IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL No. 200 OF 2024 & IA No. 1590 OF 2024 & IA No. 547 OF 2024
&
APL No. 201 OF 2024 & IA No. 1591 OF 2024 & IA No. 544 OF 2024

Dated: **19.12.2024**

Present: **Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson**
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

In the matter of:

APL No. 200 OF 2024 & IA No. 1590 OF 2024 & IA No.547 OF 2024

SOUTHERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LIMITED
Through its Chairman & Managing Director,
D. No. 19-13-65/A, Srinivasapuram
Tiruchanoor Road, Tirupati,
Chittoor District,
Andhra Pradesh – 517503 … Appellant No.1

ANDHRA PRADESH POWER COORDINATION COMMITTEE
Through its Chief General Manager,
A.P. Transco, Vidyut Sodha,
Gundala,Vijayawada – 500082 … Appellant No.2

TRANSMISSION CORPORATION OF ANDHRA PRADESH LIMITED
Through its Chairman & Managing Director,
Vidyut Soudha, Gunadala,
Eluru Road, Vijayawada,
Andhra Pradesh – 520004 … Appellant No.3

VERSUS

1. **VAAYU (INDIA) POWER CORPORATION PVT. LTD.**
   Through its Managing Director,

Commercial Complex, H-Block,
Alpha-II, Sector, Greater Noida,
Uttar Pradesh-201308. ... Respondent No.1

2. **ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION**
Through its Secretary,
4th Floor, Singareni Bhavan, Red Hills,
Hyderabad – 500004. ... Respondent No.2

Counsel on record for the Appellant(s)	:	Udit Gupta Anup Jain Vyom Chaturvedi Prachi Gupta Divya Hirawat Nishtha Goel Pragya Gupta for App. 1 Udit Gupta Anup Jain Vyom Chaturvedi Prachi Gupta Divya Hirawat Nishtha Goel Pragya Gupta for App. 2 Udit Gupta Anup Jain Vyom Chaturvedi Prachi Gupta Divya Hirawat Nishtha Goel Pragya Gupta for App. 3
Counsel on record for the Respondent(s)	:	Shri Venkatesh Shryeshth Ramesh Sharma Suhael Buttan Himangi Kapoor Anant Singh Priya Dhankar Vineet Kumar Aditya Tiwari Nehal Jain

Nikunj Bhatnagar
Kunal Veer Chopra
Vedant Choudhary
Ashutosh Kumar Srivastava
Bharath Gangadharan
Abhishek Nangia
Shivam Kumar
Siddharth Nigotia
Nihal Bhardwaj
Mohit Gupta
Manu Tiwari
Kartikay Trivedi
Punyam Bhutani
Aashwyn Singh
Harsh Vardhan for Res. 1

Gaichangpou Gangmei
Arjun D Singh
Ankita Sharma
Ishat Singh
Nisha Pandey
Maitreya Mahaley
Yimyanger Longkumer for Res. 2

In the matter of:

APL No. 201 OF 2024 & IA No. 1591 OF 2024 & IA No. 544 OF 2024

SOUTHERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LIMITED
Through its Chairman & Managing Director,
D. No. 19-13-65/A, Srinivasapuram
Tiruchanoor Road, Tirupati,
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ANDHRA PRADESH POWER COORDINATION COMMITTEE
Through its Chief General Manager,
Vidyut Sodha, Vijayawada
Andhra Pradesh – 520004 … Appellant No.2

TRANSMISSION CORPORATION OF ANDHRA PRADESH LIMITED
Through its Chairman & Managing Director,
Vidyut Soudha, Gunadala,
Eluru Road, Vijayawada,
Andhra Pradesh – 520004 … Appellant No.3

VERSUS

1. **VISHWIND INFRASTRUCTURE LLP**
   Through its Managing Director,
   Fortune Terraces, 11th Floor A-Wing,
   Plot C.T.S. No.657 & 658,
   New Link road, Andheri (West)
   Mumbai, Maharashtra-400053 ... Respondent No.1

2. **ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION**
   Through its Secretary,
   4th Floor, Singareni Bhavan, Red Hills,
   Hyderabad – 500004. ... Respondent No.2

Counsel on record for the Appellant(s) : Udit Gupta
Anup Jain
Vyom Chaturvedi
Prachi Gupta
Divya Hirawat
Nishtha Goel
Pragya Gupta for App. 1
Udit Gupta
Anup Jain
Vyom Chaturvedi
Prachi Gupta
Divya Hirawat
Nishtha Goel
Pragya Gupta for App. 2
Udit Gupta
Anup Jain
Vyom Chaturvedi
Prachi Gupta
Divya Hirawat

Nishtha Goel
Pragya Gupta for App. 3

Counsel on record for the Respondent(s) : Shri Venkatesh
Shryeshth Ramesh Sharma
Suhael Buttan
Himangi Kapoor
Anant Singh
Priya Dhankar
Vineet Kumar
Aditya Tiwari
Nehal Jain
Nikunj Bhatnagar
Kunal Veer Chopra
Vedant Choudhary
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Siddharth Nigotia
Nihal Bhardwaj
Mohit Gupta
Manu Tiwari
Kartikay Trivedi
Punyam Bhutani
Aashwyn Singh
Harsh Vardhan for Res. 1

Gaichangpou Gangmei
Arjun D Singh
Ankita Sharma
Ishat Singh
Nisha Pandey
Maitreya Mahaley
Yimyanger Longkumer for Res. 2

JUDGMENT

(PER HON'BLE MRS. SEEMA GUPTA, TECHNICAL MEMBER)

1. The instant Appeals are filed by Southern Power Distribution Company of Andhra Pradesh Limited, Andhra Pradesh Power Corporation and Transmission Corporation of Andhra Pradesh Ltd

assailing the common order dated 20.12.2023 **("impugned order")** passed by the Andhra Pradesh Electricity Regulatory Commission in O.P Nos. 3 of 2023, 13 of 2023, 32 of 2023 & 33 of 2023, whereby APERC held that the Appellant has defaulted in making payment of monthly bills and therefore committed breach as per Article 9 of the PPAs and the Respondents- VAAYU(India) Power Corporation Pvt Ltd and Vishwind Infrastructure LLP has a right to terminate the PPAs under Clause 9 thereof pursuant to such default and the subsequent payments of bills by the Appellants would not cure the default already occurred and the Appellants cannot deny issuance of 'no objection certificate' for sale of power through Open Access to the Respondents " VAAYU" and "VISHWIND"

Since the instant appeals are arising from the common impugned order and raises similar issue, we hereby dispose them with this common judgment.

FACTS OF THE CASES:

The facts, in brief, involved in both these appeals are summarised below:

2. The Appellants are Southern Power Distribution Company of A.P. Ltd (for short, hereinafter referred to as "**APSPDCL**"), and Andhra Pradesh Power Coordination Committee (for short, hereinafter referred to as "**APPCC**"), and Transmission Corporation of Andhra Pradesh Limited (for short, hereinafter referred to as "**APTRANSCO**"), Respondent No.1 is Vaayu (India) Power Corporation Private Limited (for short, hereinafter referred to as "**VAAYU"**), in Appeal No. 200 of 2024 and Vishwind Infrastructure LLP (for short, hereinafter referred to as **"VISHWIND"**) in Appeal No. 201 of 2024 are the generators of wind

Energy. Respondent No. 2 is the Andhra Pradesh Electricity Regulatory Commission (for short, hereinafter referred to as **"APERC/State Commission"**)

3. The Appellant - **APSPDCL** and Respondent - **VAAYU** have entered into 7 Power Purchase Agreements ("**PPAs**") for setting up a wind power generating station (Phase I- VII) of total capacity of 50.4 MW in Kurnool district of Andhra Pradesh. Likewise, **APSPDCL** and **VISHWIND** have also entered into 3 Power Purchase Agreements for setting up a wind power generating station (Phase II- IV) of total capacity of 7.2 MW in Kurnool district of Andhra Pradesh. The tenure of the PPAs was 20 years from the COD, at a tariff of Rs. 3.50/unit for the first 10 years from the COD. The said tariff was also subsequently approved by the APERC. The tariff for the remaining 10 years was to be determined by the APERC, upon an application by both the Parties. Since the COD, Respondents-VAAYU and VISHWIND have been supplying power to the Appellant No.1 APSPDCL and have been raising regular monthly invoices in terms of the PPA.

4. In the year 2020, the Respondent VAAYU approached the State Commission through O.P. No. 1 of 2020 for specific performance of the terms of PPA, and in compliance with the interim orders passed by the State Commission in the said O.P, the Appellant-APSPDCL cleared the dues towards monthly bills; consequently, the said O.P was closed on 24.3.2021. In the said petition, VAAYU submitted that the APSPDCL has cleared all the arrears up to January 2021 and their right to claim LPS is waived. Subsequently, VAAYU again filed a Petition O.P No. 113 of 2021 before the State Commission, on account of default by the Appellant-APSPDCL in payment of bills to the tune of

Rs. 18,60,30,535/- claimed till 09.11.2021. The said O.P. remains *sub-judice* before the State Commission.

5. The Respondent VAAYU issued numerous letters dated 21.06.2022, 14.07.2022, 31.10.2022, 06.12,2022 to Appellant No.3 - "APTRANSCO" marking a copy to Appellant Nos. 1 and 2 - APSPDCL and APPCC, requesting to release the claimed outstanding amount to them. The Respondent VAAYU addressed a Preliminary Termination Notice dated 11.01.2023 to Appellant-APTRANSCO, marking a copy to APSPDCL, APCPDCL & APPCC stating to treat above-said letters as preliminary notice for termination of PPAs with the APSPDCL in accordance with Article 9 of the said PPA. Thereafter, VAAYU issued the Termination Notice dated 01.03.2023 to APSPDCL alleging that the PPAs entered into between them ought to be considered as terminated with immediate effect since there had been no response from the Appellant No.1 APSPDCL and the default in payment of the claimed amount continued despite 30 days' notice given as a prerequisite of Article 9 of the PPAs, to cure such default. It was also intimated to Appellant that they intend to sell energy generated from the project through Open Access.

6. Thereafter, the Respondent VAAYU filed a Petition being O.P. No. 13 of 2023 before the APERC seeking a direction to Appellant No.1-APSPDCL to grant 'No Objection Certificates' to sell the power generated by them through "Open Access".

7. Respondent VISHWIND vide its letters dated 21.09.2022, 23.09.2022 to the Appellant-APSPDCL, in terms of Article 9 of the said PPA, requested for termination of the PPAs on

28.10.2022/15.10.2022 and intimated that it is planning to sell the energy generated by it through Open Access. The Appellant–APSPDCL forwarded the letter of Vishwind dated 23.09.2022 to APPCC for information and necessary action. The respondent VISHWIND vide letter dated 29.09.2022 to APSPDCL requested to take appropriate action for termination of PPA and permit respondent generator to sell power through open Access. Thereafter, the Respondent VISHWIND, issued preliminary termination notice dated 19.11.2022 to Appellant-APTRANSCO with copy to APSPDCL and APPCC, alleging that in spite of delivery of the power as per the terms of the PPAs, the DISCOM has been consistently committing default in payment of the outstanding bills and they have planned to sell energy through open access as well as they have not received any response to their letter dated 23.09.2022, which however was forwarded by APTRANSCO to APPCC on 29.09.2022 for necessary action and requested for an early action. On 02.12.2022, Respondent Vishwind issued the Notice for Termination addressed to Appellant APSPDCL, stating that the PPAs ought to be considered as terminated with immediate effect because there had been no response from the APSPDCL and the default continued despite the 30 days' notice given vide letter dated 23.09.2022 as a prerequisite of Article 9 of the PPAs, to cure such default. Respondent VISHWIND, vide its letter dated 19.12.2022, addressed to Appellant- APSPDCL, referring to its Notice of termination vide letter dated 02.12.2022, also stated that if the APSPDCL fails to respond to this said letter within 10 days, it would be constrained to take recourse to appropriate legal remedies. Respondent-VISHWIND has also addressed letters dated 29.07.2022, 15.11.2022 and 06.12.2022 to APPCC/APTRANSO marking a copy to APSPDCL requesting to payment of dues, otherwise they would be

constrained to take appropriate action under law and in terms of provision of PPA. However, in the meantime, Appellant APSPDCL vide its letter dated 04.08.2022 informed all the generators including respondents herein i.e VAAYU and VISHWIND that outstanding dues if any shall be made through amount availed through loan taken from REC and PFC.

8. Thereafter, the Respondent VISHWIND also filed a Petition dated 31.01.2023 being O.P. No. 3 of 2023 before the APERC seeking a direction to the Appellant No.1-APSPDCL to grant 'No Objection Certificates' to sell the power generated by them through "Open Access". Subsequent to filing of petitions O.P. No 13 of 2023 and O.P. No 3 of 2023 by the Respondents VAAYU and Vishwind respectively, APSPDCL also filed petitions being O.P. Nos. 32 of 2023 and 33 of 2023 before APERC seeking declaration of termination Notice dated 02.12.2022 issued by the Generators-VAAYU and Vishwind in the mid-course of PPAs, as illegal, arbitrary and invalid and stating that APSPDCL had been promptly paying dues from May 2022 and the amount due to these generators has been paid in full up to January 2023 and no subsequent bills are issued afterwards. It was also stated by APSPDCL that as on 11.04.2023, it had made payments to the generator VAAYU aggregating to Rs. 19,01,26,378/- till January 2023. This amount constituted all the invoice payments due to the VAAYU including Rs. 87,58,138 under the LPS Scheme. It is also submitted that a new invoice for February, 2023 for Rs.9,12,413/- which was received on 13.04.2023 from VISHWIND were also cleared within time. It was also stated by the Appellant APSPDCL that as of 04.03.2023, it has paid an amount of Rs.1,91,12,027/- to VISHWIND in lieu of arrears due and it also paid an amount of Rs.1,20,15,828/-

through NEFT dated 13.04.2023, therefore as on 13.04.2023 it has cleared the entire dues of Rs.6,44,78,091.

9. After hearing the parties and considering the material available on record, APERC passed the impugned common order dated 20.12.2023 in O.P. Nos. 03 of 2023, 13 of 2023, 32 of 2023 and 33 of 2023 and directed the Appellant DISCOMs to grant "No Objection Certificates" to VAAYU and VISHWIND for sale of power being generated from their projects through Open access in terms of Regulation 2 of 2006. Aggrieved by the said direction of the APERC, the Appellants have approached this Tribunal.

Analysis and Discussion

10. During the course of hearing the IA filed by the Appellants, both Ms. Suparna Srivastava, learned Counsel for the Appellants and Mr. Venkatesh, learned Counsel for Respondents agreed that it would suffice if the main appeals itself is disposed of, as the issue involved is short. Accordingly, we have heard learned counsels for the Appellants and Respondents at length; issues emerged and rival contentions are deliberated as under:

No. 1 : Maintainability of the Present Appeal under Specific Relief Act 1963

11. Learned counsel for Respondent submitted that present Appeals have been filed by the Appellants to declare termination of PPA illegal and invalid and therefore Respondents should honour their commitments of supplying energy as per PPA. Learned counsel for the Respondents contended that it is a well-established law that any person seeking benefit of the specific performance of a contract must

manifest that his conduct has been blemish-less throughout entitling him to the specific relief in terms of Section (c) of the Specific Relief Act. In support of this contention, learned counsel placed reliance on the following judicial precedents:

(a)*Aniglase Yohannan v. Ramlatha, (2005) 7 SCC 534*

(b)*C.S. Venkatesh v. A.S.C. Murthy, (2020) 3 SCC 280*

(c) *Shenbagam & Ors. v. KK Rathinavel, 2022 SCC OnLine*

12. Learned counsel for the Respondents submitted that from the above referred case laws, it is clear that the *sine qua non* for a party seeking specific performance *inter alia* is that it should have a blemish-less conduct and has not violated any terms of the contract; learned counsel for the Respondents also contended that these conditions are not satisfied in the present case as, admittedly, APSPDCL has defaulted in making the payments on several occasions for the bills raised by the Respondent Generators on a monthly basis; thereby violating the specific mandate of the PPAs by acting in variance with Article 5 of the PPAs. This is discernible from the data provided by APSPDCL, which highlights the exorbitant time taken by it to clear its dues. In fact, from the said chart, the following is evident**:**

(a) Respondent VAAYU (Appeal No. 200 of 2024):

i. Monthly payments from February 2021 to December 2021 were only made on 27.10.2022, apart from some part payments in the interregnum.

ii. Monthly payments for January and February 2022 were made on 05.11.2022. For March 2022 on 05.12.2022 and for April 2022 onwards till February 2023, payments

were made in January 2023 and April 2023 (after VIPCPL had filed the Petition before Ld. APERC)

(b) Respondent Vishwind (Appeal No. 201of 2024):

i. Monthly payments for January to June 2021 were made in November/December 2022 and for July 2021 to December 2021, payments were made in 2023 (some after the notice for termination was issued and some after filing of the Petition before Ld. APERC)

ii. Similarly, monthly payments for the entire 2022 were only made in March, April, and August of 2023 (again only after filing of petition before Ld. APERC).

13. The conduct of APSPDCL, evidenced by its persistent and significant delays in payments to the Respondent Generators, constitutes a clear breach of its contractual obligations under the PPAs. Payments that should have been made monthly were consistently delayed by several months, sometimes up to 10 months. This repeated default, along with APSPDCL's failure to cure its breaches even after receiving preliminary default notices, emphasizes the flawed nature of its conduct. Under these circumstances, APSPDCL's failure to comply with the terms of the contract disqualifies it from seeking equitable relief, such as specific performance, under Section 16 of the Specific Relief Act. Further, Section 41(e) of the Specific Relief Act stipulates that an injunction cannot be granted to prevent the breach of a contract whose performance is not specifically enforceable. Therefore, no injunction can be granted since this

Tribunal does not have the power to supervise the performance of the PPAs under the provisions of the Specific Relief Act.

14. Learned counsel for the Respondents in response to the question raised by this Tribunal during the proceedings as regards specific performance of the PPAs submitted that although APSPDCL has not explicitly sought specific performance, its request to invalidate the termination notices would effectively compel them to continue supplying power to APSPDCL. Thus, APSPDCL is effectively seeking specific performance of the PPAs by attempting to have the termination of the said PPAs by declaring them as invalid. Such an action would amount to enforcing specific performance of the PPAs, which is legally barred under Section 16 of the Specific Relief Act. Further, APSPDCL, in O.P. Nos. 32 and 33 of 2023, sought a declaration that the termination of the PPAs was illegal and void. The same reliefs are now being sought in the present appeals.

15**.** Learned counsel for Respondents submitted that, APSPDCL has not sought any consequential relief in terms of Section 34 of the Specific Relief Act, such as specific performance of the PPAs, which the APSPDCL was required to seek, and its failure to do so, bars it from now claiming declaratory relief to invalidate the termination of the PPAs. Seeking consequential relief is a mandatory requirement under the law, as Section 34 of the Specific Relief Act obliges every litigant seeking a declaration to include all reliefs which they are capable of seeking as a consequence of that relief. Without requesting consequential relief, APSPDCL's claim for declaratory relief cannot be sustained. In this regard, learned counsel for the Respondents places reliance on the following judgments:

(a) *Vasantha v. Rajalakshmi, (2024) 5 SCC 282* -

(b) *PTC India Limited v. Jaypee Karcham Hydro Corporation Limited, 2010 SCC OnLine Del 745*

(c) *Ravissant (P) Ltd. v. D.F. Export S.A., 2008 SCC OnLine*

16. The reliefs sought by APSPDCL in O.P. Nos. 32 and 33 of 2023, as well as in the instant appeals are declaratory in nature and do not include consequential reliefs. It is a rule of law that a court cannot grant relief where the party has only sought mere declaratory relief and not consequential relief. Learned Counsel for the respondent further contends that pertinently, APSPDCL has relied on "***MST Rukhmabai v. Lala Laxminarayan & Ors.", AIR 1960 SC 335***, to contend that the plea of Section 34 of the Specific Relief Act can be raised at the first instance to grant an opportunity to the party seeking only a declaratory relief to amend the prayer. However, it is important to note that since the question of Section 34 arose from a query raised by this Tribunal, it remains a pure question of law and can be examined at any stage of the proceedings, including before this Tribunal. In this regard, the relevant case laws are following:

(a) *Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari, 1950 SCC OnLine SC 44*

(b) The Hon'ble Supreme Court's decision dated 13.01.2020 passed in Civil Appeal No. 2442 of 2011 titled *K. Lubna & Ors. v. Beevi & Ors.*

17. The case law relied upon by APSPDCL cannot be applied to the present case as it is distinct in principle; in the cited case the plaintiff was allowed to amend its pleadings, whereas in the present matter,

APSPDCL explicitly declined the opportunity to amend its appeal, which was provided by this Tribunal during the proceedings. Moreover, even upon interpreting and analyzing the relief claimed under Section 42 of Specific Relief Act (now Section 32), the Court in the cited case examined the issue of limitation as a question of law. Therefore, in the instant case, even if this Tribunal finds that the present case is not covered under Section 34 of the Act (erstwhile Section 42), the reliefs sought by APSPDCL are barred under Section 16 of the said Act. Consequently, even assuming *arguendo* that the Appellants' contention is accepted, the reliefs sought will be barred by the application of Section 16 of the Specific Relief Act, given that the conduct of APSPDCL has not been blemish-free.

18. Per Contra, learned counsel for the Appellants submitted that Respondents raised the issue of maintainability of the Appeal for the first time at an advanced stage of arguments and have contended that a relief of mere declaration under Section 34 of the Specific Relief Act, 1963 cannot be sought by the Appellant when there is an alternate remedy available to them. Learned counsel for Appellants submitted that, it is a well-settled principle of law that issues affecting the root of the matter must be raised at the earliest and generally cannot be introduced at a belated stage. Section 34 reads as under:

> *"**34**. Discretion of court as to declaration of status or right:*
>
> *Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:*

> *Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.*
>
> *Explanation: A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not inexistence, and for whom, if in existence, he would be a trustee."*

19. Learned counsel for the Appellant also submitted that the proviso to Section 34 uses the expression "being able to seek further relief than a mere declaration of title," indicating that a party seeking only a declaration, which could have sought some other relief, but having failed to do so, then the court can reject the relief of mere declaration. Applying this rule to the facts of the present Appeal, it is clear that the Appellants had no remedy other than seeking a declaration that the unilateral termination of the PPA by the Respondents is invalid. The alternate remedy, in the facts of the present case, would have been the performance of the PPAs i.e. supply of power by Respondent No. 1 and payment of money for that power by the Appellants. In the present case, it is an admitted position that Respondent No. 1 has continued to supply the power and received payments even after issuing the alleged final termination notice of the PPAs. Therefore, it is clear that the only available legal remedy to the Appellants is to seek a declaration that the unilateral termination is invalid and void. Referring **to *"Mst. Rukhmabai v. Lala Laxminarayan & Ors", (1960) 2 SCR 253,*** learned counsel further submitted that any objection regarding the availability of consequential or further relief to the Appellant should have been raised at the earliest; therefore, this objection must be rejected outright.

20. Learned counsel for the Appellants also submitted that in the impugned Order, based on a misplaced interpretation of Article 9 of the PPAs, the commission, on the mere assumption that by virtue of the 'Notice of Termination', the PPAs were terminated as of 02.12.2022, has directed the Appellants to grant NoC to Respondent No. 1 for selling power generated by them through open access; if the impugned Order is not stayed during the pendency of this Appeal, and the Appellant is compelled to issue such NoCs, the PPAs would effectively cease to operate, rendering the present Appeals, which contests the illegal termination of the PPAs, wholly infructuous. Conversely, if the impugned Order is stayed, the Appellant will continue purchasing power from Respondents at the tariff agreed upon by the parties under the PPA. Thus, there is no question of any prejudice to Respondents. Learned counsel for the Appellants reiterated that notably, it is an admitted fact that Respondents VAAYU and Vishwind have consistently supplied power to the Appellant and received payments for such supply even after filing of the present Appeal and till passing of the order dated 30.05.2024, which was issued by this Tribunal.

Discussion and Analysis: the contentions with regard to various sections of Specific Relief Act are discussed heading wise as under

Section 16 of The Specific Relief Act, 1963

21. Section 15(a) of the Specific Relief Act, 1963 stipulates that, except as otherwise provided by Chapter-II, the specific performance of a contract may be obtained by any party to the said contract. Section 16(c) of the Specific Relief Act stipulates that, specific performance of a contract cannot be enforced in favour of a person

who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than the terms, the performance of which has been prevented or is waived by the defendant. Under explanation (ii) thereto, for the purposes of clause (c), the plaintiff must prove performance of, or readiness and willingness to perform, the contract according to its true construction.

22. The impugned order, passed by the APERC, records the reply filed thereto by the Discoms stating that there was no deliberate and willful default on their part in payment of moneys under the invoices; though they were under financial stress, they were making all efforts to clear the bills; the bills were cleared later till January 2023, and the bill for February 2023 would be cleared within date. It is in this context that the scope of Section 16 of the Specific Relief Act must be examined.

23. It is not in dispute that, by way of the declaratory decree sought by the Appellant, they are, in fact, seeking specific performance of the PPA for its entire 20 year duration. The embargo of enforcement of such a specific performance in the Appellant's favour, under Section 16(c) of the Specific Relief Act, is that the Appellant should have averred and proved that they had performed or had always been ready and willing to perform the essential terms of the PPA which were required to be performed by them, other than the terms, the performance of which they were either prevented or the Respondent had waived.

24. Section 16(*c*) of the Specific Relief Act mandates the plaintiff to aver in the plaint, and establish the fact by evidence aliunde, that they

have always been ready and willing to perform their part of the contract. **(Aniglase Yohannan v. Ramlatha, (2005) 7 SCC 534; Surya Narain Upadhyaya v. Ram Roop Pandey : 1995 Supp (4) SCC 542).** The basic principle, behind Section 16(*c*) read with Explanation (*ii*), is that any person seeking benefit of specific performance of contract must establish that his conduct has been blemishless throughout entitling him to the specific relief. This provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. **(Aniglase Yohannan v. Ramlatha, (2005) 7 SCC 534).** If the pleadings manifest that the conduct of the plaintiff disentitles them to get the relief on perusal of the plaint, they may be denied the relief.

25. The word ‘readiness’, in Section 16(c) of the Specific Relief Act, refers to the financial capacity, and the word ‘willingness’ refers to the conduct of the plaintiff wanting the performance. (**Shenbagam & Ors. v. KK Rathinavel, 2022 SCC OnLine SC 71)**. There is a distinction between readiness to perform the contract and willingness to perform the contract, By readiness is meant the capacity of the plaintiff to perform the contract which includes his financial position to pay. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. The factum of readiness and willingness to perform the plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The Court may infer, from the facts and circumstances, whether the plaintiff was ready and was always ready and willing to perform its part of the contract. (**His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar, (1996) 4 SCC 526).**

26. In **C.S. Venkatesh v. A.S.C. Murthy, (2020) 3 SCC 280,** the Supreme Court observed that the words *"ready and willing"* imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon his performance; the continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance; if the plaintiff fails to either aver or prove the same, he must fail; to adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior, and subsequent, to the filing of the suit along with other attending circumstances; the amount, which he had to pay the defendant, must of necessity be proved to be available; right from the date of the execution of the contract till the date of decree, he must prove that he is ready and willing to perform his part of the contract; and the court may infer from the facts and circumstances whether the plaintiff was ready, and was always ready to perform his contract.

27. In considering the submission, urged on behalf of the 1st Respondent, regarding the appellant's failure to comply with Section 16(c) of the Specific Relief Act, it is useful to note that Article 2.2, of the PPA executed between the Appellant and the 1st Respondent on 29.05.2010, stipulates that the wind power producer shall be paid tariff for energy delivered at the interconnection point for sale to discom which shall be firmed at Rs.3.50/ unit for a period of 10 years on and from the commercial operation date; and the tariff payable beyond the 10th year of operation will be as determined by the APERC.

28. As no amount was paid by the Discoms, towards the invoices raised on them by the 1st Respondent herein, from May 2022 onwards, and no response was forthcoming from the Discoms to the several

letters addressed by them for release of the outstanding dues, the 1st Respondent in Appeal No. 200 of 2024 issued a preliminary termination notice dated 11.01.2023 regarding non-payment of outstanding dues of Rs.16.39 crores along with LPS calculated as on 10.01.2023. By the said preliminary termination notice, the 1st Respondent herein informed that, inspite of delivery of power by them as per the terms of the PPAs, the Discoms had consistently committed default in payment of the outstanding bills, as a result of which the preliminary notice was issued for curing the default, and if the default was not cured within 30 days, they would be constrained to terminate the PPA.

29. Since the period to cure the defects expired, and neither was there any response from the Discoms nor were the dues paid, the 1st respondent issued termination notice dated 01.03.2023 stating that, despite considerable time having passed, the Appellant had failed to respond to the preliminary notice dated 11.01.2023; and, as there was no response from the Appellant and as the default continued despite expiry of the 30 days notice on default, the pre-requisite of Article 9 had been complied; the PPAs ought to be considered as having been terminated with immediate effect; and the notice of termination was without prejudice to their right to claim the outstanding amounts with respect to the energy already supplied under the PPA.

30. The mandate, of Section 16(*c*) of the Specific Relief Act, required the Appellant to plead, in the Petition filed by them before the APERC seeking declaration, that they were always ready and willing to perform their part of the contract, i.e. to make payment of the invoices, raised on them by the 1st respondent, as and when they fell due. No such plea of continuous readiness and willingness was, or could have been,

taken by the appellant in the said Petition. While their readiness may not be required to be gone into since they are a State Utility, their willingness to do so must be ascertained from their conduct which must be blemishless throughout, (ie both prior and subsequent to the Petition filed by them before the APERC), entitling them to the specific relief they had sought.

31. Payment, in terms of the invoices, were never made by the Appellant on time and, even on earlier occasions, it is only after the 1st Respondent had invoked the jurisdiction of the APERC, that the Appellant had tendered payment during the pendency of proceedings before the APERC. Further, the amounts due under the preliminary termination notice were not paid in its entirety even by the date the Appellant instituted the Original Petitions before the APERC seeking a declaration that termination of the PPA was illegal and invalid; and payment towards delayed payment surcharge was not made in its entirety even when the judgment was reserved in the present Appeals.

32. The above referred facts clearly show that the appellant has regularly defaulted in making payment of the invoices, raised on them by the 1st Respondent, within the stipulated time. This, by itself, establishes the failure of the Appellant to perform their part of the obligations as stipulated in the subject PPA. It is evident, therefore, that the requirement of Section 16(c), read with the explanations thereto, have not been satisfied. As the pleadings on record before the APERC manifest that the conduct of the Appellant was such as to disentitle them to the relief of specific performance, in view of the personal bar under Section 16(c), the Appellant must be denied the specific relief, of the declaratory decree which they have sought, on this score.

SECTION 34 OF THE SPECIFIC RELIEF ACT:

33. Section 34 of the Specific Relief Act relates to the discretion of the court as to declaration of status or right and, thereunder, any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief. Under the proviso thereto, no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

34. Section 34 of the Specific Relief Act obligates every litigant, seeking a declaration, to club all the reliefs which he is capable of seeking, as a consequence to that relief. (**Ravissant (P) Ltd. v. D.F. Export S.A., 2008 SCC OnLine Del 1735).** The purpose behind inclusion of the *proviso* to Section 34 is to prevent multiplicity of proceedings. A mere declaratory decree remains non-executable in most cases. A suit, which is not amended even at a later stage to seek the consequential relief, is not maintainable. **(Vasantha v. Rajalakshmi, (2024) 5 SCC 282; Venkataraja v. Vidyane Doureradjaperumal, (2014) 14 SCC 502).**

35. In **Akkamma v. Vemavathi, (2021) 18 SCC 371,** the Supreme Couirt noted that, earlier in **Arulmigu Chokkanatha Swamy Koil Trust v. Chandran, (2017) 3 SCC 702,** it was held that because of Section 34 of the SRA, 1963, the plaintiff, not being in possession and claiming only declaratory relief, ought to have claimed the relief of recovery of possession; and the trial court had rightly dismissed the

suit on the basis that the plaintiff had filed a suit for a mere declaration without the relief for recovery, which was clearly not maintainable.

36. In **Ravissant (P) Ltd. v. D.F. Export S.A., 2008 SCC OnLine Del 1735,** it was held that the plaintiff had not sought the appropriate consequential relief, i.e. decree for any amount of money allegedly spent by it, towards expenses; the plaint averments showed that such a claim was available; and, in view of these facts, the reliefs of declaration was clearly barred.

37. The power of the Court to grant the declaratory relief, sought for in the Suit, is discretionary. As discretion is exercised by the Court not as a matter of course, but for just and valid reasons, the plaintiff/petitioner cannot claim grant of such a relief for the mere asking. The proviso fetters the discretion which is conferred on the Court by the main part of Section 34 and disables it from exercising its discretion, to grant the declaratory relief, in cases where the plaintiff, being able to seek further relief than a mere declaration, omits to do so. A proviso is generally resorted to provide conditions or restrictions to the main provision. The proviso qualifies the generality of the main Section by inserting an exception or to take out, as it were, from the main clause, a part of it which, but for the proviso, would fall within the main Section. The function of a proviso is to carve out an exception or exclusion to the main provision which otherwise would have been in the main Section.

38. In the present case, the Appellant has confined the relief sought by it to a mere declaration, and has not sought any further relief. While, ordinarily, their failure to do so would be fatal to the grant of the declaratory relief sought by them, we must consider whether the

objections raised by the appellant, to such a contention urged on behalf of the 1st Respondent, requires us to take a different view.

39. As noted earlier, the 1st Respondent had terminated the PPAs on the ground that the Appellant had failed to make payment, of the invoices raised by them, within the stipulated time; and the Appellants herein, in the OPs filed by them before the APERC, had sought the specific relief of declaration that termination of the PPAs, midway by the 1st Respondent, was illegal, arbitrary and invalid.

40. It is not in dispute that, both in the Petitions filed by them before the APERC and in the present Appeals filed before this Tribunal, the Appellants have not sought the consequential relief of a direction to the 1st Respondent to specifically perform its obligations under the PPA, and to continue to supply electricity to the Appellant, in terms of the proviso to Section 34 of the Specific Relief Act. In support of their contention, that failure to seek such consequential relief is not fatal, the Appellant would submit that this objection, raised on behalf of the 1st Respondent, for the first time at the appellate stage, ought not to be entertained. On the other hand, the submission, urged on behalf of the 1st Respondent, is that the objection raised in this regard is a question of law and can be raised for the first time, even at the appellate stage.

41. Before examining this contention, it is useful to note that, in "**Mst. Rukhmabai v. Lala Laxminarayan & Ors", (1960) 2 SCR 253,** (on which reliance is placed on behalf of the appellant herein), it was contended that, in the plaint, the cause of action for the relief of declaration was given as the execution of the partition decree through the Commissioner appointed by the Court; the plaintiff should have asked for a permanent injunction restraining the appellant from

interfering with his possession; and the suit should have been dismissed in limine as the plaintiff asked for a bare declaration though he was in a position to ask for further relief within the meaning of the proviso to Section 42 of the Specific Relief Act (which is similar to the proviso to Section 34 of the Specific Relief Act, 1963).

42. It is in this context that the Supreme Court held that the proviso to Section 42 of the Specific Relief Act, 1877 enacted that "no Court shall make any such declaration when the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so"; it is a well-settled rule of practice not to dismiss suits automatically but to allow the plaintiff to make necessary amendment if he seeks to do so; the appellant did not take this plea in the written statement; nor was there any issue in respect thereof, though as many as 12 issues were raised on the pleadings; the judgment of the District Judge did not disclose that the appellant had raised any such plea; for the first time, the plea based on Section 42 of the Specific Relief Act was raised before the High Court, and even then the argument advanced was that the consequential relief should have been one for partition; the High Court rejected the contention on the ground that the plaintiff, being in possession of the joint family property, was not bound to ask for partition if he did not have the intention to separate himself from the other members of the family; it was not necessary in this case to express any opinion on the question whether the consequential relief should have been asked for; for, this question should have been raised at the earliest point of time, in which event the plaintiff could have asked for necessary amendment to comply with the provisions of Section 42 of the Specific Relief Act; and, in the circumstances, there

was no justification to allow the appellant to raise the plea before the Supreme Court.

43. In ***Sir Chunilal V. Mehta Sons, Ltd. v. Century Spinning and Manufacturing Co, 1962 SCC Online SC 57*****,** (on which reliance is placed on behalf of the 1st respondent), the Supreme Court held that the construction of a document of title or of a document which is the foundation of the rights of parties necessarily raises a question of law. Likewise, in ***State of punjab & Ors. v. Dr. R.N. Bhatnagar & Anr.", (1999) 2 SCC 330*****, (**on which also reliance is placed on behalf of the 1st respondent), the Supreme Court rejected the submission that the contention urged should not be entertained for the first time in the appeal before it, as such a contention was not canvassed before the High Court in the writ petition, holding that a pure question of law centering round the construction of a proviso to a statutory Rule can be agitated in the proceedings before the Supreme Court, as no disputed question of fact arose for consideration; and, for raising such a pure question of law, the respondent's counsel, cannot be told off at the gates.

44. It is settled law that a legal argument can be raised at any stage of the proceedings. **(UPPCL *&* Ors. vs. UPERC, 2021 SCC Online APTEL 31).** If the facts proved and found as established are sufficient to make out a case within the meaning of a provision, the question of the applicability of the Section will only be a question of law and such a question could be raised at any stage of the case and also in the final court of appeal. ***Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari, 1950 SCC OnLine SC 44*****).** A pure question of law can be examined at any stage, including before the Supreme Court; and, if the factual foundation for a case has been laid and the

legal consequences of the same have not been examined, the examination of such legal consequences would be a pure question of law. (**K. Lubna & Ors. v. Beevi & Ors (**Judgement of the Supreme Court in **Civil Appeal No. 2442 of 2011** dated 13.01.2020).

45. When a question of law is raised for the first time before an appellate court, or even before a court of last resort, upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact. (**Connecticut Fire Insurance Co. v. Kavanagh**,**1892 AC 473; Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari, 1950 SCC OnLine SC 44)**

46. What was under challenge by the Appellant before the APERC was the notice of termination issued by the 1st Respondent. The relief sought by the Appellant was to declare the said termination notice as illegal and void. While a declaration to that effect was no doubt sought, the consequential relief which ought to have been sought was for a direction to the 1st Respondent to perform its obligations under the PPA and to continue supplying electricity to the Appellant for the entire duration of the PPA. The factual foundation, in respect of the termination notice, has been laid by the 1st Respondent in the OPs filed by them and is, in fact, admitted by the Appellants in the OPs filed by them before the APERC. The facts are not in dispute. What the 1st Respondent is pointing out is only that the Appellant, having sought the relief of having the termination of the PPA declared as illegal, ought to have also sought the consequential relief of a direction to the 1st Respondent to specifically perform its obligations under the PPA by

continuing to supply energy in terms thereof. Such a contention gives rise to a question of law which arises from the undisputed facts on record. That such a contention, has been urged for the first time at the appellate stage, matters little.

47. The other submission, urged on behalf of the Appellant, is that no such further relief was required to be sought, besides the relief of a declaration that the unilateral termination of the PPA was invalid, since the 1st Respondent was continuing to supply power and was receiving payment.

48. By the termination notice dated 01.03.2023, the 1st Respondent (Petitioner in the OP) had informed the Appellant that, consequent on termination of the PPA, it would sell the generated energy through open access; and if a No Objection Certificate was not issued to them by the appellant, to enable them to sell power through open access, they would suffer irreparable injury. Since the appellant did not issue clearance or a no-objection certificate in their favour, the 1st Respondent, in these two appeals, filed OP No. 3 and 13 of 2023 before the APERC seeking a direction to the Appellant to grant a No Objection Certificate to enable them to sell the generated power through open access. In the OPs filed by them, the case of the 1st Respondent was that, they could not obtain open access, to supply the electricity generated by them elsewhere, since the Appellant had failed to grant them a No Due Certificate and clearance for sale of power at the Exchange; and the Appellants had, by their letter dated 25.05.2023, rejected the 1st Respondent's request for grant of such clearance, stating that all pending dues had been cleared.

49. In the impugned order, the APERC records that subsequent payments would not cure the default which had already occurred; and the 1st Respondent had the right to terminate the agreements/ PPAs. The Appellant was directed, by the impugned order, to grant No Objection Certificates to the 1st Respondent for sale of power, being generated from their projects, through open access in terms of Regulation 2 of the 2006 Regulations.

50. Continued supply of electricity, by the 1st Respondent to the Appellant, is not voluntary. They had no choice, but to continue supplying electricity to the Appellant, since they were neither granted a No Due Certificate nor did the appellant issue clearance to the 1st Respondent for sale of power by them through open access in the Exchange. The only choice the 1st Respondent had, other than to continue supplying electricity to the Appellant, was to shut down their plant. Having chosen not to grant them open access, and thereby forcing the 1st respondent to continue supplying electricity to them, the appellant cannot take advantage of its own wrong to now contend that they need not seek the consequential relief as the 1st respondent continues to supply electricity to them.

51. In such circumstances, the contention that the consequential relief was not required to be sought, as the 1st Respondent continued to supply power, is only required to be noted to be rejected. Since no consequential relief was sought, the proviso to Section 34 of the Specific Relief Act disentitles the Appellant from being granted the declaratory relief sought for by them.

SECTION 41 & 42 OF THE SPECIFIC RELIEF ACT

52. Section 41(e) of the Specific Relief Act, 1963 stipulates that an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. Since the subject PPA cannot be directed to be specifically performed/enforced, more so in the light of our earlier observations regarding non-compliance by the Appellant of Sections 16 and 34 of the Specific Relief Act, 1963, no injunction can be granted restraining the 1st Respondent from terminating the subject PPA.

Section 42 of the Specific Relief Act, 1963 is an exception to Section 41(e), and provides that, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement. Under the proviso thereto, Section 42 would apply only if the plaintiff has not failed to perform the contract so far as it is binding on him.

53. In **PTC India Limited v. Jaypee Karcham Hydro Corporation Limited, 2010 SCC OnLine Del 745,** the Delhi High Court held that, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative covenant, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative covenant; Section 42 is thus an exception to Section 41; this is because if there is a negative covenant, the Court has no discretion to exercise; in

restraining by injunction the breach of a negative covenant, the interference of the Court is in effect an order for specific performance; the rationale for this is that if parties for valuable consideration, with their eyes open, have contracted that a particular thing shall not be done, all that a Court has to do is to order, by way of injunction, that the said thing shall not be done; and, in such a case, the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties; and, in view of the bar contained in Section 14(1)(a) to (d) read with Section 41 of the Specific Relief Act, 1963 no relief can be granted.

54. It is unnecessary for us to examine whether the subject PPA comprises both an affirmative and negative covenant, for the proviso to Section 42 makes it clear that Section 42 would apply only if the plaintiff has not failed to perform the contract in so far as it is binding on him. As noted herein above, the Appellant, which had filed the petition before the APERC seeking a declaration that termination of the PPA by the 1st respondent is illegal, arbitrary and void, had failed to make payment of the monthly invoices raised on them by the 1st Respondent within the stipulated time, and had, thereby, failed to fulfil its obligations under the PPA.

Issue No2: Does Doctrine of waiver and acquiescence apply to Respondents, taking away their right to Terminate the PPA

55. Ms Suparna Srivastava, Learned counsel for the Appellants submitted that from a perusal of Articles 9 and 10 of the PPAs entered into between both the parties, it is clear that if either party commits a breach of the PPAs at the first instance, the other party is first required to seek specific performance of PPA by giving the defaulting party a 30-day notice to rectify the breach. If despite giving such notice, no

efforts are taken for curing the default, the non-defaulting party has the right to issue a preliminary notice of termination, granting an additional 30 days to cure the default. Only if the default is not remedied within this 30-day period then the non-defaulting party has a right to terminate the PPAs and seek damages. Without adhering to the prescribed procedure under Article 9 of the PPAs, as aforementioned, no termination can be deemed to be 'valid'.

56. Learned counsel for the Appellants submitted that the parties to the PPAs must have clear intention to pursue the performance of the contract, rather than its termination, as highlighted in ***"Union of India v. D.N. Revri & Co.", 1976 4 SCC 147.*** This is more so considering that the contract in question is a PPA, which holds a sacrosanct status in eye of law and directly impacts public rights. The settled legal position is that PPAs must be honoured by the parties as stated in the Judgment dated 22.02.2024 in Appeal No. 313/2018: ***Gadre Marine Export & Anr. vs. NERC & Ors para 31.*** Additionally, by referring to the judgment in "***UPPCL & Ors. vs. UPERC", 2021 SCC Online APTEL 31para 115 and 338.*** it is submitted that since the PPAs were approved by the APERC, Respondent No. 1 could not have unilaterally terminated the agreements without obtaining the necessary approval from the APERC.

57. Further, as the parties intended to perform the PPA rather than terminate it, Respondent Vishwind in 2020 had approached APERC, seeking specific performance of the PPAs and seeking directions against the Appellant to clear the outstanding bills. Upon the Appellant's payment of outstanding bills, the APERC, with the Respondent consent, disposed of the said OP 15 of 2020 as it had served its purpose.

58. Learned counsel of the Appellants further submitted that the principles of the doctrine of waiver and acquiescence have time and again been riterated and relied upon by courts and judicial authorities. It is also contended that the waiver, as a defence, is a question of law that can be raised at any stage of the case, as noted in "***Sir Chunilal V. Mehta Sons, Ltd. v. Century Spinning and Manufacturing Co.",*** **1962 SCC Online SC 57** and "***State of Punjab & Ors. v. Dr. R.N. Bhatnagar & Anr.",*** **(1999) 2 SCC 330.** In the present facts of the case, it is evident that the Respondents had clear options to either terminate the contract or pursue specific performance and continue their obligations under the PPAs. It is an admitted fact that despite allegedly opting for termination of the PPAs, Respondent No. 1 continued performing its obligations under PPAs, including supply of power and raising bills on the Appellants. Consequently, the Appellants have also performed their part of the contract and paid the said bills. Therefore, it is evident that both the parties were intended to continue the PPAs and fulfil their respective duties, which is clear from the fact that the Appellant consistently showed readiness and willingness to perform its duties under the PPAs. Consequently, Respondent No. 1 was estopped from terminating the PPAs when it had chosen to continue with the performance of the same by application of doctrine of waiver and acquiescence. In this regard, learned counsel placed its reliance on "***Tele 2 International Card Company SA & Ors. v. Post Office Limited",*** (2009) EWCA Civ 9; "***Kanchan Udyog Ltd. v. United Spirits Ltd.",*** **(2017) 8 SCC 237.** By drawing our attention to the decision in "***Union of India & Ors. v. N. Murugesan & Ors***.", **(2022) 2 SCC 25**, learned counsel submitted that it is also a well-established principle of law that a party cannot be

permitted to approbate and reprobate, such as “blow hot, blow cold” or “fast and loose” at the same time.

59. It is further submitted by the learned counsel of the Appellants that Respondent VAAYU and Vishwind had filed petitions being O.P. No. 113 of 2021 and O.P. No. 23 of 2024 respectively, before the APERC, seeking directions for the payment of LPS accrued due to the delay caused by the Appellants in making payments for the power supplied by the Respondent’s wind power plants situated in Kurnool and Ananlapur district in the State of Andhra Pradesh from June 2020. The APERC, vide its Order dated 08.05.2024, directed the Appellants to pay the LPS amount, after due reconciliation, in four monthly instalments, with the first instalment commencing from 01.07.2024. In compliance with the aforesaid direction, APSPDCL has made the payment of the first instalment.

60. Hence, the finding of the APERC that the delay in the payment of outstanding tariff bills constitutes a breach of the PPA and therefore Respondents VAAYU and Vishwind has unilateral right to terminate the PPAs without any intervention or approval of the Commission, is *prima facie* erroneous in as much as the notices issued by Respondents VAAYU and Vishwind indicate that the procedure prescribed under Article 9 of the PPAs has not been duly followed.

61. Per contra, learned counsel for the Respondent submitted that Respondent Generator VAAYU and Vishwind terminated the PPAs on 01.03.2023 and 02.12.2022 after issuing preliminary default notices on 11.01.2023 and 19.11.2022 in case of Respondent-VAAYU and Respondent-Vishwind respectively, due to continuous defaults made by APSPDCL.

62. As all obligations between the parties stood extinguished on 01.03.2023 and 02.12.2022, any *post facto* payments made by APSPDCL towards outstanding dues against bills raised under the PPAs cannot absolve APSPDCL's default and are therefore inconsequential. Learned counsel for Respondents submitted that despite APSPDCL making subsequent payments, these payments cannot be construed to be admitted as the revocation of termination. The Respondent Generators retain both the right; i.e. to receive payments and also the right to terminate the PPAs, since these rights being independent of each other. A similar argument was also raised before this Tribunal and settled in ***'M/s Jasper Energy Private Limited vs. Karnataka Power Transmission Corporation Limited & Ors.***', Appeal No. 145 of 2012 (Judgment dated 30.04.2013, as well as in ***"Sandur Power Company Ltd. vs. Karnataka Power Transmission Corporation Ltd. & Ors.",*** Appeal No. 180 of 2009, and ***"Mangalore Electricity Supply Company Ltd. vs. Sandur Power Company Ltd. & Ors."***, Appeal No. 104 of 2010 (Judgment dated 11.04.2011.

63. So far as the contention of the APSPDCL that the Respondent Generators continued to supply power to it even after the termination of the PPAs, learned counsel for the Respondents submitted that as the Respondent Generators did not receive the No Objection Certificate (NOC) from APSPDCL, they are left with no option but to continue supply power. Although the Impugned Orders were passed in December 2023, APSPDCL granted the NOC only after the Respondent Generators initiated contempt proceedings before the APERC. Further, the contention of the APSPDCL that the Respondent Generators were required to first approach the APERC for approval of

termination under Article 10 of the PPA is wholly misconceived, as the Respondent Generators opted to invoke Article 9 of the PPA, which gives either party the right to unilaterally terminate the PPAs. Thus in view of above contentions, the appeals lack merits and prayed for their dismissal.

Analysis

64. Main contentions raised by learned counsel for the Appellants is that the intention of parties to the PPA is clearly to endeavour performance of the contract rather than its termination and in the event of default in payment, Respondents have the option to terminate the contract or seek specific performance of contract and continue their obligation; however, Respondents, even after exercising the option of termination of the PPA, has continued to perform its obligation under the PPA i.e supply of power and raising bills on the Appellant, and Appellants have also performed their part of the contract i.e. payment of bills. Learned counsel for the Appellants citing few judgements pleaded that doctrine of waiver and acquiescence would apply in present case and Respondents is estopped from terminating the PPA unilaterally and parties cannot be permitted to approbate and reprobate, “blow hot –blow cold’ and fast and loose at the same time.

65. There is no doubt that when parties enter the PPA, they have clear intention for performance of the PPA rather than its termination ***“Union of India v. D.N.Revri & CO”, (1976 4 SCC 147),*** and accordingly PPAs, generally, have provisions for curing of defects, if any occur during the currency of PPA, by either party; however to protect the interest of parties, provisions for termination of PPA, in certain circumstances, mainly in the event of default, is also

incorporated, instead of either parties to undertake legal recourse of establishing frustration of Contract for coming out of PPA. In addition, there cannot be two opinions that PPA has a sacrosanct status in the eyes of law and PPAs must be honoured by the parties as also referred by Appellant through Judgement dated 22.02.2014 in Appeal No. 313/2018 **(Gadre Marine Export & Anr vs NERC & Ors).** In the present case let us examine the conduct of parties, their default if any, and does doctrine of waiver and acquiescence would apply to Respondents estopping them for termination of PPA.

66. Three Power purchase Agreements (PPAs) were executed between Vishwind and APSPDCL on 30.10.2010, and 17.12.2011 for setting up of wind power generating station of 7.2 MW in Kurnool District, Andhra Pradesh. Likewise, seven Power Purchase Agreements (PPAs) were executed between VAAYU and APSPDCL on 29.05.201 for the establishment of a 50.4 MW wind power generating station in Kurnool District, Andhra Pradesh. The tenure of PPAs was of 20 years from COD and all the delivered energy at the interconnection point is to be delivered/sold to DISCOM at a tariff of Rs 3.50 per unit for first 10 years and for subsequent year as determined by APERC. The Vishwind generating projects were commissioned from 14.10.2010 to 30.09.2011 and VAAYU generating projects were commissioned from 02.08.2010 to 31.10.2010 and these generators have been supplying power to the Appellants and raising monthly bills. As per PPAs, APSPDCL, the Discom was required to make payment of monthly bills so received by them (within 5 days of metering date) within a period of 30 days from metering date; Discom has to pay interest at existing nationalised bank Prime Lending Rate in the event of delay in making the payment from the due date. The

rights and obligation of each party are defined in the PPA, action and consequences of default have been stated in Article 9 of the PPA

67. Based on the submission made by the learned counsel of Respondents and also conceded by Learned counsel of the Appellants, it is noted that the Appellants have defaulted in making payments and in the past Respondents had to approach State commission for getting dues cleared by the Appellants besides making regular follow-ups with the Appellants for the release of payments, such instances are as stated below:

a) In the year 2020, the Respondent VAAYU approached the State Commission through O.P. No. 1 of 2020 for specific performance of the terms of PPA, and in compliance with the interim orders passed therein by the State Commission, the Appellant-APSPDCL cleared the dues up to Jan 2021 monthly bills; consequently, the said O.P. was closed on 24.3.2021. Respondent VVAYU also waived LPS.
b) Respondent VAAYU again filed a Petition O.P No. 113 of 2021 before the State Commission, on account of default by the Appellant-APSPDCL in payment of bills to the tune of Rs. 18,60,30,535/- claimed till 09.11.2021. The said O.P. remains *sub-judice,* however, Appellants cleared arrears on invoices up to April 2022.
c) Respondent VAAYU vide its several letters dated 21.06.2022, 14.07.2022, 31.10.2022, 06.12.22, requested the Appellants to release outstanding amount, which has accumulated to about Rs 19.14 crore against energy payments due for Feb 22 to Sept 22.

d) Likewise Respondent Vishwind, also approached State commission vide O.P 15 of 2020 for clearing of outstanding dues by Appellants, who in turn cleared entire arrears till May 2020 and partial payments made for the period June 2020 to December 2020.

e) Respondent Vishwind vide its several letters dated 29.07.2022, 15.11.2022, 06.12.2022 requested the Appellants to release outstanding amount, which has accumulated to about Rs 6.30 crores against energy payments incl. LPS for June 22 to Sept 22. Vide letters dated 21.09.2022, 23.09.2022, 19.11.2022, Respondent Vishwind also communicated to Appellants that in view of consistent default in making payments, they plan to sell the energy generated through open access and to terminate the PPA

f) Respondent VAAYU vide letter dated 01.03.2023 and Respondent Vishwind vide letter dated 02.12.2022 terminated the agreement and conveyed that it will be selling energy generated from the project through open access.

Though termination notices have been issued as a consequence of default in payment in the year 2022, however earlier defaults are noted to show that default continued for a long time.

68. It is noted that the PPA puts an obligation on the Appellants to make payments within up to 30 days of receiving the invoice, while it's a fact, not disputed by Appellants, that there have been delays in making the payments as submitted by Respondents:

In case of VAAYU : Monthly payments from February 2021 to December 2021 were only made on 27.10.2022, besides from some part payments in the interregnum. Monthly payments for January and February 2022 were made on 05.11.2022. For March 2022 on

05.12.2022 and for April 2022 onwards till February 2023, payments were made in January 2023 and April 2023

In case of Vishwind : Monthly payments for January to June 2021 were made in November/December 2022 and for July 2021 to December 2021, payments were made in 2023 (some after the notice for termination was issued and some after filing of the Petition before Ld. APERC). Monthly payments for the entire 2022 were only made in March, April, and August of 2023 (after filing of petition before Ld. APERC).

69. It is not difficult to imagine that persistent default on the part of Appellant in making the payment for the energy received by them, would have caused hardship to the Respondents VAAYU and Vishwind in meeting their obligations as well as for running the generation projects. Learned counsel for the Appellants, submitted that the Appellant APSPDCL vide its letter dated 04.08.2022 informed all the generators including respondents herein i.e VAAYU and Vishwind that outstanding dues if any shall be made through amount availed by loan taken from REC and PFC. However, we observe that such assurance do not indicate any clear time frame about clearing of outstanding dues and without appreciating the consequences it may pose on Respondent generators in meeting its debt and interest repayment obligations and managing day to day operations. On one occasion, Respondent generator has waived their right of LPS on delayed payment. In our view, the conduct of APSPDCL, demonstrates breach of its contractual obligations under the PPAs and Respondent generators have made persistent effort to perform under the PPA and they can't be faulted for seeking avenues to sell their power through open Access.

70. Learned counsel for the Appellants has contended that after exercising the option of termination of the PPAs, Respondents continued to perform the obligation under PPA i.e. Supply of energy and thus by application of doctrine of waiver and Acquiescence, Respondents are estopped from terminating the PPAs.

71. As stated in earlier paras, Respondents Generators, being must run wind generators, and connected to the state grid continued to supply power to the Appellants, even after the final termination notice (issue of its legality and validity is deliberated separately in following paragraphs), as it had no choice but to supply the energy to Appellants in spite of persistent default by Appellants in clearing outstanding dues, as in the absence of NOC Respondents could not avail open Access to sell their energy outside, and, in the absence of NOC, other than shutting the wind turbines, Respondent Generators had no option but to keep supplying energy to the Appellants as these are embedded in the State Grid; and APSPDCL has also not disputed receipt of such supply of energy as they claimed to have made the payments, may be belatedly. Looking at the conduct of parties involved, we are of the view that Respondent generators have taken several measures, so that its outstanding dues gets cleared and they had all along endeavoured to perform the PPA. As is evident from above, outstanding dues were majorly cleared by Appellants, with the interference of State commission. We observe, the Appellants has persistently defaulted in their obligation of making payments of the monthly Invoices for the energy received, a fact not even disputed by them.

72. Learned counsel for the Appellant submitted that in "***Tele 2 International Card Company SA & Ors. v. Post Office Limited*****", (2009) EWCA Civ 9,** reliance was placed on **Motor Oil Hellas**

(Corinth) Refineries SA v Shipping Corporation of India (The "Kanchenjunga"), to hold that the doctrine of affirmation of a contract by election can be summarised as follows: (1) if a contract gives a party a right to terminate upon the occurrence of defined actions or inactions of the other party and those actions or inactions occur, the innocent party is entitled to exercise that right. The innocent party has to decide whether or not to do so. Its decision is, in law, an election. (2) It is a prerequisite to the exercise of the election that the party concerned is aware of the facts giving rise to its right and the right itself. (3) The innocent party has to make a decision, because if it does not do so then "the time may come when the law takes the decision out of its hands, either by holding [it] to have elected not to exercise the right which has become available to it, or sometimes by holding it to have elected to exercise it. (4) Where, with knowledge of the relevant facts, the party that has the right to terminate the contract acts in a manner which is consistent only with it having chosen one or other of two alternative and inconsistent courses of action open to it (ie. to terminate or affirm the contract), then it will be held to have made its election accordingly. (5) An election can be communicated to the other party by words or conduct. However, in cases where it is alleged that a party has elected not to exercise a right, such as a right to terminate a contract on the happening of defined events, it will only be held to have elected not to exercise that right if the party "has so communicated its election to the other party in clear and unequivocal terms".

73. When a party to a contract is put in a position where it has to decide whether or not to exercise a right to terminate that it is given by the terms of a contract, and it is disputed whether that party has

terminated or has elected to abandon the right to terminate, then a court has to make a finding one way or the other. Whether a party has elected to terminate or to affirm the contract is a question of fact: either a party has affirmed the contract or it has not. If the innocent party has not affirmed the contract, then the right to terminate will be exercisable still. (**Tele 2 International Card Company SA & Ors. v. Post Office Limited", (2009) EWCA Civ 9).**

74. The submission urged on behalf of the Appellant, that the 1st Respondent had waived its right to terminate the PPA, and had acquiesced to the performance of the PPA, is only to be noted to be rejected. While it is true that, even after issuing the notice to terminate the subject PPA, the 1st Respondent continued to supply electricity to the Appellant, such supply was not a voluntary act on their part, but was because the only choice available to the 1st Respondent was either to continue supplying electricity to the Appellant or to shut down its generating plant. The 1st Respondent's request, for grant of a no objection certificate to enable them to secure open access and thereby supply electricity elsewhere, was rejected by the Appellant, and consequent thereto the 1st Respondent had perforce to file a petition before the APERC seeking open access.

75. Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which, except for such waiver, the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver, which the courts of law recognize, is a rule of judicial policy that a person will not be allowed to take inconsistent positions to gain advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver

is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. **(P. Dasa Muni Reddy v. P. Appa Rao: (1974) 2 SCC 725 ; Kanchan Udyog Ltd. v. United Spirits Ltd, (2017) 8 SCC 237)**

76. Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be implied. (**Waman Shriniwas Kini v. Ratilal Bhagwandas & Co: AIR 1959 SC 689; Kanchan Udyog Ltd. v. United Spirits Ltd.", (2017) 8 SCC 237).** As waiver is an intentional relinquishment of a known right, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. **(All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487).**

77. Waiver is a voluntary act and the intention of the 1st Respondent, to waive its contractual right to terminate the PPA, must be evident from the material on record. In the present case, the notice of termination of the PPA dated 01.03.2023 in case of VAAYU (APL 200 of 2024) and 02.12.2022 in case of VISHWINND (APL 201 of 2024) itself records that the said notice was being issued without prejudice to the right of the 1st Respondent to claim the outstanding amounts with

respect to the energy already supplied under the PPA. It is evident, therefore, that neither has the 1st Respondent waived its right to terminate the PPAs or to claim the outstanding dues nor has it acquiesced to the subject PPA by voluntarily consenting to continue supplying electricity to the appellant.

78. Acquiescence is sitting by, when another is invading the rights and spending money on it. It implies positive acts, not merely silence or inaction. Acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant. **(Power Control Appliances v. Sumeet Machines (P) Ltd., (1994) 2 SCC 448).**

79. It is necessary that the person who alleges this lying by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title. In order to make out such acquiescence it is necessary to establish that the plaintiff stood by and knowingly allowed the defendants to proceed and to expend money in ignorance of the fact that he had rights and means to assert such rights. **(Proctor v. Bannis [(1887) 36 Ch D 740; Power Control Appliances v. Sumeet Machines (P) Ltd., (1994) 2 SCC 448).** The underlying principle governing the concept of acquiescence is of estoppel. The question of prejudice is also an important issue to be taken note of by the court. (**Kanchan Udyog Ltd. v. United Spirits Ltd.", (2017) 8 SCC 237).**

80. It is stated, in Halsbury's Laws of England, Fourth Edn., Vol. 24 at paragraph 943, thus:

"943. Acquiescence.— An injunction may be refused on the ground of the plaintiff's acquiescence in the defendant's infringement of his right. The principles on which the court will refuse interlocutory or final relief on this ground are the same, but a stronger case is required to support a refusal to grant final relief at the hearing. The reason is that at the hearing of the cause it is the court's duty to decide upon the rights of the parties, and the dismissal of the action on the ground of acquiescence amounts to a decision that a right which once existed is absolutely and for ever lost".

81. The conduct of the 1st respondent, in continuing to supply electricity to the Appellant even after they had issued the notice of termination dated 01.03.2023 and 02.12.2022, shows that it was not a voluntary act on their part, but was only because they faced the Hobson's choice of either continuing to supply electricity to the Appellant or to shut down their generation plant.

82. Reliance has been placed by the Appellant on the judgment of the Supreme Court in "***Union of India & Ors. v. N. Murugesan & Ors.",*** **(2022) 2 SCC 25, and the relevant extract is reproducing below:**

> ***26.*** *These phrases are borrowed from the Scots law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a*

> *party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the Contract Act concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally.*

83. The doctrine of approbate and reprobate has also no application to the facts of the present case. Approbate and reprobate would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. (**Kanchan Udyog Ltd. v. United Spirits Ltd.", (2017) 8 SCC 237).**

84. Since the 1st Respondent had issued the notice of termination of the PPA dated 01.03.2023 (APL 200 of 2024) and 02.12.2022 (APL

201 of 2024), without prejudice to their right to claim payment for the supplies already effected by them, and as they had perforce to continue supplying electricity to the appellant as the latter did not give its consent to the 1st respondent being given open access to supply electricity elsewhere, the doctrine of approbate and reprobate has also no application to the case on hand. Thus we do not find merit in the submission of Learned Counsel for the Appellants on this count and the issue is decided against the Appellants.

Issue No 3 : Are Termination Notice valid in terms of Article 8,9 and 10 of PPA

85. Learned counsel for the Appellants contended that the notices under Articles 9.1 and 9.3 of the PPAs are mandatorily required to be issued to the Chief General Manager (Commercial & RAC), APCPDCL, in terms of Article 8 of the PPAs. Any notice issued contrary to Article 8 cannot qualify as a notice under Article 9, as referenced in "***Talwandi Sabo Power Ltd. vs. PSPCL"*, 2016 SCC OnLine APTEL 64**. In the present case, the notices sent by Respondent No. 1 have been issued to third parties, and as such, the same are not in accordance with the method prescribed for issuing notices under Article 8 of the PPAs, and therefore, cannot be considered as valid notices as per Article 9.1 of the PPAs.

86. By referring to the decision in "***Power Management Company Limited v. M/s Sky Power Southeast Solar India Private Limited & Others",* (2023) 2 SCC 703**, learned counsel further submitted that without issuing the first default notice giving the specified time from the date of issue of notice, the second notice, which would be a notice of termination, cannot be issued. Further, in "***Thangam Textiles v. First***

***Income-Tax Officer"*, (1972),** the Madras High Court as regards the service of notice to the correct person has held if notices are not served as required, then proceeding undertaken are void and inoperative. Therefore, any notice issued in derogation of the express terms of the PPA cannot be said to be a default notice and the same is invalid.

87. Regarding the contention of the Respondents that two clauses of the same Article i.e., Article 9.1 and 9.3 are independent and can be read separately; learned counsel for the Appellants submitted that these clauses cannot be construed in isolation and must be read together, as they are interconnected to each other. The words used in Article 9.1 are "…*DISCOM commits* ***a*** *breach…*" and Article 9.3 uses the words "*If* ***the*** *default continues…*". It is important to note that as per the meaning of "a" and "the," the former is used to refer to persons or things not previously mentioned, while the latter refers to something or someone that has already been mentioned or is readily understood. Therefore, it is evident that the use of "the" before "default" in Article 9.3 refers to the default already mentioned in Article 9.1, indicating that both clauses are interconnected and cannot be read independently. It is further submitted that any contract or a term/ provision of contract shall always be read as a whole and not in parts and is to be considered with reference to its object and the whole of its terms and accordingly, whole context must be considered. Reference in this regard has been drawn from the decision in ***"Transmission Corporation of Andhra Pradesh Limited. & Ors. v. GMR Vemagiri Power Generation Limited. & Anr", (2018) 3 SCC 716.***

88. Learned Counsel for the Appellants further asserts that it has been iterated and upheld by the Courts that the true construction of a

contract must depend upon import of the words used and not upon what the parties choose to say afterwards. The subsequent conduct of the parties in performing the contract does not alter the effect of clear and unambiguous words used in the contract. The intention of the parties is to be derived from the language used, and shall be viewed in the light of the surrounding circumstances and the object of the contract, which is also stated in the decision in ***"Bank of India v. K. Mohandas", (2009) 5 SCC 313.*** It is also contended that, as per the established principles of interpretation, the two sub-sections of any section must be construed as a whole "*each portion throwing light, if need be, on the rest*". These two sub-sections are interdependent and should be read together to avoid any inconsistency, making every effort to harmonize them where reasonably possible. Learned counsel draws the reference from the decision in **"*Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd"*, 1962 SCC OnLine SC 65**. Further, learned counsel for the Appellants by referring to **"Kalawatibai v. Soiryabai", (1991) 3 SCC 410** submitted that it is well settled that a section has to be read in its entirety as one composite unit without bifurcating it or ignoring any part of it. Viewed from this perspective the section, undoubtedly, comprises two parts, one descriptive, specifying the essential requirements for applicability of the section, other consequences arising out of it. One cannot operate without the other. Referring to ***Bangalore Electricity Supply Co. Ltd. v. E.S. Solar Power (P) Ltd., (2021) 6 SCC 718*****,** learned counsel for the Appellants contended that every contract is to be considered with refrence to its object and whole of its terms.

89. Per contra, learned counsel for the Respondent Generators submitted that since 2019, the Appellant-APSPDCL is defaulting in

making the payment of monthly invoices that were regularly raised by them for the energy supplied as per Article 1.6 read with Article 5 of the PPAs. Due to the continuous defaults, the Respondent Generators were compelled to approach the APERC, seeking directions for APSPDCL to pay the outstanding invoices along with the Late Payment Surcharge. APSPDCL belatedly made payment of the outstanding invoices up to January 2021. However, APSPDCL thereafter again defaulted in making payments for the monthly invoices regularly raised under the PPAs. It is because of APSPDCL's persistent non-payment of dues despite numerous letters issued, the Respondent Generators were compelled to send preliminary notices for termination of the PPAs on 11.01.2023 for VAAYU and 21.09.2022, and 23.09.2022, for Vishwind , in terms of Article 9.3 of the PPAs. Even after issuance of these notices, APSPDCL failed to clear its dues, which forced Respondent Generators to terminate the PPAs through notices dated 01.03.2022 for VAAYU and 02.12.2022 for Vishwind. In these letters, the Respondent Generators also requested APSPDCL to issue NOC in order to sell the power through Open Access.

90. Learned counsel for the Respondents further submitted that the PPAs include a mechanism to address defaults by a party to the terms and conditions of the PPAs. Article 9.3 allows the Respondent Generators to terminate the PPAs, if a default continues for 30 days or more after issuing a preliminary default notice. However, APSPDCL, at the Appellate stage, has raised a new contention that Article 9.1 of the PPAs precedes Article 9.3 of the PPAs. It is pertinent to mention that Article 9.1 of PPAs deals with the default by APSPDCL and provides that the Respondent Generators will be entitled to specific performance of the PPAs and/or to claim damages, provided a 30-day

notice is given to APSPDCL. It is also important to note that Article 9.1, which deals with APSPDCL's default, operates independently of Article 9.3, which pertains to termination. The remedy of specific performance under Article 9.1 is distinct from the right to terminate under Article 9.3. It is well-established trite law that it is the duty of the appellate courts only to correct errors in the judgments or proceedings of the lower courts, and not to adjudicate the new pleas that could have been raised earlier before the lower courts. This principle is supported by the Apex Court's decision in ***"Chittoori Subbanna v Kudappa Subbanna & Ors.", 1964 SCC OnLine SC 322***, and the Rajasthan High Court judgment dated 28.07.2023 passed by the High Court of Rajasthan in Civil Writ Petition No. 15286 of 2018 titled **"*Jaipur Development Authority v Prerna Agricultural Farms Private Limited*",**

91. Learned counsel for the Respondents contended that the requirement of Article 8 of the PPAs is fulfilled, as the preliminary default notice dated 11.01.2023, even though sent to APTRANSCO is marked and received by APSPDCL and was received by APPCC as sent by APSPDCL to them. Additionally, relying on the decision of the Hon'ble Himachal Pradesh High Court in "***Deva Builders Vs. Nathpa Jhakri Joint Venture",*** [Civil Suit No. 49 of 1999, learned counsel for the Respondents submitted that even in cases of improper notice, termination of a contract remains valid. The Hon'ble Supreme Court in "***Ghanshyam Dass and Ors. v. Dominion of India & Ors."***, **(1984) 3 SCC 46,** also ruled that a notice is sufficient if it fulfils the object of informing.

92. Learned counsel for the Respondents also submitted that while the proceedings before the APERC were pending, APSPDCL had made payments for certain months of dues, claiming that default has

been cured and thus the PPAs could not be terminated. However, it is important to note that APSPDCL is obligated to make payments of bills for the delivered energy at the prescribed tariff by the due date of payment, as per Article 5 of the PPAs. According to Article 9 of the PPAs, if either of the party breaches the terms of the PPA, the other party can terminate the PPA after the 30-day default curing period has elapsed. Consequently, the Respondent Generators terminated the PPAs on 01.03.2023 and 02.12.2022 after issuing preliminary default notices on 11.01.2023 and 21.09.2022/23.09.2022 in case of Respondent-VAAYU and Respondent-Vishwind respectively, due to continuous defaults made by APSPDCL.

Discussion and Analysis

Judgement relied upon by the Appellants

93. In the judgment in ***Talwandi Sabo Power Ltd. vs. PSPCL***", 2016 SCC OnLine APTEL 64, this Tribunal held that the PPA was the controlling document, and was a binding contract; Section 50 of the Indian Contract Act embodies the oft quoted legal principle that when the contract expressly provides that a particular thing relating to furtherance of contract has to be done in a particular manner then it has to be done in that manner and in no other manner; thus, if Article 6.1.1 of the PPA prescribes notices to be given in a particular manner, notices have to be given in that manner and no other manner; if Article 18.11 prescribes that notice to be served on the Procurer has to be served on its authorised representative it has to be served on him and on no other person; there is no scope to urge that conduct of parties shows that there was substantial notice; when the contract contains express and unambiguous terms there can be no question of there being any implied term or reading

the contract as a whole; search for implied term on the specious ground that it is equitable is not permissible; and a term will not be implied if it would be inconsistent with the express wording of the contract.

94. Similarly, in ***M.P. Power Management Company Limited v. M/s Sky Power Southeast Solar India Private Limited & Others",*** (2023) 2 SCC 703, the Supreme Court observed that what was expected of the appellant was, as the non-defaulting party, to issue a default notice to the defaulting party viz. the seller; Article 9.1 contemplated that if the default is not fully set right within three months from the date of issue of the default notice, then, in the case of default by the seller, the appellant was to serve a seven days' notice of termination; the notice was, undoubtedly, to be in writing; it was by the second notice, which was to be of the duration of seven days that the appellant could validly terminate the agreement; without issuing the first default notice, giving three months' time from the date of issue of the notice, the second notice, which would be a notice of termination, cannot be issued; the subject-matter of the said notice appeared to be the fulfilment of condition subsequent, it was clearly mentioned that as per Article 2.5.1, the PPA was liable for termination, and the first respondent was asked for the explanation within ten days from the date of the letter for further necessary action in the matter; the said notice could not qualify as one which was issued as a default notice under Article 9.1; Article 9.1 contemplated a default, the issuance of default notice and, most importantly, giving a period of three months for the seller (first respondent) to set things right; and it was if the seller did not remedy the matter within three months, that the second notice, which was essentially an order of termination of the PPA, could be issued.

95. This Tribunal further held that what Article 9.1 read with Article 9.4(*a*) contemplated was not the mere running of time for a period of three months, after the occurrence of the seller's event of default but an opportunity to the seller by the giving of a notice of default and waiting for three months; and it was only after the seller was put on notice of the default, which it had committed and an opportunity was granted to remove fully the default and it persevered in breach, that a valid order of termination could be passed.

96. Further, in ***Thangam Textiles v. First Income-Tax Officer***, (1972), the court agreed with the view of the Mysore High Court, in Nataraj v. Fifth Income-tax Officer [[1965] 56 I.T.R. 250 (Mys.), that the service should be in accordance with the provisions of the Act, and unless the provisions relating to the mode of service are strictly complied with the reassessment proceeding was without jurisdiction.

97. In ***Transmission Corporation of Andhra Pradesh Limited. & Ors. v. GMR Vemagiri Power Generation Limited. & Anr",*** (2018) 3 SCC 716, the Supreme Court held that the PPA is a technical commercial document which has been drafted by persons conversant with the business; the principle of business efficacy will also have to be kept in mind for interpreting the contract; the terms of the agreement have to be read first to understand the true scope and meaning of the same with regard to the nature of the agreement that the parties had in mind. It will not be safe to exclude any word in the same; the terms of a contract have to be given their plain meaning with regard to the intendment of the parties as to what was intended to be included and what was not intended to be included, as distinct from an express exclusion; the commercial parlance test will also have to be applied; in the event of any ambiguity

arising, the terms of the contract will have to be interpreted by taking into consideration all surrounding facts and circumstances, including correspondence exchanged, to arrive at the real intendment of the parties, and not what one of the parties may contend subsequently to have been the intendment; every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of enquiry is the meaning of an isolated clause; a commercial document cannot be interpreted in a manner to arrive at a complete variance with what may originally have been the intendment of the parties; such a situation can only be contemplated when the implied term can be considered necessary to lend efficacy to the terms of the contract; and, if the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties, it will not be prudent to read implied terms on the understanding of a party, or by the court, with regard to business efficacy.

98. In ***Bank of India v. K. Mohandas",*** (2009) 5 SCC 313, the Supreme Court held that the true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards, nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract; the intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract; the nature and purpose of the contract is an important guide in ascertaining the intention of the parties; and it is also a well-recognised principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each

clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible.

99. In ***Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd"***, 1962 SCC OnLine SC 65, the Supreme Court held that the first rule of construction which was elementary, was that the words used in the section must be given their plain grammatical meaning; the sub-sections must be construed as a whole "each portion throwing light, if need be, on the rest"; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy.

100. In ***Kalawatibai v. Soiryabai***", (1991) 3 SCC 410, the Supreme Court referred with approval to its earlier judgement, in ***V. Tulasamma v. Shesha Reddy***: (1977) 3 SCC 99, wherein it was observed that the section was, "a classic instance of statutory provision which, by reason of its inapt draftsmanship, has created endless confusion for litigants.

In ***Kalawatibai v. Soiryabai",*** (1991) 3 SCC 410, the Supreme Court observed that a section has to be read in its entirety as one composite unit without bifurcating it or ignoring any part of it.

101. In ***Bangalore Electricity Supply Co. Ltd. v. E.S. Solar Power (P) Ltd***., (2021) 6 SCC 718, the Supreme Court referred with approval to Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL), wherein the broad principles of interpretation of contract was summarised as follows :(1) Interpretation is the ascertainment of the meaning which the document

would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. (2) subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them. (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the

law does not require Judges to attribute to the parties an intention which they plainly could not have had.

In ***Bangalore Electricity Supply Co. Ltd. v. E.S. Solar Power (P) Ltd.,*** (2021) 6 SCC 718, the Supreme Court held that the duty of the court is not to delve deep into the intricacies of human mind to explore the undisclosed intention, but only to take the meaning of words used i.e. to say expressed intentions; in seeking to construe a clause in a contract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean; the exercise which has to be undertaken is to determine what the words used mean; if the clause is ambiguous, and it has two possible meanings, the court has to prefer one above the other in accordance with the settled principles; if one meaning is more in accord with what the court considers to be the underlined purpose and intent of the contract, or part of it, than the other, then the court will choose the former or rather than the latter; the intention of the parties must be understood from the language they have used, considered in the light of the surrounding circumstances and object of the contract. every contract is to be considered with reference to its object, and the whole of its terms and accordingly the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause.

Judgement relied upon by Respondents

102. In the judgment in **Chittoori Subbanna v Kudappa Subbanna & Ors.", 1964 SCC OnLine SC 322,** the Supreme Court held that, where a party omits to raise an objection to a direction given by the lower court in its judgment he must be deemed to have waived his right and he cannot, for the first time at the hearing of an appeal from the decision of that court,

challenge its power to make the direction; and, as held in **London Chatham and Dover Railway Co. v. South-Eastern Railway Co. [(1889) 40 Ch. D. 100 at p. 106-09]**, an omission of this kind must be treated as a waiver even of a plea of jurisdiction; it is right and proper that parties to a litigation should not be permitted to set up the grounds of their claims or defence in driblets or at different stages and embarrass the opponents; and considerations of public policy require that a successful party should not, at the appellate stage, be faced with new grounds of attack after having repulsed the original ones.

103. In **Chittoori Subbanna v Kudappa Subbanna & Ors.", 1964 SCC OnLine SC 322,** the Supreme Court held that the proper function of an appellate court is to correct an error in the judgment or proceedings of the court below and not to adjudicate upon a different kind of dispute — a dispute that was never taken before the court below; it is only in exceptional cases that the appellate court may in its discretion allow a new point, to be raised before it provided there are good grounds for allowing it to be raised and no prejudice is caused thereby to the opponent of the party permitted to raise such point.

104. In **Jaipur Development Authority v Prerna Agricultural Farms Private Limited,** it was held that the Appellate Court or the Tribunal has jurisdiction to uphold, reverse or modify the order against which an appeal has been preferred; the Appellate Court or Tribunal has no jurisdiction to adjudicate upon a different kind of dispute that was never taken up while passing the order under challenge in appeal.

105. In **Ghanshyam Dass and Ors. v. Dominion of India & Ors.", (1984) 3 SCC 46,** the Supreme Court held that the question as to whether

a notice under Section 80 of the Code is valid or not is a question of judicial construction; notice under this section should be held to be sufficient if it substantially fulfils its object of informing the parties concerned of the nature of the suit to be filed; though the terms of the section have to be strictly complied with, that does not mean that the notice should be scrutinised in a pedantic manner divorced from common sense; the point to be considered is whether notice gives sufficient information as to the nature of the claim such as would enable the recipient to avert the litigation.

106. The Supreme Court further held that, in the present case, in the notice Ex. A-8 the name, description and place of residence of the plaintiff Seth Lachman Dass, the father of the plaintiffs, was given but unfortunately before filing the suit he died and thereafter within the period of limitation the suit was instituted by his sons on the basis of the said notice; the notice Ex. A-8 undoubtedly fulfilled the requirement of Section 80 insofar as the cause of action and the relief claimed were concerned as they were absolutely the same as set out in the plaint; a***s stated in Dhian Singh Sobha Singh [AIR 1958 SC 274 : 1958 SCR 781 : 1958 SCJ 363]*** , the notice must substantially fulfil its work of intimating the parties concerned generally of the nature of the suit intended to be filed and, if it does so, it would be sufficient compliance of the section, as to the requirement that it should state the name, description and place of residence of the plaintiff, there must be identity of the person who issues the notice with the person who brings the suit.

107. The main contention of the Appellant is that Preliminary notice of termination issued on 11.01.2023 and 21.09.2022/23.09.2022 and termination of PPAs on 01.03.2023 and 02.12.2022 are not valid on two

counts, firstly as notice under Article 9.3 is interlinked to notice to be given under article 9.1 as well as notices so issued were not addressed to the person as notified under Article 8. To deliberate on the rival contention, it would be important to refer to the relevant clauses of the PPA as reproduced below:

"Article 9 (DEFAULT)

9.1 In the event, DISCOM commits a breach of any of the terms of this, Agreement, the Wind Power Producer shall be entitled to specific performance of this Agreement or claimed such damages as would be available under Law or both, at its option, by giving 30 days notice to DISCOM

9.2 In the event, Wind Power Producer commits a breach of any of the terms of this Agreement, the DISCOM shall be entitled to specific performance of this Agreement or claimed such damages as would be available under Law or both, at its option, by giving 30 days notice to Wind Power Producer.

9.3 If the default continues for a period of 30 days or more, either party will have a right to issue a preliminary notice for termination of this Agreement. if the default is not cured within 30 days thereafter, either party can terminate this Agreement and can claim damages at its option."

"8.1 Except as otherwise expressly provided in this Agreement, all notices or other communications which are required or permitted hereunder shall be in writing and sufficient if delivered personally or sent by registered or certified mail, telecopy, telex or telegram addressed as follows:

If to the Wind power producer:

Attention : Mr Ajay Mehra

M/s Vaayu (India) Power Corporation Private Limited,
Plot No.33, Daman Patalia Road, Bhimpore,
Daman - 396 210 India.
Telephone: +91-0260-2220624, 2220678
Fax : +91-0260-2221508

If to the DISCOM:

Attention : Chief General Manager (Commercial & RAC),
APCPDCL, 6-1-50,
Corporate Office,
Mint Compound, Hyderabad, 500063.
Fax No. : 040- 23431395
Telephone No. : 040 23431008, 23431377

8.2 All notices or communications given by telecopy, telex or telegram shall be confirmed by depositing a copy of the same in the post office in an envelope property addressed to the appropriate party for delivery by registered or certified mail. All notices shall be deemed delivered upon receipt, including notices given by telecopy, telex or telegram regardless of the date the confirmation of such notice is received.

8.3 Any party may by written notice change the address and/or addresses to which such notices and communications to it are to be delivered or mailed."

108. In our view, as per Article 9.1 and 9.2, in case of default by either party (Appellant/ Respondent generators), the other party (Respondent Generator/Appellant) is entitled to invoke specific performance of the agreement or claim damages as applicable under Law or both by giving notice of 30 days. Provision under Article 9.1 or Article 9.2 is limited to seeking specific performance of the contract and or damages, that too only after

giving notice of 30 days after occurrence of default and does not provide for either party to terminate the PPA. In a situation that default by a party continues for a period beyond 30 days, option of enforcing specific performance of the agreement or to claim damages is not automatically available to other party (non defaulting) unless the notice of 30 days has been given by other party (non defaulting party) as per Article 9.1 and 9.2; the other party may or may not choose to invoke provisions under Article 9.1 and 9.2 as the case may be. In case default continues for 30 days, and no 30 days notice has been given under Article 9.1 or Article 9.2, non defaulting party is not entitled to seek specific performance of agreement or claim damages under Article 9.1/Article 9.2, but can invoke provisions under Article 9.3 and give preliminary notice of default if so desired and if default is not cured within 30 days thereafter, non defaulting party can terminate the Agreement. So from a bare reading of Article 9.1/Article 9.2 and Article 9.3, it is observed that immediately on occurrence of default, other party can seek specific performance of the Agreement / and to claim damages, however 30 days notice period is required to be given under Article 9.1/Article 9.2; while under Article 9.3, Preliminary Notice can be given only after continuation of default for 30 days and further notice of 30 days is to be given, and only after expiry of this period, other party has right to terminate the agreement. Thus, right to terminate agreement accrues only after 60 days of occurrence of default, subsequent to serving of preliminary notice after 30 days of default with further notice period of 30 days. So, in our opinion, for termination of agreement, preliminary notice of 30 days that too subsequent to continuation of default for 30 days is a must and

Article 9.3 does not impose any pre-condition for serving the notice under Article 9.1/ Article 9.2, which is primarily for specific performance of Agreement and/or to claim damages. Thus, we do not find merit in the contention of learned counsel for the Appellants that notice under Article 9.3 must be preceded by notice under Article 9.1/Article 9.2. The reliance placed by the Appellant on the judgement in **"Transmission Corporation of Andhra Pradesh Limited & Ors v. GMR Vemagiri Power Generation Limited & Anr(2018) 3 SCC 716"** is not relevant as from bare reading of Article 9.1/Article 9.2 and Article 9.3 in the present case, there is no interdependence between the two Articles necessitating notice of default under Article 9.1/Article 9.2 first and then only to proceed with Preliminary notice of default and termination notice under Article 9.3. In our view, the other party can proceed with the termination procedure under Article 9.3, subject to fulfilling condition under Article 9.3 without invoking specific performance of Agreement and or to claim damages under Article 9.1/Article 9.2. Likewise, the non-defaulting party can invoke provisions under Article 9.1/Article 9.2 with or without progressing to invoke provision under Article 9.3 even if default continues for more than 30 days. Thus, we hold that Article 9.1 / Article 9.2 and Article 9.3 are to be read independently as no interdependence of Article 9.3 over Article 9.1/Article 9.2 have been provided in the Agreement and therefore the issue is decided in favour of Respondent Generators and against Appellants. We therefore don't find it necessary to further delve in to the matter, whether Appellant could or could not have taken the plea of inter-dependence of Article 9.1/Article 9.2 over Article 9.3 for the first time at Appellate stage.

109. With this backdrop, we will deliberate whether the notices issued for termination of Agreement comply with the requirement under Article 8 and Article 9.3.

110. It is an admitted fact that there has been persistent default on the part of the Appellants in making payment under the Agreement and Respondent Generators have time and again invoked jurisdiction of the State Commission for liquidation of dues by the Appellant, subsequent to which dues were liquidated progressively albeit with delay ranging from one month to ten months.

111. Under Article 8.1 in the various PPAs signed during 2010, notices intended for the DISCOM are to be directed to the attention of the Chief General Manager (APCPDCL) at the Corporate Office, Mint Compound Hyderabad, and as per Article 8.3, either party may, by written notice, change the address for delivery or mailing of such notices or communications. In case of Respondent Generator Vishwind (APL 201 of 2021), Preliminary Termination notice dated 21.09.2022, citing default in making the payment and its intention to sell power through Open Access, was issued to the Chief General Manager (IPC & P&M), APSPDCL , Corporate office Chittoor Dist A.P with termination date as 28.10.2022 thus fulfilling the condition of 30 Days notice for termination of Agreement as per Article 9.3. In fact, the said preliminary notice of termination issued to APSPDCL was forwarded by APSPDCL to APPCC vide its letter dated 29.09.2022 for necessary action. However, as contended by learned counsel for Respondent Vishwind no response was received from APSPDCL with regard to Preliminary termination Notice nor the defects were cured inspite of its follow up at all levels and final termination notice dated 02.12.2022 was issued to the Chief General Manager (APSPDCL)

treating PPA as terminated and once again conveying its intent to sell energy through open access; Termination notice was without prejudice to their right for the recovery of its unpaid dues for the energy supplied.

112. With intermediate and subsequent letters, Respondent Generator reiterated its stand to sell power through open access and followed up for clearing outstanding dues with Chairman & Managing Director, Transmission Corporation for Andhra Pradesh Limited (vide letter dated 19.11.2022); the Chief General Manager (IPC & P&MM) APSPDCL, informing that PPA stand terminated w.e.f 02.12.2022 and seeking response on the letters issued earlier including the termination notice.

113. Based on above deliberation, we are of the view that pre-termination notice dated 21.09.2022 and termination notice dated 02.12.2022 in case of Respondent Vishwind have been issued in compliance with Article 9.3 of the Agreement.

114. In case of Respondent Generator VAAYU (APL 200 of 2021), citing continuous and continuing default in making the payment in spite of giving several reminder letters to make due payments, issued Preliminary Termination notice dated 11.01.2023 to Chairman & Managing Director (APTRANSCO) with a copy marked to Chief General Manager –Finance, APSPDCL & APCPDCL, APPCC Vidyut Soudha and to Joint Managing Director APTRANSCO. This Preliminary Termination notice was followed by Notice of Termination dated 01.03.2023 addressed to the Chief Manager (IPC & P&MM), APSPDCL and also its intent to sell energy generated from the project through Open Access. The learned counsel for the Appellants, besides contesting that Article 9.1 and 9.3 of PPA are to be read in continuity and not independently and notices to be issued accordingly, which has been dealt with by this Tribunal in previous

paragraphs, has contested that Notices has not been issued as per express term of the PPA and therefore not valid. We note that as per Article 8.1, the notices in case of DISCOM were to be issued to:

Attention : Chief General Manager (Commercial & RAC),
APCPDCL, 6-1-50,
Corporate Office,
Mint Compound, Hyderabad, 500063.

115. The preliminary termination notice dated 11.01.2023 was issued to Chairman APTRANSCO with a copy marked to Chief General Manager (Finance, APSPDCL & APCPDCL, APPCC) while the Final termination letter dated 01.03.2023 was issued to Chief General Manager (IPC & P&MM) APSPDCL. The Appellants have never disputed that it did not receive the Preliminary Termination Notice dated 11.01.2023, but only cited delay in receiving the same as noticed from their counter filed in petition dated 07.03.2023 in O.P No.13 of 2023 before the CERC. Further it is observed from Article 8.2 of the PPA that notice shall be deemed to be delivered upon receipt as reproduced below:

> *"8.2 All notices shall be deemed delivered upon receipt, including notices given by telecopy, telex or telegram regardless of the date the confirmation of such notice is received".*

116. Considering that receipt of the Preliminary termination notice dated 11.01.2023 by the Appellants has not been disputed and Article 8.2 of the PPA provides that notice shall be deemed to be delivered upon receipt, we do not find merit in the submissions of the Appellants and hold that Preliminary termination notice dated 11.01.2023 and Notice of termination dated 01.03. 2023 are deemed to be delivered as

per Article 8.2 and Article 9.3 of the PPA and Termination of PPA vide referred termination notices is valid and subsisting.

117. Regarding the contention of the Appellants citing judgement in "*UPPCL & Ors. vs. UPERC (2021 SCC online APTEL 31' that PPAs having been approved by APERC could not have been unilaterally terminated by Respondents without the approval of APERC, we are of the view that the observations in the referred judgement applies to* facts of that case and cannot be a generalised statement applicable to all cases; more so in the present case the PPA as approved by the commission, specifies a mechanism for termination of the contract and there is no precondition for approval of APERC before termination. Thus, referred judgment is not applicable to the present case in view of the specified mechanism for termination of contract provided in the PPA.

118. Based on above deliberations, we do not find reasons to interfere with the impugned order of State commission. The Appellant is directed to issue NOCs to the Respondent forthwith to enable them to seek Open Access. The captioned Appeals and associated IAs, are dismissed.

Pronounced in open court on this 19th Day of December, 2024

(Seema Gupta)	**(Justice Ramesh Ranganathan)**
Technical Member (Electricity)	**Chairperson**

Reportable/~~Non-Reportable~~

ts/ag/dk