated transmission line of the Appellant which the Appellant alleged was due to Powergrid. The claim of the Appellant was with regard to operationalization of the open access only on 12.09.2012 even though the same was due to the delay in dedicated transmission line. This is also clear from the Impugned Order wherein the State Commission has held that the construction of the dedicated transmission line to the Bilaspur (Sipat) Pooling Station was the responsibility of the Appellant and the delay in this regard is not a ground for extension of time. No issue regarding the readiness of the Bilaspur (Sipat) Pooling Station or otherwise of Powergrid as a transmission licensee was considered in the Impugned Order. This was because the Appellant had not raised this issue either in the correspondence with the Respondent No. 2 or in its Petition or any other pleading before the State Commission.

7.42 The Appellant cannot now seek to take a new stand without any pleadings to the said effect. It is well settled principle that no evidence can be led on an issue without pleadings to that effect. Reference may

be made to the decision of the Hon'ble Supreme Court in Union of India v. Ibrahim Uddin and Another (2012) 8 SCC 148.

7.43 There is no pleading or otherwise any submission that Powergrid as a transmission licensee was not ready or that the Bilaspur (Sipat) Pooling Station was not ready. Without prejudice to the above submission that the issues raised by the Appellant cannot be considered at this stage, it is submitted that there is no merit in the averments sought to be made by the Appellant.

7.44 The Respondent No. 2 had considered the request of the Appellant for extension of time only with regard to the delay in the commissioning of Bilaspur (Sipat) Pooling Station. The correspondences and communications between the Appellant and the Respondent No. 2 indicate that the extension was only for commissioning of Bilaspur (Sipat) Pooling Station (as quoted above). The Bilaspur (Sipat) Pooling Station was commissioned on 01.04.2012. This was duly acknowledged in the Letter dated 02.04.2012 by Powergrid. Further this was stated in the Reply Affidavit by Powergrid before the State Commission:

“9.....
vi. *POWERGRID commissioned the Sipat Pooling Station w.e.f. 01.04.2012 as part of the System Strengthening Scheme in Western Region.*”

7.45 The letter now relied on by the Appellant does not relate to the commissioning of the Bilaspur (Sipat) Pooling Station as such and in any case cannot contradict the Reply Affidavit filed before the State Commission. The readiness of one of the ICT in the Pooling Station does not delay the commissioning of the Pooling Station itself. Further the Appellant had sought for details of commissioning of transmission lines and not the Bilaspur (Sipat) Pooling Station and therefore it is clear that the letter of Powergrid now sought to be relied on by the Appellant does not deal with the Pooling Station.

7.46 In view of the above, the fact that the Bilaspur (Sipat) Pooling Station was commissioned on 01.04.2012 has not been controverted and therefore there is no merit in the contention of the Appellant.

Re: Liability of the Appellant to pay Liquidated Damages

7.47 In terms of Article 4.6 of the PPA, in case the Appellant does not achieve the Commercial Operation Date within the specified time, the Appellant is liable for liquidated damages to the Respondent No. 2 as provided in the said Article .

7.48 The exception for payment of liquidated damages is that if there was extension of time under Article 4.5.1. As submitted hereinabove, the Appellant was not entitled to any further extension of time after

01.05.2012. Therefore, the Appellant is liable for liquidated damages for the delay in the commissioning of generating station beyond such date. The same was accordingly levied and recovered by the Respondent No. 2.

7.49 The Appellant is unnecessarily confusing Article 4.6.1 and 4.6.5. Article 4.6.5 relates to delay in commissioning beyond the Revised Scheduled Commercial Operation Date. The Revised Scheduled Commercial Operation Date is a defined term (**Article 1.1 Definitions read with Article 3.1.2 viii**). The Revised Scheduled Commercial Operation Date is the preponed Scheduled Commercial Operation Date i.e a date prior to the original Scheduled Commercial Operation Date sought by the Appellant. The present case deals with extended Scheduled Commercial Operation date and there is no pre-ponement of the Scheduled Commercial Operation Date resulting in the Revised Scheduled Commercial Operation Date. Since there was no Revised Scheduled Commercial Operation Date, Article 4.6.5 has no applicability. The Appellant is liable for liquidated damages under Article 4.6.1.

Re: Proof of Actual Damages

7.50 The contention now raised by the Appellant is that the liquidated damages cannot be levied unless the Respondent No. 2 can provide actual damages due to the breach of contract, which is misconceived.

The PPA provides for payment of liquidated damages in cases of delays in commissioning of the generating station and supply of electricity in terms of the PPA. The very purpose of liquidated damages is that the parties pre-estimate the loss suffered by the innocent party in case of breach of the contract. The concept of liquidated damages is to in fact avoid litigation.

7.51 The Liquidated Damages fixed by agreement between the parties in the case of a power Purchase Agreement is sacrosanct and it cannot be treated as not enforceable, particularly, in the context of the foundation of a contractual relationship that the parties are free to agree on the terms and conditions and adequacy of consideration is never an issue.

7.52 The amount of liquidated damages have been provided in the PPA as per the decision of the Central Government given in the Statutory Guidelines issued under Section 63 of the Electricity Act, 2003 and is uniformly applicable to all Tariff based competitive bids in India. This is not a stipulation by way of penalty but a genuine and accurate pre-estimate of the actual loss. The same was considered to be proper compensation for the delay in a regulatory environment and considering the purchase of power by the Procurer is for maintaining supply of electricity to the consumers at large. The bidders duly accepted the above term and submitted their bids, including the Appellant.

- 7.53** In this regard, the PPA as executed between the Appellant and the Respondent No. 2 specifically recognizes that the liquidated damages is a genuine and accurate pre-estimate of the loss.
- 7.54** In the context of the above, the parties in the PPA have not only agreed to the Liquidated Damages payable but have also re-affirmed that the amount fixed is agreed to between the parties as genuine and accurate pre-estimate of the actual loss that will be suffered by the non-defaulting party. The liquidated sum payable is duly fixed as the genuine pre-estimate of the actual loss which the parties agree to be taken to obviate the necessity to establish by evidence or prove actual loss.
- 7.55** Further the damages are being claimed in the present case by a public utility under a regulatory regime and in the interests of consumers at large. The provision of such liquidated damages is a necessity in the case of regulated industry such as the power sector. Further, the stipulation by way of Liquidated Damages with a provision such as Article 4.6.4 has been adopted in a regulatory framework considering the fact that it is difficult to prove the actual level of damage there has to be a certainty for both the parties on the quantum of damages.
- 7.56** It is also relevant that the PPA provisions are conscious of situations where the Liquidated Damages are payable and where the actual losses

are to be compensated. While, Articles 4.6.1, 4.6.4 and 4.7.1 speaks about the fixed sum payable but Article 4.6.5 provides for the actual reimbursement of the charges payable i.e. to CTU or STU. This also indicates that both the Central Government as well as the parties by mutual agreement have decided that there is not a requirement for determination of actual loss in the case of delayed commissioning of the units for breach of the generator. In Agreements such as the PPA the Liquidated damages is provided to avoid any uncertainty as well as recognising the fact that these aspects are difficult to ascertain for actual damages.

7.57 It is well settled principle of the construction of contract that the interpretation of the terms of the contract is to be based on the intention of the parties to be gathered objectively, as was at the time of the contract and not from what either parties may say after the dispute has arisen. Tested in terms of the above principle, it cannot possibly be stated that Appellant and the Respondent No. 2 intended at the time of entering into the contract that actual loss should be established and the amount provided in Article 4.6.1 of the PPA is to be treated as a ceiling amount only. If the intention of the parties was to provide the amount as a ceiling and that there was a need to prove the actual loss, the provision in the PPA would not be a Liquidated Damage clause. This is

also clear from Article 4.6.4 and 18.13 which recognizes that the amount in Article 4.6.1 is a pre-estimate of the damages.

7.58 As per settled law, a stipulation of Liquidated Damages could either be a genuine pre-estimate of damages or byway of penalty depending on the nature of the provision. If it is a genuine pre-estimate of damages, there is no requirement to prove damage or loss. If it is a penalty, there is a requirement to establish loss for getting a reasonable compensation.

7.59 This Tribunal has already examined the issue of the liability to pay liquidated damages in the context of power purchase agreements. The Hon'ble Tribunal has considered the difficulty in calculating the actual loss and held that since the compensation payable has been pre-estimated and is not penal in nature, there is no need to provide evidence that actual loss incurred.

a. PTC India Limited v Gujarat Electricity Regulatory Commission and Anr 2014 ELR (APTEL) 1243 (Paras 43-53):

b. Lanco Kondapalli Power Limited v Andhra Pradesh Electricity Regulatory Commission 2015 ELR (APTEL) 755):

7.60 The Hon'ble High Court of Delhi has also recognized that liquidated damages as specified in the PPA should be awarded. In Dalmia Solar Power Ltd. –v- NTPC Vidyut Vyapar Nigam Ltd vide Order dated

14.03.2017 in OMP (COMM) 120/2017 has held that the Liquidated Damages provided in the Agreement are payable unless the Court finds the specified compensation amount as liquidated damages in the Agreement to be unreasonable. The decision dated 14.03.2017 passed by the Hon'ble High Court of Delhi arises out of the proceedings initiated under Section 34 of the Arbitration and Conciliation Act, 1996 challenging an award. In that case, it was argued that it was incumbent on the Court to determine what was reasonable compensation. However the Hon'ble High Court held that the Petitioner therein did not adduce any evidence to show that the amount was unreasonable. The Hon'ble High Court held that the burden of proof is on the person committing the breach to show that no loss was suffered by the other party or that the amount specified was not reasonable.

7.61 In Bharat Sanchar Nigam Ltd. v. Reliance Communication Ltd. (2011) 1 SCC 394 dealing with the regulated industry, the Hon'ble Supreme Court held as under:

“53. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorise as penalties the clauses described as liquidated damages. This principle is relevant to regulatory regimes. It is important to bear in mind that while categorising damages as “penal” or “liquidated damages”, one must keep in mind the concept of pricing of these contracts and the level playing field provided to the operators because it is on costing and pricing that the loss to BSNL is measured and, therefore, all calls during the relevant period have to be seen. (See Communications Law in India by Vikram Raghavan at p. 639.) Since Clause 6.4.6

represents pre-estimate of reasonable compensation, Section 74 of the Contract Act is not violated. Thus, it is not necessary to discuss various judgments of this Court under Section 74 of the Contract Act.”

In the above judgment, the Hon’ble Supreme Court held that liquidated damages ought not to be interfered with particularly in regulatory regime.

7.62 In ONGC –v- Saw Pipe Limited (2003) 5 SCC 705, the Hon’ble Supreme Court has held that if the compensation named is a genuine pre-estimate of loss, then there is no question of providing the loss:

7.63 The contention of the Appellant interpreting the judgment of the Hon’ble Supreme Court in Kailash Nath Associates v. Delhi Development Authority (2015) 4 SCC 136 is misconceived. The Hon’ble Supreme Court had considered the earlier decisions of the Hon’ble Court and held as under:

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

*43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages **fixed by both parties and found to be such by the Court. In other cases**, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so*

stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

7.64 In Construction and Design Services v Delhi Development

Authority, AIR 2015 SC 1282 (decided subsequent to Kailash Nath Case), the Hon'ble Supreme Court again considered the issue of Liquidated Damages, proof required etc. in the light of the earlier decision of the Hon'ble Supreme Court in Oil and Natural Gas Corporation Ltd v Saw Pipes (2003) 5 SCC 705.

7.65 The decision in Construction Design case, therefore, reiterates the principle that if the sum is named as liquidated damages then it is payable and the burden for showing that there has been no loss or injury is on the Appellant.

7.66 The Hon'ble High Court of Bombay in Ultratech Cement Ltd v. Sunfield Resources Pty Ltd Judgment dated 21.12.2016 in Appeal 881 of 2005 (2016 SCC Online Bom 10023), has considered sequence of judgments of the Hon'ble Courts, including the decision of the Hon'ble Supreme Court Kailashnath (Supra).

7.67 In view of the above, the settled law is that if the sum named as liquidated damages is not by way of penalty but is genuine pre-estimate

of the loss that will be suffered, then there is no necessity to enquire into actual loss and the agreement reached between the parties stipulating the sum is binding and is payable. The agreement between the parties estimating the damage would itself be evidence. In other words, no actual loss or damages need to be established. Unless the Liquidated Damages provision results in payment of an exorbitant and unconscionable amount, the same cannot be treated a terrorem or a penalty, particularly, in the context of the parties being free to agree to the terms and conditions of the contract and adequacy of consideration not being a relevant issue.

7.68 Even as per the Appellant, the Respondent No. 2 would be entitled to liquidated amount if it is a genuine pre-estimate of the damages. As submitted herein above, the liquidated damages are a genuine pre-estimate of damages which has been admitted by the Appellant itself in Articles 4.6.4 and 18.13 the PPA. The Appellant cannot now claim that the liquidated damages is not reasonable or genuine pre-estimate or that the Respondent No. 2 is required to prove any loss. It is a well-settled principle of law that terms and conditions of the PPA are binding and it is not open to a party to subsequently wriggle out of the terms of the PPA because it is not convenient to do so. In view of the above, it is

submitted that there is no merit in the Appeal and the Appeal is liable to be dismissed.

8. Additional Submissions filed by Respondent No.2:-

8.1 It was the responsibility of the Appellant to get a proper certificate from the CTU as per the requirements of Article 4.5.1 and therefore in case the Appellant is unable to obtain such clear authentication from CTU, the Appellant cannot claim any extension on this account. Article 4.5.1 inter alia reads as under:

*“The Scheduled Commercial Operations Date, the Scheduled Connection Date and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.5.3, for a reasonable period but not less than ‘day to day’ basis, to permit the Seller through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Seller or in the case of the Procurer’s Event of Default, till such time such default is rectified by the Procurer **provided that in case of sub-article (c) of Article 4.5.1, the Seller shall have to produce a certificate from CTU authenticating such delay in provision of open access or transmission facilities.**”*

8.2 The CTU in its Reply before the State Commission while placing the relevant facts had specifically stated that the Sipat Pooling Station was commissioned with effect from 01.04.2012 and had not referred to the third ICT. Therefore as far as CTU was concerned, the third ICT was not relevant for the commissioning of the Appellant’s power project.

- 8.3** The Letter dated 29.06.2018 by the CTU is in response to the query of the Appellant as to the commissioning dates of specific elements without any reference to their relevance to the Appellant's generating station and not related to commissioning of Bilaspur (Sipat) Pooling Station which was the relevant factor for extension of time as per the letters written by Respondent No. 2.
- 8.4** The contention of the Appellant that the Reply Affidavit filed by the CTU before the State Commission is clarified by the Letter dated 29.06.2018 is untenable. There cannot be a clarification of a Reply on affidavit by way of a Letter. The letter also does not refer to the Reply Affidavit filed by it. The Appellant cannot seek to contend that the CTU has contradicted a specific statement made on affidavit by reference to a letter. This is particularly when the Letter does not address the issue of commissioning of the Bilaspur (Sipat) Pooling Station. The Appellant in its Letter dated 06.06.2018 had not sought for such information. The Appellant had only sought for commissioning dates for various elements which has been confirmed by the CTU.
- 8.5** The fact that the third ICT is not relevant to the commissioning of the Appellant's generating station is clear from the fact that second unit of the Appellant was commissioned on 21.06.2012 and started scheduling power i.e. much prior to the readiness of the ICT which has been

claimed to be 01.08.2012. Therefore the commencement of supply of power by the Appellant was not delayed by any delay by CTU.

8.6 Further the CTU/Powergrid had also in Letter dated 29.06.2012 clarified that the line bay could take the present generation load (Page 300 Vol II). The present generation load as on 29.06.2012 was after the commissioning of both units (and therefore the power plant) of the Appellant. The Appellant has now in Para 15 of the Additional Submissions, sought to claim that the stand of CTU/Powergrid was not technically feasible and has sought to give explanations which had not been placed on record before.

8.7 It is submitted that the Letter dated 29.06.2012 was produced by the Appellant but the Appellant has failed to produce any letter or email by the Appellant to CTU/Powergrid in response claiming that the stand of CTU/Powergrid is untenable. The contention of the Appellant is therefore clearly an afterthought and is de hors the record. The Appellant cannot be permitted to raise unsubstantiated pleas for the first time by way of Additional Written Submissions.

8.8 With regard to the contention that the Powergrid did not demand the transmission charges from the Appellant from the period 01.04.2012 till 11.09.2012, it is submitted as under:

- a. It is the CTU/Powergrid which has confirmed that the Bilaspur (Sipat) Pooling Station was ready on 01.04.2012.
- b. Powergrid had an independent consultancy contract with the Appellant in regard to the dedicated transmission system to be constructed by the Appellant to reach the Bilaspur (Sipat) Pooling Station.
- c. There may be issues between Powergrid and the Appellant on the transmission charges payable to Powergrid during the pendency of completion of the dedicated transmission line. The Respondent is not concerned with the same. The obligation of the Appellant to supply power to the Respondent No. 2 commenced on 01.05.2012 i.e. 30 days from 01.04.2012 as mentioned in the communications between the parties.
- d. The above is also fortified by the fact that pending the completion of the dedicated transmission line, the Appellant sought a LILO connectivity from the generating station to another transmission line and commenced supply of electricity to the Respondent No. 2 on 21.06.2012, without raising any issue at the relevant time on the commissioning of the Bilaspur (Sipat) Pooling Station on 01.04.2012.
- e. The contemporaneous stand taken by the Appellant was not that the Bilaspur (Sipat) Pooling Station was not commissioned on 01.04.2012 but the case was that the dedicated transmission line was not ready.
- f. The challenge to the Bilaspur (Sipat) Pooling Station not being ready is an afterthought and has been raised for the first time in

the Application being I.A. No. I.A. No. 871 of 2018 filed on 10.07.2018.

8.9 With regard to the loss to Respondent No. 2, it is submitted that there has been a delay in commissioning of the power project from 01.05.2012 to 21.06.2012 and consequently there has been a non supply of power. This is a legal injury caused to the Respondent No. 2 and for such delays and loss, the Respondent No. 2 is entitled to liquidated damages which has been provided in the PPA and recognized to be a genuine and reasonable pre-estimate. There is no need for the Respondent No. 2 to provide any actual loss. In this regard, the Respondent No. 2 has made detailed submissions in the Written Submissions.

8.10 The Respondent No. 2 had also relied on the decision of Hon'ble High Court of Bombay in Ultratech Cement Ltd v. Sunfield Resources Pty Ltd Judgment dated 21.12.2016 in Appeal 881 of 2005 (2016 SCC Online Bom 10023) which had inter alia considered the decision in Kailash Nath (Supra) and held that once the liquidated damages are genuine pre-estimates, there is no need to prove any actual loss. The Respondent No. 2 had also referred to various decisions which have not been considered or responded to by the Appellant.

8.11 The Appellant is misconstruing the import of the decision of the Hon'ble Tribunal in Lanco Kondapalli Power Limited v Andhra Pradesh Electricity Regulatory Commission 2015 ELR (APTEL) 755). The Hon'ble Tribunal therein was dealing with the issue of liquidated damages for non supply of electricity which is similar to the present case wherein the Appellant delayed the commissioning of the Unit 2 thereby causing non supply of electricity to the Respondent No. 2. The Hon'ble Tribunal had specifically held that the pre-calculated liquidated damages had been provided in the PPA in view of the difficulties in calculating the actual damages suffered by a party due to non supply of electricity by the other party. The Appellant cannot now contend that there can be no difficulty for ascertaining damages in the present case of non supply of power by the Appellant to the Respondent No. 2. Further the Appellate Tribunal had specifically held in the case of Lanco, that *"there is no need to explain the actual damage caused since a pre-estimated damage has been arrived by both the parties in the PPA"*.

8.12 Further the Hon'ble Tribunal in PTC India Limited v Gujarat Electricity Regulatory Commission and Anr 2014 ELR (APTEL) 1243 involving the Respondent No. 2 had held that there was no need for Respondent No. 2 to provide evidence for actual loss incurred as a result of breach of contract by PTC.

8.13 Similarly in Bharat Sanchar Nigam Ltd. v. Reliance Communication Ltd.

(2011) 1 SCC 394 the Hon'ble Supreme Court had considered the principle of liquidated damages being a reasonable pre-estimate as relevant to regulatory regimes. It was specifically noted that the liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty (Para 53).

8.14 With regard to Additional Submissions, the Appellant has raised external issues which have no relevance to the present Petition. The contention that the Appellant would have taken 7 months from commissioning of Bilaspur (Sipat) Pooling Station is clearly contrary to the extension granted by the Respondent No. 2 and accepted by the Appellant i.e. 30 days from commissioning of Pooling Station. The issue of infirm power is not related to Liquidated damages at all. The infirm power would have been injected irrespective of when the generating station would have been commissioned. The Appellant is raising unnecessary issue in an attempt to hide its own delays and avoid payment of liquidated damages.

9. We have heard learned Counsel appearing for the Appellant and the learned Counsel appearing for the Respondents at considerable length of time and gone through the written submissions carefully

and after thorough critical evaluation of the relevant material available on records, the main two issues that arise for our consideration are as follows:

Issue No.1: Whether in the facts and circumstances of the case, the State Commission failed to appreciate that the delay caused in operationalisation of the LTA is attributable to PGCIL and not the Appellant ?

Issue No.2: Whether the State Commission has erroneously upheld the recovery of liquidated damages by Respondent No.2/ GUVNL without enquiring conclusively into the actual loss or damages suffered by GUVNL during alleged delay period of 52 days?

Our Consideration & Analysis:-

9. Issue No.1:-

9.1 Learned counsel, Mr. Matrugupta Misra, appearing for the Appellant submitted that initially they executed a 'Turnkey Agreement' dated 18.06.2009 with PGCIL which included design, procurement, erection, and commissioning etc, of 2 Nos. 400 kv extension bays at WR Pooling Point at Sipat, Bilaspur. However, subsequently at the behest of PGCIL, the contract was awarded to ABB to undertake that scope of work retaining PGCIL as Consultant for supervisory role. Learned counsel contended that in view of the anticipated delay in

commissioning of the Sipat Pooling Station and in turn delay in operationalization of LTA, the Respondent/GUVNL vide its letter dated 05.08.2008 granted an extension for COD of the TPS upto 30 days from the date on which the open access/ transmission facilities for evacuation of power was made available to the Appellant. Learned counsel vehemently submitted that the bare perusal of the aforesaid letter would suffice that GUVNL under its wisdom rightly stated that the computation of 30 days would start from the date on which the open access/transmission facilities for evacuation of power from the Appellant's TPS to GUVNL's delivery point is made available and hence, the liability of the Appellant could only be triggered on the availability of the open access which has nothing to do with the commissioning of Sipat Pooling Station. Accordingly, the whole controversy in hand is whether the open access was not made available to the Appellant due to default on the part of PGCIL or not? He was quick to point out that through various letters issued from time to time by GUVNL to the Appellant to obtain a written communication from PGCIL regarding any work pending on their part to make open access operational and confirmation of the date of commencement of LTA, no any response in this regard was received from PGCIL despite even direct communication from GUVNL to PGCIL.

9.2 It was further agreed by GUVNL vide its series of letters that upon obtaining the communication from PGCIL by the Appellant, no liquidated damages shall be imposed. He further contended that PGCIL not being privy to the PPA may choose not to respond to the communications made by GUVNL / Appellant from time to time and such failure on the part of PGCIL cannot translate into liability on the part of the Appellant. Learned counsel for the Appellant submitted that -

“PGCIL vide letter dated 02.04.2012 declared that the following elements under WRSS-X had been put to regular operation under WR, which would be under commercial operation w.e.f. 01.04.2012:

- *765/ 400 KV Bilaspur pooling station (near Sipat) along with LILO of Sipat-Seoni Ckt-I with 3x80 MVAR Switchable line reactor 3x80 MVAR bus reactor;*
- *765/ 400 KV, 1500 MVA ICT-I & II”.*

Subsequent to the declaration of PGCIL for commercial operation of the above elements at Bilaspur Pooling Station w.e.f. 01.04.2012, GUVNL requested PGCIL to confirm as to whether LTA granted to the Appellant has become effective from 01.04.2012 or not and in case the same was not effective, it may be clarified as to the delay in effecting the LTA was due to PGCIL or on account of Appellant's default in laying 400 KV D/c transmission line from its power project to the Sipat Pooling Station. Learned counsel further contended that though most of the elements at Sipat pooling station were commissioned on 01.04.2012 but the Appellant was not provided with the LTA which became operational only

from 12.09.2012 as confirmed by PGCIL vide letter dated 25.09.2012.

Learned counsel also referred to the BPTA executed between the Appellant and PGCIL dated 03.04.2009 whereby the Appellant was entitled to receive LTA upon fulfilment of the following :-

- i. commissioning of a 400 kV dedicated transmission line between the generating plant of the Appellant till WR Pooling station near Sipat; and
- ii. establishment of 400/ 765 kV, 3x1500 MVA WR Pooling Station near Sipat and LILO of 765 kV Sipat – Sconi 2x S/c at WR Pooling Station.

He further submitted that PGCIL declared commissioning of certain assets with effect from 01.04.2012 but no any transmission charges were levied on the Appellant due to fact that its LTA was not operationalised since that date. This was mainly on account of the fact that the pooling station was not commissioned in its entirety on 01.04.2012 which was a technical requirement for LTA as also envisaged in the BPTA dated 03.04.2009. PGCIL vide its letter dated 29.06.2018 has clarified the entire scenario by referring to the BPTA in the manner mentioned above which thus reads as under:-

“Subsequently, the 765/400 Kv, 2x1500 MVA Bilaspur Pooling Station along with LILO of Sipat- Seoni 765 kV 2xS/c lines at Bilaspur Pooling Station was commissioned on 01.04.2012 and 3rd 765/400 kV, 1x1500 MVA ICT at Bilaspur Pooling Station, was commissioned on 01.08.2012. However, since the

dedicated line (mentioned at (i) above was commissioned on 11.09.2012, the LTOA was made effective on 12.09.2012.”

It would thus appear that the Sipat Pooling Station could be commissioned only on 01.08.2012 and became ready for LTA operation since then. Learned counsel further submitted that though the transmission lines connecting its TPS to Bilaspur Pooling station were completed in time, the connecting bays got delayed for non-supply/erection of dead end tower by CTU/ PGCIL and as such the consequential delay in operationalisation of LTA on this account too, was caused due to PGCIL and not the Appellant. Therefore, he submitted that the order impugned passed by the State Commission is liable to be set aside and the matter be remanded back for fresh re-consideration in accordance with law.

9.3 *Per contra*, Mr. C.K. Rai, learned counsel for Respondent Commission submitted that while referring to various correspondences between the parties, it is evident that though the Sipat Pooling Station got completed on 01.04.2012 (excepting some elements) but the dedicated line and line bays got commissioned only on 11.09.2012. Accordingly, LTA become operational w.e.f. 12.09.2012 as confirmed by CTU. It is not in dispute that line bays were delayed due to various factors including

change of agencies, non-supply of critical dead end towers (T2D) but as per the PPA the responsibility for completion of dedicated line and line bays rested with the Appellant. He further submitted that the agreement between the Appellant and PGCIL/ABB for construction of line and bays are different and distinct from the PPA executed between the Appellant and GUVNL which provides for execution of the project and supply of power as per agreed time schedule. Admittedly, PGCIL declared COD of certain assets at Bilaspur Pooling Station along with LILO of Sipat-Seoni Circuit I as on 1.04.2012 but did not make LTA effective from such date. PGCIL vide its letter dated 25.09.2012 addressed to the Appellant conveyed regarding the commissioning of the complete transmission system from the Appellant's plant to WR Pooling Station at Bilaspur on 11.09.2012 and declared that the long term open access is made effective from 12.09.2012.

- 9.4** Learned counsel further contended that from the aforesaid facts, it became clear that delay in supply of power by the Appellant up to contracted capacity with the Respondent from 1.05.2012 to 12.09.2012 is attributable to the Appellant as the said dedicated lines and bays were

delayed on account of the Appellant and LTA was granted immediately after the completion of entire transmission system. It thus emerges that delay in operationalisation of LTA was due to the delay in activities of the Appellant and not the PGCIL/CTU.

9.5 Learned counsel, Mr. M.G. Ramachandran, appearing for Respondent No.2/GUVNL submitted that as per the PPA, the Appellant was entitled to the extension of COD for delay in provision of open access and transmission facilities for reasons solely attributable to the Central Transmission Utility. He contended that it was the sole responsibility of the Appellant to construct and commission the dedicated transmission system from its generating station to the Pooling Station of CTU along with associated 400 KV line bays (2 nos.) at the Pooling Station. Learned counsel clarified that the reference transmission system was a dedicated transmission system which is not part of ISTS of the CTU. Thus, any delay in the reference transmission lines and bays is attributable to the Appellant alone. Learned counsel further submitted that the letter of GUVNL dated 05.08.2008 as being referred by the Appellant clearly provided the extension of COD only till the commissioning of Bilaspur Sipat Pooling Station which was duly

acknowledged by the Appellant vide letter dated 14.04.2011. The aforesaid letter reads as under:-

“Kindly refer your letter No. GUVNL/COM/CFM(Trading)/042 dtd. 05.08.2008 wherein GUVNL has granted the extension of Commercial Operation Date for our 2 X 135 MW TPS upto 25.02.11 or in case the commissioning of Sipat Pooling station is delayed beyond that also then the COD was extended upto 30 days from the date on which Open Access/transmission facilities for evacuation of power is made available i.e. commissioning of Sipat Pooling station.

Since the commissioning of Sipat Pooling Station delayed, the provisions of the PPA shall be effective after the extended COD i.e. after commissioning of Sipat Pooling Station.”

(Emphasis Supplied)

- 9.6** Learned counsel for Respondent NO.2/GUVNL vehemently submitted that the contention of the Appellant presuming extension of COD granted by GUVNL was till the commissioning of dedicated line and line bays is entirely misplaced and contrary to the clear understanding between the parties from the beginning. He contended that Sipat Pooling Station was commissioned on 01.04.2012 as notified by PGCIL (CTU) and hence as per above letter of GUVNL, the extended COD would work out to 30 days from 01.04.2012 i.e. 01.05.2012. Learned counsel further submitted that the letter dated 29.06.2018 of Powergrid now relied on by the Appellant for the first time in the Appeal does not deal with the commissioning of the Bilaspur (Sipat) Pooling Station and does not refer to or in any manner contradict the statement made on affidavit by it before the State Commission. The non-readiness

of one of the ICTs in the Pooling Station would not delay the commissioning of the Pooling Station and it is clear that the pooling station itself had been commissioned on 01.04.2012. This is also clear from the fact that second unit of the Appellant was commissioned on 21.06.2012 and started scheduling power i.e. much prior to the readiness of one of the ICT (01.08.2012). Therefore the commencement of supply of power by the Appellant was not delayed due to any delay by CTU.

- 9.7** Learned counsel advancing his submissions further submitted that the operationalisation of LTA up to 11.09.2012 was not done only due to the fact that the lines and bays of the Appellant were not ready which got completed in all respects only on 11.09.2012 and since 12.09.2012 the LTA was operationalised by the CTU. Learned counsel also pointed out that the Appellant being responsible solely for completion of dedicated lines and bays cannot claim any compensation in terms of time extension etc. due to delay on the part of their contractor /sub-contractor whether the same was PGCIL or ABB. Learned counsel referred Article 12.4 of PPA wherein delays in performance of any contractor/sub-contractor of other agencies are considered as Force Majeure Exclusions. To substantiate his submissions, learned counsel relied on various judgments of this Tribunal as follows:-

a. Power Grid Corporation of India Limited v. Central Electricity Regulatory Commission and Ors dated 13.08.2015 in Appeal No. 281 of 2014:

9.3.....Thus, the delay is on account of the contractor hired by the Appellant/petitioner. We further approve the view adopted by the Central Commission that the beneficiaries cannot be saddled with cost as result of the default of the contractor.....

b. Maharashtra State Power Generating Company Limited v. Maharashtra Electricity Regulatory Commission and Ors dated 18.10.2012 in Appeal No.161 of 2011.

59. Summary of Our Findings

.....

(2) The Appellant cannot be permitted to avoid the application of the operational norms mandated by the Regulations on the ground of failure or inaction of its contractor. The deviation in operational performance parameters due to contractor's default could not be considered as uncontrollable factor for passing on the consequential cost to the consumers."

In view of the above facts, learned counsel for the second Respondent reiterated that delay in operationalisation of LTA cannot be attributed to the PGCIL/CTU instead, the Appellant himself has delayed the inter-connecting transmission facilities required for the same. Therefore, he submitted that the order impugned has been rightly passed by the State Commission, interference of this Tribunal does not call for.

Our Findings:-

9.8 Having regard to the submissions and contentions of the learned counsel for the Appellant and learned counsel for the Respondents, it is relevant to note that Bilaspur Sipat Pooling Station got commissioned in part w.e.f. 01.04.2012 but the dedicated lines including terminal bays were completed in all respects on 11.09.2012 and LTA was operationalised subsequently from 12.09.2012. The second Respondent, GUVNL in view of the anticipated delay in commissioning of Sipat Pooling Station of CTU/PGCIL had agreed for extension of COD for TPS of the Appellant upto 30 days from the date on which open access/transmission facilities for evacuation of power is made available vide their letter dated 05.08.2008. Further, it is also evident from records that the LTA of the Appellant was not made effective from 01.04.2012 despite declaration of COD of the Sipat Pooling Station and the same was operationalised only after commissioning of the 3rd 1500 MVA ICT and readiness of dedicated transmission system including 02 nos. 400 kv terminal bays at Sipat. While looking at BPTA dated 03.04.2009 between the Appellant and the PGCIL, it is noticed that LTA was granted to the Appellant with certain pre-requisite conditions viz. completion of the entire transmission system including dedicated transmission lines terminal bays, 3 X 1500 MVA ICTs in 400 /765 KV

Pooling Station at Sipat, LILO of Sipat-Seoni 2 X S/C Line at WR Pooling Station, etc.. Therefore, it becomes crystal clear that the LTA could be operationalised only after commissioning all 3 nos. 1500 MVA transformers at pooling station which got completed in all respects on 01.08.2012. Besides, it is also noted from the submissions of the parties that the terminal bays were also got delayed because of one or the other reasons including those of the Appellant and its contractors including PGCIL. However, the dead end tower which was to be supplied and erected by CTU/PGCIL also caused considerable delay in the commissioning of 400 KV bays at Sipat. Learned counsel for the Respondent Commission has rightly submitted that the agreement executed between the Appellant and its contractors/sub-contractors are entirely different and distinct from the agreement executed between the Appellant and the second Respondent/GUVNL and as such any delay on the part of the contractors/sub-contractors/agents cannot be passed on the Respondent. Instead, it has to be absorbed by the Appellant which was solely responsible for the execution of dedicated transmission line and bays. The same is the contention of the second Respondent also and to substantiate his submissions, he placed the reliance of the judgments of this Tribunal on this subject. We are, however, of the opinion that the LTA of the Appellant was not declared effective from 01.04.2012 for the purpose of charges presumably due to the fact that

the third ICT was not commissioned which was a pre-requisite for granting LTA and its operationalisation as per BPTA dated 03.04.2009. We do not find any force in the contentions of the learned counsel for the Respondents that even without commissioning & changing of all the ICTs at Sipat Pooling Stations, LTA can be operationalised. As a general practice, the LTA in favour of any utility is granted/operationalised by the CTU/PGCIL only after critical power system studies of the associated network ensuing prescribed redundancy in the system. In view of these facts, we are of the considered opinion that the third ICT at Sipat Pooling Station was essential before making LTA operational which got commissioned only on 01.08.2012. Therefore, if it is presumed that delay in operationalisation of LTA was caused due to commissioning of dedicated transmission system which became ready only on 11.09.2012 in all respects, the LTA itself could not have been operationalised before 01.08.2012. Accordingly, we hold that delay in LTA operationalisation cannot be attributed to the Appellant alone and the PGCIL/CTU was equally responsible for such delay viz. PGCIL/CTU till the charging of the third 1500 MVA ICT on 01.08.2012 at Sipat Pooling Station and the Appellant thereafter upto the commissioning of transmission lines / terminal bays (11.09.2012). Therefore, we are of the considered view that this issue is answered partly in favour of the Appellant.

10. Issue No.2:-

10.1 Learned counsel for the Appellant submitted that that the Appellant achieved COD of Unit NO.1 on 13.12.2011 and subsequently started supplying power to the second Respondent/GUVNL through LILO which was an interim arrangement proposed and constructed by the Appellant since the Sipat Pooling Station was not ready at that time. He further submitted that the Appellant was supplying power to GUVNL under short term open access by constructing the said LILLO at a cost of above Rs.2.1 crore which admittedly was not an obligation under the PPA. Learned counsel further contended that Unit No.2 of the Appellant got commissioned on 21.06.2012. He was quick to point out that if the LILLO was not constructed by the Appellant then the drawl of start up power from Sipat polling station would have been admissible only after six months after the date of synchronisation of the 1st generating unit. Thus, assuming the Bilaspur Sub Station was commissioned on 01.04.2012, the Appellant would have been able to commission Unit-I at least 5-6 months from the date of commissioning of the Bilaspur Pooling Station. Learned counsel vehemently submitted that the Appellant has acted in a bona fide manner irrespective of the fact that the LILLO arrangement for supplying power to GUVNL was constructed at a considerable cost of over Rs.2.1 crores and the same has never been claimed by the

Appellant by way of compensation etc.. Instead, GUVNL could avail cheaper power at Rs.1.90 per unit at least one year in advance and also availed infirm power into the Grid during 2011-12 to the tune of almost Rs.7.4 crores which was much more than the imposed LD of Rs.5.2 crores.

10.2 Learned counsel for the Appellant vehemently further submitted that PGCIL vide its letter dated 29.06.2018 has clarified the entire scenario by referring to the BPTA and confirm that certain elements at Sipat Pooling Station got commissioned on 01.04.2012 but the third 765/400 kV, 1X1500 MVA ICT at Bilaspur Pooling Station could be commissioned only on 01.08.2012. Learned counsel accordingly reiterated that the actual commissioning of the Sipat pooling station with all its elements got commissioned only on 01.08.2012 and at the best GUVNL could only impose LD upon the Appellant after the lapse of 30 days from 01.08.2012 i.e. only after 01.09.2012. Learned counsel further submitted that the Appellant has been scheduling power to the GUVNL before even commencement of the Sipat Pooling Station as COD of 1st unit achieved in Dec.'2011 i.e 100 MW power was scheduled 4 months even prior to commissioning the first batch of assets of Bilaspur Pooling Station. The 2nd unit was synchronised on 31st March'2012 and infirm power injected into the Grid up to the date of

commissioning of 2nd unit on 21.06.2012 benefiting GUVNL much more than the LD of Rs.5.2 Crore. As such, actually the second Respondent did not face any financial loss as the Appellant has made best possible efforts to comply with the PPA and supply the power as per the PPA. In view of these factual positions, there does not appear any justification for GUVNL to impose penalty upon the Appellant and the same should be returned with interest by setting aside the order impugned passed by the State Commission in the interest of natural justice.

10.3 Per contra, learned counsel for the first Respondent contended that the Article 4.1 of the PPA states that it is the seller's responsibility to execute the project in timely manner so as to achieve the COD of each of the units and the Contracted Capacity is made available through the use of Prudent Utility Practices to meet the Procurer's scheduling and dispatch requirements throughout the term of the Agreement. From the aforesaid facts, it is clear that the delay in supply of power by the Appellant upto the contracted capacity with the second Respondent from 01.05.2012 (i.e. 30 days' after the declaration of COD of Sipat Pooling Station by PGCIL) to 12.09.2012 is attributable to the Appellant and, therefore, the Appellant is liable to pay LD as per the provisions of PPA. The fact that the said lines were delayed and in turn LTA granted by CTU from 12.09.2012, as per Article 4.6.1 of the PPA, the Appellant is liable to pay

liquidated damages which the second Respondent has imposed amounting to Rs.5.2 crore. Learned counsel further contended that the contention of the Appellant that LD is not payable by it on the ground that the Respondent has not suffered any damage is also not tenable as the said contention is against the provision of Section 74 of the Indian Contract Act, 1872. He further submitted that the scope and interpretation of this provision has been considered by the Hon'ble Supreme Court in its judgment in Kailash Nath Associates Vs. Delhi Development Authority, 2015 SCC (4) SCC 136. Learned counsel further brought out that the supply of infirm power into the grid and payment of the amount received from such power to GUVNL is different and distinct issue than the levy of LD by the Respondent. With respect to the contentions of the Appellant that in case of default on the part of the Appellant then the liquidated damages is payable under Article 4.5.1 read with Article 4.6.1 and 4.6.5. It is further contended that as per the contentions of the Appellant, the second Respondent has to show the damages it has suffered because of the alleged delay is also not tenable as per Section 74 of the Indian Contract Act, 1872. Summing up his arguments, learned counsel for the Respondent Commission reiterated that the liquidated damages has been imposed by the Respondent/GUVNL for non-supply of power from the declared COD of Sipat Pooling Station and the Commission has rightly upheld the

decision of the Respondent/GUVNL. Learned counsel for the Respondent/GUVNL vehemently submitted that the State Commission by assigning valid and cogent reasons has passed the order impugned, interference of this Tribunal not called for.

10.4 Learned counsel for the second Respondent submitted that as per Article 4.6 of the PPA, in case the Appellant does not achieve the COD within the specified time, the Appellant is liable for liquidated damages to the second Respondent as provided in the said article. He was quick to point out that the Appellant is unnecessarily confusing Article 4.6.1 and 4.6.5 whereas Article 4.6.5 relates to delay in commissioning beyond the revised COD and the revised COD is a defined term in the Article 1.1 definitions read with Article 3.1.2 (viii). Learned counsel further submitted that the contention now raised by the Appellant is that the liquidated damages cannot be levied unless second Respondent provides details of actual damages due to the alleged breach of contract which is misconceived. He vehemently submitted that the very purpose of LD is that the parties pre-estimate loss suffered by the innocent party in case of breach of contract. Learned counsel contended that the amount of liquidated damage has been clearly provided in the PPA as per statutory guidelines issued by the Central Govt. under Section 63 of the Act. Further, as per the settled law, a stipulation of LD could rather

be a general pre-estimate of damages or by way of penalty depending on the nature of the provision. To substantiate his arguments, learned counsel placed reliance on the following judgments of this Tribunal :-

a. PTC India Limited v Gujarat Electricity Regulatory Commission and Anr 2014 ELR (APTEL) 1243 (Paras 43-53):

b. Lanco Kondapalli Power Limited v Andhra Pradesh Electricity Regulatory Commission 2015 ELR (APTEL) 755):

In above judgments, this Tribunal held that since the compensation payable has been pre-estimated and is not penal in nature, there is no need to provide evidence that actual loss incurred.

The Hon'ble High Court of Delhi has also recognized that liquidated damages as specified in the PPA should be awarded. In Dalmia Solar Power Ltd. -v- NTPC Vidyut Vyapar Nigam Ltd vide Order dated 14.03.2017 in OMP (COMM) 120/2017 has held that the Liquidated Damages provided in the Agreement are payable unless the Court finds the specified compensation amount as liquidated damages in the Agreement to be unreasonable. The decision dated 14.03.2017 passed by the Hon'ble High Court of Delhi arises out of the proceedings initiated under Section 34 of the Arbitration and Conciliation Act, 1996 challenging an award. In that case, it was argued that it was incumbent on the Court to determine what was reasonable compensation. However the Hon'ble High Court held that the Petitioner therein did not adduce any evidence to show that the amount was unreasonable. The Hon'ble

High Court held that the burden of proof is on the person committing the breach to show that no loss was suffered by the other party or that the amount specified was not reasonable.

In Bharat Sanchar Nigam Ltd. v. Reliance Communication Ltd. (2011) 1 SCC 394 dealing with the regulated industry, the Hon'ble Supreme Court held as under:

“53. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorise as penalties the clauses described as liquidated damages. This principle is relevant to regulatory regimes. It is important to bear in mind that while categorising damages as “penal” or “liquidated damages”, one must keep in mind the concept of pricing of these contracts and the level playing field provided to the operators because it is on costing and pricing that the loss to BSNL is measured and, therefore, all calls during the relevant period have to be seen. (See Communications Law in India by Vikram Raghavan at p. 639.) Since Clause 6.4.6 represents pre-estimate of reasonable compensation, Section 74 of the Contract Act is not violated. Thus, it is not necessary to discuss various judgments of this Court under Section 74 of the Contract Act.”

(Emphasis supplied)

10.5 Learned counsel further submitted that reliance of the Appellant on the judgment of the Hon'ble Supreme Court in Kailash Nath Associates v. Delhi Development Authority (2015) 4 SCC 136 is totally misconceived.

In view of the above facts and decision of the various judgments relied upon by second Respondent, learned counsel emphasised that if the sum named as LD is not by way of penalty but is generally pre-estimate

of the loss that will be suffered then there is no necessity of enquiring into actual loss and the agreement reached between the parties stipulating the sum is pending and is payable.

Our Findings:-

10.6 We have carefully considered the submissions and contentions of the learned counsel for the Appellant and the Respondents and also perused the findings of the State Commission as well as decisions of various courts including this Tribunal. What emerges is that there has been a delay of 52 days in commissioning the second unit of the TPS of the Appellant (while reckoning from 01.04.2012) and as per relevant clause of the PPA, the amount towards liquidated damages worked out to be Rs.5.2 crores which has been deducted by the second Respondent/GUVNL from the Appellant. While the Appellant contends that the alleged delay has been caused on account of PGCIL/CTU, the Respondents contest that the entire delay has been effected on account of delay in various activities of the Appellant. Having considered the submissions of both the counsel(s) and the material placed before us, it is pertinent to note that PGCIL declared COD of Sipat Pooling Station on 01.04.2012 but the third 1500 MVA ICT could be commissioned only on 01.08.2012 and LTA was operationalised w.e.f. 12.09.2012 after

completion of the entire transmission system associated with the project. While PGCIL started levying transmission charges on the beneficiary constituents w.e.f. 01.04.2012 but no any charge was levied on the Appellant due to the fact that the Sipat Pooling Station was not commissioned in totality and LTA was not operationalised. We also taken note from the records that to supply power to the second Respondent/GUVNL, the Appellant has made sincere efforts, bona fide in nature and in the process commissioned LILO of adjoining transmission line at the cost of over Rs.2.10 crores and started supply of power w.e.f. December, 2011 itself. Subsequent to the commissioning of second unit on 21.06.2012, the Appellant has been supplying full quantum of power to GUVNL through short term open access. Even prior to that, the second Respondent has earned considerable amount over Rs.7 crores on account of infirm power supplied by the Appellant/TPS. The learned counsel for the Respondents contend that gain from infirm power and levy of LD are two different and distinct aspects and cannot be clubbed together. We have already analysed the delay in accomplishment of various activities on the part of the Appellant and PGCIL/CTU while dealing with the Issue No.1 above. Accordingly, we hold that the entire delay of 52 days cannot be held against the Appellant as the Sipat Pooling Station got completed in all respects as per BPTA dated 03.04.2009 only on

01.08.2012 and applying a 30 days margin over that (As agreed by GUVNL, vide letter dated 05.08.2008), the LD period can atmost be reckoned from 01.09.2012. This results into a net delay of 11 days for imposing LD as the dedicated lines including terminal bays got completed on 11.09.2012 and LTA was operationalised on 12.09.2012.

ORDER

Having regard to the facts and circumstances of the case as stated supra, we are of the considered view that the issues raised in the present appeal being Appeal No. 279 of 2015 answered in favour of the Appellant.

The Appeal filed by the Appellant is allowed in part to the extent of re-computation of liquidated damages as per our findings in Para 10.6 as stated supra. The impugned order dated 04.08.2015 passed in Petition No.1405 of 2014 on the file of Gujarat Electricity Regulatory Commission is set aside with the direction to the first Respondent/ Gujarat Electricity Regulatory Commission for consideration of the above directions.

The matter stands remitted back to the State Commission with the direction to consider the matter afresh in accordance with law and in the light of the directions of this Tribunal as stated in Para 10.6 above and dispose of the same after affording reasonable opportunity of hearing to

both the parties as expeditiously as possible at any rate within a period of six months from the date of the appearance of the parties.

The Appellant and Respondents are directed to appear either personally or through their counsel without further notice before the first Respondent/ Gujarat Electricity Regulatory Commission on 20.02.2019.

In view of the disposal of the Appeal, the relief sought in the IA No.871 of 2018 does not survive for consideration, accordingly stands disposed of.

No order as to costs.

Pronounced in the Open Court on this **January 18th, 2019.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / NON-REPORTABLE

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