APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 232 OF 2025 &
IA NO. 1114 OF 2025 & IA NO. 1192 OF 2025

Dated: 28th November, 2025

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

In the matter of:

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED
Through its Chief Engineer (Power Purchase)
Prakashgad, Plot No. G-9,
Anant Kanekar Marg Bandra (E),
Mumbai – 400015. … Appellant

VERSUS

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**
   Through its Secretary
   World Trade Centre, 6th, 7th and 8th Floor,
   Tower-B, Nauroji Nagar,
   New Delhi – 110029. … Respondent No.1

2. **RATNAGIRI GAS AND POWER PRIVATE LIMITED**
   Through its Chief Executive Officer
   Site Office at: RGPPL Anjanwel, … Respondent No.2
   Taluka: Guhagar, District: Ratnagiri,
   Maharashtra – 415634.

Counsel for the Appellant(s): Ramanuj Kumar
Vishal Binod
Aditya Dubey
Sagnik Maitra
Rimali Batra
Abhishek Lalwani

Counsel for the Respondent(s): Anand K. Ganesan
Swapna Seshadri

Ritu Apurva
Karthikeyan M. ***for Res.2***

JUDGEMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

Appeal No. 232 of 2025 has been filed by the Maharashtra State Electricity Distribution Company Limited ("MSEDCL" for short) aggrieved by the order passed by the Central Electricity Regulatory Commission ("CERC" for short) in Petition No. 276/MP/2024 dated 12.06.2025. The reliefs sought by MSEDCL, in Appeal No. 232 of 2025, are (a) to set aside the order of the CERC in Petition No. 276/MP/2024; (b) declare that the invoices raised by the 2nd Respondent- Ratnagiri Gas and Power Private Ltd ("RGPPL" for short) against the Appellant-MSEDCL, as more specifically set out in Annexure A-29 of the Appeal, as void, non-est and illegal; (c) restrain the 2nd Respondent-RGPPL from issuing any further invoices under the terminated PPA dated 10.04.2007 and from uploading any further invoices on the PRAAPTI portal, seeking payment thereof; (d) direct the 3rd Respondent-Grid Controller of India Limited and the 4th Respondent-PFC Limited not to take any coercive actions prejudicial to the Appellant's short term access and full GNA; and (e) restrain the Respondents from taking any coercive steps against the Appellants in furtherance of such impermissible, inapplicable, void, non-est and arbitrary invoices, including by way of regulation of GNA and open access under the framework of the LPS Rules.

Petition No. 276/MP/2024 was filed by MSEDCL before the CERC, under Section 79(1)(f) of the Electricity Act, 2003, seeking quashing of the invoices raised by the 1st Respondent-RGPPL on them as being void, illegal and *non-est;* seeking appropriate directions against RGPPL to withdraw the invoices

uploaded on the PRAAPTI portal; to restrain them from issuing or uploading any further invoices on the said portal; and from taking any coercive action in furtherance of such invoices, including by way of seeking regulation of open access under the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022.

II. IMPUGNED ORDER PASSED BY THE CERC IN PETITION NO. 276/MP/2024 DATED 12TH JUNE, 2025: ITS CONTENTS:

In its order, in Petition No. 276/MP/2024 dated 12th June, 2025, the CERC noted the background facts leading up to the filing of E.P.No.12 of 2023 before this Tribunal by RGPPL. It then noted that MSEDCL had filed IA No.1068 of 2024 in the Execution Proceedings (E.P. No.12/2023) seeking intervention of this Tribunal in respect of the PRAAPTI proceedings in the light of the approaching trigger date for the curtailment of open access of MSEDCL, due to non-payment of dues against the outstanding invoices raised by RGPPL; MSEDCL had also filed W.P. No. 24685 of 2024 before the High Court of Bombay, seeking directions to set aside the invoices raised by RGPPL, and also to restrain RGPPL from issuing fresh invoices under the allegedly terminated PPA, and from uploading any invoices in the PRAAPTI portal; the Bombay High Court, vide its order dated 8.8.2024, disposed of the said writ petition directing: (a) the Petitioner (MSEDCL) to file their Petition before the CERC by 14th August 2024 along with an application for stay. These papers and proceedings shall also be served on the Respondents by 14th August, 2024; (b) the CERC to take up the stay application of the Petitioner on 20th August, 2024; (c) in the interregnum and until 20th August, 2024, there shall be no reduction or withdrawal of access for sale and purchase of electricity as provided in Rule 7(c) of the said Rules. It was clarified that this will not affect the reduction. If any, that is already triggered and /or taken place; (d) it was clarified that the interim protection granted will be subject to the orders passed by the CERC in the proposed stay application

to be filed by the Petitioner; and the CERC shall decide the Petition and the application for the interim reliefs of the Petitioner without being influenced by anything stated in this order; and, in the above background, MSEDCL had filed the present Petition ie Petition No. 276/MP/2024 seeking the relief(s), along with IA No.67/2024, seeking urgent interim reliefs before this Commission.

The CERC, thereafter, noted the submissions of MSEDCL including that, during the pendency of the proceedings pertaining *inter-alia* to the interpretation of the terms of the PPA, relating to declaration of capacity, the term of the GSA/GSTA executed between RGPPL and RIL and Neco Ltd, expired on 31.3.2014, resulting in RGPPL being without any approved GSA/GSTA required for supplying power to MSEDCL under the PPA; RGPPL was unable to find any viable fuel source which could be approved under Article 5.9 of the PPA, thereby resulting in RGPPL's consistent and irremediable failure to achieve even the relaxed NAPAF norms permitted by the Commission; such failure by RGPPL dislodged the fundamental basis of the PPA, namely to receive reliable and continuous supply of power in accordance with the terms of the PPA, rendering it frustrated; (b) on account of such prolonged and incurable failure of RGPPL to identify a viable fuel source and its inability to ensure reliable and continuous power supply to MSEDCL at commercial rates, MSEDCL was constrained to terminate the PPA with effect from 1.4.2014, vide termination letter dated 8.5.2014; and the said termination was also in the public interest as a significant quantum of MSEDCL's power procurement, was blocked by an unreliable generator, which was unable to supply power to it, thereby significantly affecting MSEDCL's ability to maintain a reliable supply of electricity to crores of its consumers, across the state.

MSEDCL had also contended that termination of the PPA had attained finality, as RGPPL did not challenge the said termination, before any competent court, till date; the validity of the termination itself could not be called into

question at this stage, as any such challenge, while bad even on merits, would be barred by the law of limitation; RGPPL had responded to the aforesaid termination letter vide its letter dated 22.5.2014, raising various misconceived pleas against the termination and reiterating its non-maintainable and non-est claims for the payment of capacity charges; notably, even as RGPPL objected to the termination of the PPA by its aforesaid letter, it took no steps whatsoever to challenge such termination by pursuing appropriate legal remedies; despite MSEDCL's clear position on this aspect, and in spite of the PPA being terminated, RGPPL issued letter dated 3.6.2014 to MSEDCL, informing that the termination of the PPA dated 10.4.2007 by MSEDCL was not acceptable; accordingly, RGPPL requested MSEDCL to clear its outstanding dues; RGPPL continued to raise several misconceived invoices on MSEDCL, including towards Late Payment Surcharge, Western Regional Load Despatch Centre Fee & Charges, and other statutory fees like fees to the Maharashtra Pollution Control Board, Consent fee, Panchayat tax, and electricity duty & tax on sale for colony power consumption, etc; and the said invoices were justifiably not honoured by MSEDCL for being void, illegal, and *non-est*, as having been issued in the absence of a valid PPA.

After referring to the earlier judgement of this Tribunal in Appeal No. 261/2013 dated 22.4.2015, MSEDCL contended that the said proceedings was not concerned with the issue of termination of the PPA as the PPA was terminated post the filing of Petition No.166/MP/2012 and the appeal itself; the Supreme Court dismissed MSEDCL's Civil Appeal No. 1922 of 2023 by its judgment dated 9.11.2023, thereby confirming CERC's order dated 30.7.2012 in Petition No. 166/MP/2012; and, on 5.12.2023, MSEDCL filed Review Petition No. 1997/2023 seeking review of the judgement dated 9.11.2023, which was also dismissed by the Supreme Court vide its order dated 19.3.2024, without expressing any opinion on the merits of the issues raised thereunder.

MSEDCL further contended that RGPPL, based on an erroneous reading of the Supreme Court's judgment dated 9.11.2023 (which had merely confirmed the CERC's order dated 30.7.2013 regarding the interpretation of Article 4.3 of the PPA) and deliberately ignoring termination of the PPA, addressed letter dated 14.11.2023 seeking payment of approximately Rs. 6017 crores towards allegedly outstanding dues for the period from 2013-14 till 2023-24; in furtherance of its aforesaid letter, RGPPL also raised an invoice dated 23.11.2023 on MSEDCL, demanding payment of approximately Rs. 6017 crores, towards the outstanding dues for the period 2013-14 to 2023-24; it has continued to issue further illegal and void invoices on MSEDCL towards capacity charges and late payment surcharge; it is clear from a bare perusal of the said letter and the invoice that only a claim of approximately Rs 1400 crores for 2013-14 pertains to the period during which the PPA was in existence; the remainder claim pertains to 2014-15 onwards, during which there was no valid PPA between the parties, and hence, such claims are bad and illegal; even the claim in respect of 2013-14 is sought to be recovered in a manifestly illegal and self-serving manner as RGPPL itself admittedly and indisputably agreed to keep its claims pertaining to 2013-14 and 2014-15 in abeyance in accordance with the PMO MoM, in lieu of which, it benefitted from the various concessions and waivers from GoM, including waiver from payment of VAT, CST, Entry Tax, Octroi to the tune of Rs. 1140 crores and transmission charges/losses in the amounts of approximately Rs. 342 crores; and RGPPL ought not to be permitted to resile from its promise, and claim recovery of amounts due for 2013-14, including any LPS; after taking into account the benefit derived by RGPPL in the form of tax waivers and other concessions accorded by GoM to the tune of about Rs. 1482 crores and the aforementioned payment of Rs. 500 crores by them, there is no amount outstanding to be paid to RGPPL for the period prior to the termination; post termination of the PPA, there cannot be any liability on MSEDCL; and, in view of the payment made by MSEDCL on 14.3.2024, T-GNA and full open access of MSEDCL were restored temporarily.

The grounds on which MSEDCL sought the reliefs, prayed for in the Petition, include that the PPA stands terminated, and such termination has attained finality; the PPA was validly terminated by MSEDCL; the scope of proceedings before this Commission in Petition No. 166/MP/2012, before the APTEL and the Supreme Court in the appeals arising out of the said proceedings, were confined to an interpretation of certain clauses of the PPA and do not relate to the consequences of the PPA being terminated; RGPPL's claims for the period prior to the termination of the PPA is also not valid in lieu of the benefits and various concessions and waivers it received from the GoM; and Regulation of the Petitioner's GNA and open access is illegal.

The CERC then noted the contents of the reply affidavit filed by RGPPL and the submissions urged on their behalf, including that MSEDCL was re-agitating the issue of alleged termination of the PPA, without any legal or contractual backing; a perusal of the MSEDCL's letter dated 8.5.2014, on which the declaration was sought, gives the reason for termination as the incorrect interpretation of Articles 4.3 and 5.9 of the PPA by RGPPL; however, since the Supreme Court, in its judgment dated 9.11.2023, has conclusively held that RGPPL's interpretation is correct, there can be no question of accepting termination by MSEDCL on the very same grounds; MSEDCL cannot be permitted to rely on a letter of termination, which is against the ratio decided by the Supreme Court; there is no provision in the PPA enabling either of the parties to terminate the PPA unilaterally; MSEDCL had raised this ground in its Civil Appeal before the Supreme Court (paras MM and NN), and the said Civil Appeal was dismissed, confirming the judgment of APTEL and the order of this Commission; MSEDCL sought to review the said judgment by filing a Review Petition, and one of the grounds taken was with regard to the issue of the alleged termination not being decided; vide order dated 19.3.2024, the Review Petition was dismissed by the Supreme Court; to raise the issue of alleged termination once again in the present petition will amount to re-arguing the grounds that it

had raised in the Civil Appeal and the Review Petition before the Supreme Court; the Supreme Court cannot be understood to have left the question of termination open, especially when the Review Petition was dismissed on merits, after perusal of the grounds taken; the ground of termination is without merit for the following reasons (i) the PPA between the parties is valid for a period of 25 years from COD of the last generating unit, i.e, till 18.5.2034 (ii) there is no provision in the PPA for an early termination and both the parties are bound to perform the PPA till 18.5.2034 (iii) the purported termination attempted by MSEDCL vide letter dated 8.5.2014 was immediately repudiated by RGPPL vide letter dated 22.5.2014 (iv) the position of RGPPL with regard to the unilateral termination as sought by MSEDCL was conveyed in several letters including letters dated 22.5.2014, 3.6.2014, 13.4.2016, 21.6.2019, 10.5.2021, 24.11.2021 & 29.10.2022; (v) with effect from 1.4.2014, RGPPL has been faithfully declaring availability as per Article 4.3 of the PPA and all the schedule and energy accounting is being maintained by WRLDC; MSEDCL's contention that RGPPL should have challenged the unilateral termination is preposterous; RGPPL had promptly repudiated the termination and continued to do so through several of its communications over the years; RGPPL has a decree in its favour from all the courts requiring MSEDCL to make payment of the capacity charges and also approving its interpretation of the PPA; the bills raised are strictly in terms of this interpretation, which has also been affirmed by the Supreme Court, and the tariff orders issued by this Commission; as MSEDCL is seeking to avoid payment of capacity charges, relying on its act of termination, it was for MSEDCL, at the relevant time, to seek such a declaration by filing appropriate proceedings before this Commission in accordance with law; it is MSEDCL that cannot sleep over its rights; and having attempted unsuccessfully over the last several years to force RGPPL to challenge the unilateral termination, they now seek to belatedly challenge and seek a declaration that its termination was correct; the PPA is valid and subsisting and is being performed by RGPPL till date; MSEDCL, on the other hand, is seeking to take advantage of its own

wrong, one by engaging in a unilateral termination, two, by claiming that it is for RGPPL to go and challenge such termination, even if indirectly done, and three, by reiterating this issue after having been denied the relief prayed under the very same grounds before the Supreme Court; the cause of action, if any, arose on 22.5.2014 when RGPPL repudiated the unilateral termination of the PPA by MSEDCL; therefore, a petition seeking a declaration that the termination was correct could have been filed by MSEDCL latest by 21.4.2017; the petition is therefore barred by limitation; the Petition is also barred by the principles of Explanation V to Section 11 of the CPC, 1908; MSEDCL did not even bring up this aspect of termination as an alternative argument in its appeal, which was then pending before APTEL; however MSEDCL, after losing the appeal, did bring this aspect squarely in its contention when it filed Civil Appeal No. 1922/2023 before the Supreme Court; the Civil Appeal was dismissed on 9.11.2023 and the Review Petition filed by MSEDCL, on the specific ground that the issue of termination had not been dealt with by the Supreme Court which amounts to an error apparent on the face of the record, was once again rejected by the Supreme Court vide order dated 19.3.2024; a specific prayer claiming a direction to MSEDCL to pay fixed charges was made in Petition No.166/MP/2012 filed by RGPPL and the Commission in paras 25 and 26, clearly held that MSEDCL cannot disown its liability to pay the fixed charges, when RGPPL declares capacity, based on RLNG as a primary fuel; in para 26, the Commission directed that the fixed charges recovery be made by RGPPL, based on availability, after accounting for the declaration of capacity by RLNG; during the pendency of Appeal No.261 of 2013 filed by MSEDCL, it issued a communication of purported termination on 8.5.2014, which was repudiated by RGPPL on 22.5.2014; and APTEL vide judgment dated 22.4.2015 held that MSEDCL was required to pay the capacity charges to RGPPL and that it was under an obligation to pay the capacity charges to RGPPL, even if it does not give consent to the GSA/GTA, for procuring the RLNG.

During the hearing before the CERC on 09.12.2024, learned Senior counsel for MSEDCL pointed out that while IA No. 99/2024 has been filed seeking to amend the petition, IA No. 100/2024 has been filed seeking interim reliefs. He, however, submitted that since the reply has been filed by the Respondent RGPPL, MSEDCL may be granted two weeks' time to file its rejoinder to the same. The learned Senior counsel for the Respondent RGPPL did not oppose the said request of MSEDCL, but pointed out that the reliefs sought in the IAs were not maintainable, being consequential in nature, which may arise only after a decision in the main petition. He accordingly prayed that the Commission may dispose of the main petition after hearing the parties. The Commission, after hearing the learned Senior Counsel for both parties, permitted MSEDCL to file its rejoinder. In response, MSEDCL filed its rejoinder vide affidavit dated 3.1.2025.

Based on the submissions of the parties, the CERC held that the issues that emerge for consideration were: (A) *Whether the issue of termination of PPA dated 10.4.2007 has attained finality, as on 1.4.2014, as contended by MSEDCL?;* (B) *Whether the principles of law of limitation and constructive res judicata is applicable in the present case?; and* (c) *Relief(s) to be granted.*

On issues (A) & (B), the CERC observed that Petition No. 166/MP/2012 was disposed of by order dated 30.7.2013; in para 25 of the said order, the Commission had held that the interpretation placed by MSEDCL on Article 5.9 was not sustainable since it negates the provisions of Article 4.3 of the PPA; the declaration of capacity under Article 4.3 of the PPA is independent of the provision of Article 5.9 and is not dependent on any other factor, such as price of fuel, etc; recovery of fixed charges is to be governed by the declared capacity of the generating station; MSEDCL in its discretion may not schedule the capacity declared on RLNG since it had implications on the variable charges; however, it cannot disown its liability to pay the fixed charges when RGPPL

declared capacity based on RLNG as the primary fuel in accordance with Article 4.3 of the PPA. In Para 26 of the said order, the Commission observed that any declaration of capacity by RGPPL, based on RLNG as the primary fuel, qualified for the computation of availability of the generating station for recovery of fixed charges and, accordingly, the fixed charge recovery be made by the petitioner based on availability after accounting for declaration of capacity on RLNG.

The CERC, thereafter, noted that MSEDCL filed Appeal No. 261 of 2013 before APTEL, and during the pendency of the said appeal, MSEDCL vide letter dated 8.5.2014, terminated the PPA (with effect from 1.4.2014), mainly on the ground that RGPPL had not been able to enter into GSA and that it was not viable for MSEDCL to accept supply from an alternate source (RLNG) in light of the increased cost; in response RGPPL, while pointing out that the PPA was valid for a period of 25 years from COD (till 18.5.2034), repudiated the said termination by MSEDCL as illegal, vide its various correspondences, and with directions to MSEDCL to clear all its outstanding dues; RGPPL did not challenge the PPA termination, perhaps on the count that it had a favourable order from the Commission, nor had MSEDCL approached any forum seeking a declaration that its termination of the PPA with effect from 1.4.2014, was valid, perhaps on the count that the reasons for termination in letter dated 8.5.2014, which involved the interpretation of Articles 4.3 and 5.9, were already pending consideration in the appeal filed before APTEL; pursuant to the APTEL judgment dated 22.4.2015 (in Appeal No. 261 of 2013) affirming the Commission's order dated 30.7.2013, MSEDCL filed Civil Appeal (1922 of 2023) before the Supreme Court and raised, amongst others, the issue of termination of the PPA vide grounds MM and NN; in case, MSEDCL felt that the issue of termination had attained finality and that the same was a separate cause of action, to be agitated by RGPPL, there was no reason for MSEDCL to raise the ground of PPA termination in the Civil Appeal and seek the decision of the Supreme Court; by raising such grounds in the Civil Appeal, MSEDCL had

expressly sought an adjudication on the issue of PPA termination, which was rejected by the Supreme Court vide its order dated 9.11.2023 on merits (as in para 9 above) with a direction that the execution proceedings filed by the RGPPL before APTEL be continued; the contention of MSEDCL that it had merely disclosed the factum of PPA termination in the Civil Appeal, and that it had not sought any adjudication on the validity of the PPA termination or any relief was sought in relation to the PPA termination, cannot be accepted, considering the fact that MSEDCL had, in grounds (I) and (J) of the review petition filed by it (against order dated 9.11.2023), raised the specific plea of PPA termination with effect from 1.4.2014 having attained finality, and that it cannot be saddled with any liability towards capacity charges from 1.4.2014, under paras (I) and (J) below the head '*Re: Termination of the PPA has not been considered despite attaining finality'*; the review petition was also dismissed by the Supreme Court vide order dated 19.3.2024, holding that there was no error apparent on the face of the record, and that no case for review under Order 47 Rule 1 of the Supreme Court Rules, 2013 had been established; MSEDCL, having raised the issue of PPA termination from 1.4.2014 in the Civil Appeal vide grounds MM and NN, and thereafter in the review petition vide grounds I and J stating that the PPA termination attained finality and that it has no liability to pay the capacity charges, which were rejected by the Supreme Court, cannot now argue that the scope of the Civil Appeal/Review Petition was limited to the issues raised in the original proceedings, and that no relief whatsoever was sought by it in relation to the PPA termination; the Supreme Court cannot be understood to have left open the question of the PPA termination by MSEDCL from 1.4.2014, when the Civil Appeal was rejected on 9.11.2023, without any liberty being granted to MSEDCL and when the review petition was also dismissed subsequently vide order dated 19.3.2024, on the ground that there was no error apparent on the face of the order dated 9.11.2023; and MSEDCL's contention that the PPA termination attained finality from 1.4.2014 and that it cannot be saddled with any liability

towards the capacity charges from 1.4.2014, stood rejected by the Supreme Court vide its orders above.

The CERC further observed that, in this background, it would be grossly unfair and illegal for MSEDCL to re-agitate/re-argue the same issues before this Commission in this petition; the relief(s) sought by MSEDCL, in the present petition (under para 1 above), was nothing but an attempt by MSEDCL to seek a declaration that the PPA termination from 1.4.2014 was correct and that it had no liability towards RGPPL to pay the capacity charges from 1.4.2014; this was not permissible as the question of PPA termination from 1.4.2014 attaining finality was deemed to have been rejected by the Supreme Court, despite MSEDCL raising the same; the APTEL judgment dated 22.4.2015 and the Supreme Court judgment dated 9.11.2023 have specifically rejected the contentions, which formed the basis of termination of the PPA by MSEDCL; and, in the above backdrop, the submissions of MSEDCL stand rejected, and the present Petition is not maintainable.

The CERC observed that, in its view, the PPA stands valid as on 1.4.2014, and MSEDCL was therefore, liable to pay capacity charges, in terms of the Commission's order dated 30.7.2013 and the judgment of APTEL dated 22.4.2015, which stood confirmed by the Supreme Court orders dated 9.11.2023 and 19.3.2024, for the period when RGPPL declared power availability based on RLNG.

On the issue of limitation, the CERC observed that MSEDCL had unilaterally terminated the PPA vide letter dated 8.5.2014 (with effect from 1.4.2014), and the same was repudiated by RGPPL vide letter dated 22.5.2014 with directions upon MSEDCL to pay fixed charges in terms of the PPA; RGPPL has not challenged the PPA termination, and MSEDCL has also not sought any declaration that its termination was correct, and it cannot be saddled with the liability for fixed charges; however, the issue of PPA termination was raised

before the Supreme Court by MSEDCL in the Civil Appeal filed by it, which was rejected by the Supreme Court vide order dated 9.11.2023, and thereafter specifically in the review petition mainly contending that (i) RGPPL had not challenged the PPA termination (ii) the PPA termination has attained finality and (iii) MSEDCL cannot be saddled with the liability of fixed charges after 1.4.2014, which were also rejected by the Supreme Court on 19.3.2024; though MSEDCL had contended that it has only sought the quashing of the illegal invoices raised by RGPPL, the same was on the backdrop of its contention that the PPA termination attained finality with effect from 1.4.2014, which was not entertained by the Supreme Court in its orders dated 9.11.2023 and 19.3.2024, as stated above; even the submission of MSEDCL that RGPPL having not opted to challenge the termination, has rendered the termination final and hence any potential challenge thereto is barred by limitation was also not acceptable, keeping in view that the same issue raised by MSEDCL for a specific finding, in the review petition, was rejected by the Supreme Court; RGPPL had a decree in its favour from all the courts, requiring MSEDCL to make payment of the capacity charges; thus, MSEDCL having raised the issue of PPA termination, which stood rejected by the Supreme Court, cannot now, based on the prayers in this petition, belatedly seek a declaration that the PPA termination from 1.4.2014 was correct and that the same had attained finality as on 1.4.2014; even assuming, without admitting, that the PPA termination was effective from 1.4.2014, MSEDCL ought to have filed a petition seeking such declaration, within the period of three years from the date when the right to sue first accrued, i.e., when RGPPL repudiated the termination on 22.5.2014, in terms of Part-II (Section 58) to the Schedule of the Limitation Act 1963; having not done so, MSEDCL cannot now make submissions to the contrary and claim reliefs, based on the premise that PPA termination attained finality from 1.4.2014, and it has, therefore, no liability to pay RGPPL the capacity charges from 1.4.2014, as no valid contract exists between the parties; and the present petition is therefore barred by limitation.

On applicability of Explanation V to Section 11 CPC, the CERC observed that Section 11 of the Code of Civil Procedure, 1908 (CPC) embodies the doctrine of res judicata or the rule of conclusiveness of a judgment; it enacts that once a matter is finally decided by a competent court, no party can be permitted to reopen it in a subsequent litigation; MSEDCL had relied upon the judgment of the Supreme court in **Yogendra Narayan Choudhury v UOI: (1996) 7 SCC 1** to contend that, since the order in the review petition was passed in chambers by circulation without expressing any opinion on merits of the issues raised, the said order amounted to a summary dismissal of the review petition which does not amount to res judicata; the judgment relied upon by MSEDCL is not applicable in the present case; the said judgment is on the dismissal of the SLP *in limine* without assigning any reasons; in the present case, MSEDCL did not file any SLP, but raised the issue of PPA termination in the Civil Appeal; the Civil Appeal having been dismissed, Explanation IV and V of Section 11 of the CPC were applicable, and the issue of PPA termination is deemed to have been negatived by the Supreme Court; the Supreme Court, having perused the Review Petition and having held that there was no error apparent on the face of the record and that no case for review was made out by MSEDCL, under Order 47 Rule 1 of CPC, by no stretch of imagination can the same be *in limine* dismissal, but is a dismissal on merits; when the civil appeal, wherein the issue of PPA termination was raised by MSEDCL, was dismissed by the Supreme Court vide order dated 9.11.2023, it cannot be argued that the Supreme Court was not seized of the issue of PPA termination by MSEDCL; further, MSEDCL having raised the same issue in the review petition, which was also dismissed by the Supreme Court on 19.3.2024, MSEDCL cannot now contend that the issue of PPA termination can be raised again in this petition; this is not permissible; dismissal of the Civil Appeal and the review petition by the Supreme Court reinforces the finality of the original judgment, which continues in full force; the principles of constructive res judicata are squarely applicable in the present case; and the petition is, therefore, not maintainable on this count.

On the merits of termination of the PPA, the CERC observed that, considering the fact that the present petition filed by MSEDCL is held to be not maintainable in law, as per the discussions in the previous paragraphs, they were refraining from examining the submissions of the parties on merits.

On MSEDCL's submission that RGPPL claims for the period prior to the termination of the PPA (i.e., 1.4.2014) were also grossly inflated and illegal, the CERC noted that the Government of Maharashtra had specifically raised the issues of tax waiver and concessions alleged to have been granted to RGPPL, as a defense in the Execution Petition (12/2023) filed by RGPPL before APTEL, and APTEL vide its order dated 17.1.2025 had held that, both on the ground that the Government of Maharashtra was neither a necessary nor a proper party to the present execution proceedings, and also on the ground that the objection raised by them, to the grant of the relief sought for by the Execution Petitioner, did not merit acceptance, they saw no reason to entertain the impleadment petition or the objection raised by the Government of Maharashtra on the merits of the EP filed by RGPPL, making it clear that any claim, which the Government of Maharashtra may have against the Execution Petitioner (RGPPL), could always be agitated by them in independent legal proceedings.

The CERC further observed that the Government of Maharashtra was not a party to the proceedings in the present case; no documents had been produced before them by MSEDCL to show that waivers/concessions were granted by the Government of Maharashtra as set-off against the payment of capacity charges by MSEDCL to RGPPL; and, accordingly, the submissions of MSEDCL on this count were disposed of in terms of the decision of APTEL in the execution proceedings as above.

With regards the contention of MSEDCL that RGPPL agreed to keep its claims for the years 2013-14 and 2014-15 in abeyance, in accordance with the

PMO minutes of meeting, the CERC observed that MSEDCL could not rely upon the minutes of the meeting selectively and raise frivolous pleas to deny the rightful claims of RGPPL; and RGPPL was entitled to payment of tariff in terms of the tariff orders issued by the Commission, for the complete period when it declared power availability, based on RLNG, read with the orders of APTEL and the Supreme Court.

On the reliefs to be granted, CERC observed that it had, in its interim order dated 30.9.2024 in IA No. 67/2024 (in Petition No.276/ MP/2024), directed that no further coercive/precipitative action shall be taken by RGPPL with regard to recovery of the balance amounts and the same shall await a final decision of this Commission in this petition. In Para 27 of the said order, it had observed that it was evident from the submissions of RGPPL that the total amount recoverable from MSEDCL was in excess of Rs. 7000 crores, out of which an amount of Rs.1400 crores related to the period 2013-14; however, an amount of Rs 471 crores was only payable by MSEDCL in terms of the invoices uploaded in the PRRAPTI portal by RGPPL to avoid curtailment of power; since MSEDCL was found not entitled to the grant of interim reliefs, as aforesaid, they had direct MSEDCL to make payment of Rs.471 crore to RGPPL within 15 days from the date of the order; upon such payment by MSEDCL, RGPPL shall withdraw such restrictions from the PRAAPTI portal; the recovery of the balance amounts by RGPPL shall, however, await the final decision of this Commission in the main petition; and, accordingly, they had directed that no further coercive/precipitative action shall be taken by RGPPL with regard to the recovery of the balance amounts; and RGPPL was directed to ensure that the plant remained in operation.

The CERC further observed that an amount of Rs. 471 crore had been paid by MSEDCL to RGPPL, in terms of the interim order; since they had, in this order, rejected the submissions of MSEDCL as not maintainable, and had held

that the PPA dated 10.4.2007 was valid even after 1.4.2014, RGPPL was entitled to claim the amounts outstanding from MSEDCL by uploading the bills in the PRAAPTI portal; consequently, the interim order directing RGPPL not to take any coercive/precipitative action against MSEDCL, for recovery of the balance amounts, stood discharged.

The CERC also observed that its order dated 30.9.2024, in the said IA, was subject to the decision of APTEL in the Execution Petition No. 12/2023 pending before APTEL; APTEL, vide its order dated 17.1.2025, had disposed of the said Petition, holding that the Execution Petition was allowed to the extent indicated hereinabove and MSEDCL shall pay RGPPL capacity charges of Rs.31,27,48,66,735/-,(Rupees Three Thousand One Hundred and Twenty Seven Crores Forty Eight Lakhs Sixty Six Thousand Seven Hundred and Thirty Five only) less the amount realized of Rs.6,50,28,02,079/- (Rupees Six Hundred and Fifty Crores Twenty Eight Lakhs Two Thousand and Seventy Nine only); consequently, MSEDCL shall pay RGPPL Rs. 2477,20,64,656/- (Rupees Two Thousand Four Hundred and Seventy-Seven Crores Twenty Lakhs Sixty-Four Thousand Six Hundred and Fifty-Six only), (capacity charges of Rs. 31,27,48,66,735/- minus realization of Rs.6,50,28.02,079/-), within four months from the date of receipt of a copy of the order; in case MSEDCL has paid Rs.471 Crores as directed by the CERC in its order in IA No. 67 of 2024 in Petition No. 276/MP/2024 dated 30.09.2024, and if the said amount was payable towards capacity charges for the period covered by the present EP, MSEDCL may deduct Rs. 471 Crores from Rs.2477,20,64,656/-, and pay RGPPL Rs. 2006,20,94,656/- (Rupees Two Thousand and Six Crores Twenty Lakhs Ninety-Four Thousand Six Hundred and Fifty-Six only) within four months from the date of receipt of a copy of the order; in case payment of Rs. 2477,20,64,656/- (Rupees Two Thousand Four Hundred and Seventy-Seven Crores Twenty Lakhs Sixty-Four Thousand Six Hundred and Fifty-Six only), or Rs. 2006,20,94,656/- (Rupees Two Thousand and Six Crores Twenty Lakhs Ninety Four Thousand Six Hundred and

Fifty Six only), as the case may be, is not made within four months from the date of receipt of a copy of this order, Bank Account No. 0239256010710 of MSEDCL with Mumbai Industrial Finance Branch of Canara Bank and A/c No. 016020110000033 of MSEDCL at Mumbai Large Corporate Branch of the Bank of India shall stand attached, and the afore-said amounts shall be realized from the said bank accounts. The Execution Petition was, accordingly, disposed of.

The CERC also noted that MSEDCL had filed an appeal (Civil Appeal No.4286/2025) before the Supreme Court against the APTEL judgment dated 17.1.2025, and the Supreme Court on 6.5.2025 had passed the following interim order:

> "*The appellant, Maharashtra State Electricity Distribution Company Limited, shall pay half of the amount as computed, that is, half of Rs.2477.20 crores, to the Respondents by way of six equal monthly instalments, beginning from 15.07.2025.*
>
> *The instalments shall be paid as per the time fixed. Upon failure to pay the instalments within time, the appellant MSEDCL, shall be liable to pay interest, as fixed and payable by the Discom(s) to the generating companies in terms of the regulations or tariff orders etc.*
>
> *List the appeal for consideration in the week commencing 18.08.2025"*.

Petition No.276/MP/2024, along with the IAs were accordingly disposed of.

The dispute in the present appeal (ie Appeal No.232 of 2025) revolves mainly around the question whether the earlier order of the CERC, in Petition No.166/MP/2012 dated 30.07.2013, which has attained finality on the said order being affirmed by this Tribunal in Appeal No. 261 of 2013 dated

22.04.2015, and by the Supreme Court in Civil Appeal No. 1922 of 2023 dated 09.11.2023, and the Review Petition filed thereagainst (R.P.(C). No. 1977 of 2023 dated 19.03.2024) having been dismissed, constitutes res-judicata; and whether the CERC was justified in passing the impugned order in Petition No.276/MP/2024 dated 12.06.2025, holding that Petition No. 276/MP/2024 was not maintainable on this score. It is necessary for us, therefore, to note, albeit in brief, the contents of Petition No.166/MP/2012, the afore-said orders, the letter of termination and the reply thereto, etc.

III. PETITION NO. 166/MP/2012 FILED BY RGPPL BEFORE CERC:

Petition No. 166/MP/2012 was filed by RGPPL before the CERC, under Section 79 of the Electricity Act, 2003, seeking appropriate directions for resolving Fuel related aspects relating to the 1967.08 MW Gas Power Project of RGPPL.

In the said Petition, RGPPL stated that it had a power station in Ratnagiri District in the state of Maharashtra with an installed capacity of 1967.08 MW (under commercial generation) and an LNG terminal of 5.0 MMTPA capacity; in terms of allocation of power, made by Ministry of Power, Government of India, the power generated from RGPPL was being supplied to the States of Maharashtra, Goa and the Union territories of Daman & Due and Dadra & Nagar Haveli; the power from the generating station of RGPPL was primarily supplied to the Respondent - Maharashtra State Distribution Company Limited ('MSEDCL' for short); and RGPPL and MSEDCL had entered into a Power Purchase Agreement (hereinafter referred to as 'PPA') dated 10.4.2007 for sale and purchase of power from their project.

After extracting the definition of "*Declared Capacity", "Gross Calorific Value",* Clause 4.3 and 5.9 of the PPA, it is stated that Articles 4.3 and 5.9 read with the definition of the term `Declared Capacity' in the PPA (quoted above)

have the following implications: (a) the primary fuel to be used for generation and supply of electricity to MSEDCL can be LNG/natural gas/R-LNG. Alternatively, the liquid fuel can also be used if agreed to by MSEDCL; (b) though R-LNG can be used as primary fuel without any further approval of MSEDCL, RGPPL has to obtain approval of MSEDCL for any short term/long term contracts that may be signed for R-LNG to be used in the gas power stations in terms of Article 5.9; the CERC, vide Para 27 of its Order dated 18.08.2010, had stipulated Normative Annual Plant Availability Factor (NAPAF) for recovery of full Annual Fixed Charges (AFC) for this station; the actual Plant Availability Factor (PAFY) achieved during the previous years and till date was tabulated in the table thereunder; the said lower Plant Availability Factor excluded availability of power from the project which RGPPL was in a position to generate using RLNG (when the domestic natural gas was not available), but MSEDCL did not agree to schedule generation of electricity, based on RLNG; and the current domestic gas allocation under the contracts entered into by RGPPL with designated suppliers were as detailed in the table thereunder.

It is further stated that the Government of India had equated RGPPL along with the Fertilizer Units for supply of gas to RGPPL; RGPPL had been getting contracted quantity of natural gas from RIL till September 2011 after which there had been a continuous reduction in gas supply and the current supply was of the order of 3.3 MMSCMD; the gas supplier RIL had attributed this shortfall to low yield from KG D6 gas fields and they had informed that pro-rata reduction was being applied on supply to RGPPL at par with all power sector customers; RGPPL had approached various authorities in the Govt. of India highlighting the issue of continued reduction of gas supply, and had explained at length - the consequential underutilization of generation capability of RGPPL's power block, resulting in the stranded capacity to the extent of 1000 MW; these efforts yielded in further allocation of gas from alternate source

by the Ministry of Petroleum & Natural Gas vide order dated September 30, 2011 allocating additional gas of 0.9 MMSCMD from marginal fields of ONGC to be supplied by GAIL; ONGC gas commenced on January 30, 2012 after swapping arrangement was worked out by GAIL with MAHAGENCO, and the daily supply currently was of the 'order of 0.6 MMSCMD; against allocation of designated quantity of 8.5 MMSCMD (7.6 from KG basin and 0.9 from ONGC gas fields) of gas required by them, RGPPL was getting only about 3.6 MMSCMD of gas in totality; RGPPL highlighted the gas shortfall issue to the Government of India, and the matter was also included in the agenda for the meeting of Empowered Group of Ministers (EGOM) for utilization of gas in its meeting on February 24, 2012; RGPPL has been seeking supply of full 7.6 MMSMD of KG D6 gas at par with fertilizer units in line with the decision of EGoM (on utilization of gas) in its meeting dated 28.04.2008; since September, 2011, gas supply from RIL was steadily declining and in order to supplement the shortfall in domestic gas during FY 2011-12, RGPPL had entered into gas tie-up with GAIL for supply of R-LNG under spot cargo on a reasonable endeavor basis in December 2011 (take and pay contract); in these circumstances, RGPPL had been offering capacity based on RLNG as per the Tariff Regulations, 2009; on 16.12.2011, RGPPL wrote to MSEDCL stating that, with the present available gas, RGPPL will not be able to achieve target availability and substantial capacity shall remain available but stranded; thus RGPPL is unable to fully service the beneficiaries; in addition, RGPPL is also falling short of target availability set out in the tariff order for full fixed cost recovery which may impact the long-term viability of the project; in order to overcome this crisis, RGPPL had tied up 2.0 MMSCMD spot R-LNG from GAIL on reasonable Endeavour (RE) basis for the period up to 31.03.2012; while entering into a contract, they had made sure that no liability was passed on to the beneficiaries except the fuel cost for actual dispatch requisitioned; and RGPPL would give the station capacity declaration on domestic gas and R-LNG separately for scheduling starting December 17, 2011

as per the terms and conditions of the tariff regulations for the control period 2009 – 14.

It is further stated in the said Petition that MSEDCL, by letter dated 19.12.2011, had stated that RGPPL had informed that they had declared capacity with R-LNG gas for 125 MW for 17.12.2011 and 445 MW for 18.12.2011, the variable cost of energy of which would be Rs. 7.05 per unit; if MSEDCL purchased this high cost power then the consumers of MSEDCL would be unnecessarily overburdened; as such MSEDCL had not given consent to schedule such costly power, and this was issued without prejudice to all other terms and conditions of the PPA and the CERC order dated 18.08.2010; in the above background, at the Commercial Committee Meeting of the Western Region Power Committee held on 23rd December, 2011 at Mumbai, the matter was discussed; the said issue was again discussed in the Technical Co-ordination Committee and the 19th Meeting of Western Region Power Committee, held at Navi Mumbai on 10th February, 2012; in these circumstances, RGPPL had made all that was in its power and control to source natural gas *required for the operation of power project at the full capacity; the Government of India had accorded priority to RGPPL in the allocation of domestic gas; despite various efforts made and for reasons not only beyond the control of RGPPL but also under the extra-ordinary circumstances beyond anybody's reasonable control, RGPPL was not able to get supply of the requisite quantum of natural gas; MSEDCL had, from time to time, been raising objections to the payment of capacity charges to RGPPL when the declaration of availability was of RLNG; MSEDCL had been raising objections to the effect that RGPPL required permission of MSEDCL for signing any contract for procurement of RLNG; RGPPL had been placing its views on the issues raised by MSEDCL; and copies of the correspondence between the parties dated 19.12.2011, .20.12.2011, 23.12.2011, 27.12.2011, 20.1.2012, 6.2.2012, 10.2.2012, 15.2.2012, 1.3.2012 and, 2.3.2012 were attached.

The Petition then states that, under the Power Purchase Agreement entered into between the parties, RGPPL is entitled to declare capacity" on the basis of availability of gas or liquid fuel; the primary fuel has been defined in Article 4.3 for declaration of capacity as LNG/natural gas. and/or RLNG with a provision that normally the capacity of the station shall be declared on gas and/or RLNG; if the capacity of the station cannot be declared on gas or on RLNG, RGPPL can declare the capacity on liquid fuel if agreed by MSEDCL; in terms of Article 5.9, RGPPL is required to obtain approval of MSEDCL on contracting terms and price before entering into short term or long term contracts of gas supply or gas transportation; if MSEDCL is unable to take electricity generated by use of RLNG, RGPPL should be entitled to fixed charges on the basis of capacity declaration/deemed generation; in the circumstances mentioned above, there is a need to resolve the matters relating to use of RLNG as primary fuel for generation and supply of electricity in order to ensure full fixed charge recovery which is essential for viability of the project which has been revived and put to beneficial use in abnormal circumstances; non-availability of the power station to the extent of the specified PLF for want of domestic gas, and the need to use RLNG as primary fuel, is not on account of any reasons attributable to RGPPL; in the circumstances, RGPPL is unable to achieve 80% NAPAF solely due to gas supply constraints; non- availability in the circumstance is on account of Force Majeure reason; accordingly, NAPAF for recovery of fixed charges be revised to the actual achieved NAPAF level for the period during which RGPPL is unable to achieve the NAPAF on account of non-availability of gas and the control to source available gas does not vest with RGPL as per Clause 5.9 of the PPA; RGPPL has time and again taken up the issue at the highest level of policy makers/ decision makers in the Govt. of India for supply of domestic gas at its allocated quantity, but the same has not fructified so far; in the current circumstances, RGPPL is unable to achieve 80% NAPAF by use of domestic gas solely due to gas supply constraint; the CERC, in the past, had granted relief in respect of Kawas GPS and Gandhar GPS of NTPC Limited on the similar grounds of non-availability of adequate fuel (gas) required to meet the target availability; and the CERC, vide Para 15 c of its order dated 01.11.2002 in Petition No. 86 of 2002, had stated that they

were satisfied that, on account of non-availability of adequate quantity of gas, it was not possible for both Kowas GPS and Gandhar GPS to achieve availability level of 80% simultaneously at present; "impossibility" was not on account of the conduct of the petitioner and was for circumstances and reasons beyond its control; Law does not force a person to do an impossible act; and, therefore, the Commission considered it necessary to allow one time relaxation in the normative target availability level for recovery of capacity charges in respect of Kawas GP5 and Gandhar. GPS.

The Petition concludes stating that, in view of the above submissions, RGPPL respectfully prayed as under- (a) the Commission may be pleased to admit the petition to resolve the issues arising out of the non-availability of domestic gas of the required quantum and the reservations of beneficiaries to allow RGPPL to enter into contracts for available alternate fuel i.e. RLNG and consequences thereof; (b) revise the "Normative Annual Plant Availability Factor" for RGPPL for full fixed cost recovery at the actually achieved NAPAF level till fuel supply to the allocated/ contracted quantity was restored with consequential orders of the payment of fixed charges; (c) direct beneficiaries to pay the fixed charges due to RGPPL; and (d) pass any other order in this regard as the Commission may find appropriate in the circumstances.

IV. ORDER OF CERC IN PETITION NO. 166/MP/2012 DATED 30,07.2013:

In its order, in Petition No. 166/MP/2012 dated 30,07.2013, the CERC, after noting the submissions urged on behalf of the Petitioner RGPPL, also noted that the respondent-MSEDCL, in its reply, had submitted that, under the PPA in terms of Article 4.3, the primary fuel for the generating station was Natural Gas and/or RLNG and the provision mandated that the capacity of the generating station was to be declared on LNG/RLNG, the arrangement for which was to be made by RGPPL as per MSEDCL's requirement; MSEDCL had pressed into service Article 5.9 of the PPA, according to which RGPPL was

required to obtain approval of MSEDCL prior to entering into any contracts for gas supply or gas transportation; MSEDCL had submitted that RGPPL had to seek approval of MSEDCL before entering into any gas supply/ gas transportation agreement as regards the contracting terms and price of the gas supply/transportation agreements having commercial implications for MSEDCL; RGPPL did not seek approval of MSEDCL prior to executing the alternative fuel supply agreements, and was liable for breach of contract; in the teeth of the express contractual terms, RGPPL was not entitled to claim AFC; non-availability of fuel could not be a ground for invoking *Force Majeure* clause in view of the exclusion provided under Article 10.4 (a) of the PPA, according to which unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the project were excluded from the purview of *Force Majeure* events; in view of Article 10.5 of the PPA, a notice of *Force Majeure* with full particulars of the *Force Majeure* event was a necessary pre-condition to claiming relief under that Article, but RGPPL had never issued notice under Article 10.5 of the PPA; and in terms of Article 10.7 of the PPA too, no relief could be given to RGPPL as RGPPL was in breach of its obligations under the PPA.

The CERC thereafter noted that, on the question of relaxation of NAPAF, MSEDCL had stated that NAPAF had been considered by the Commission in its order dated 18.8.2010 after examining in detail the circumstances necessitating relaxation of normative APAF of 85%; the Commission had agreed to relaxation in NAPAF as a one-time dispensation and no further request for relaxation could be entertained and consequences of any shortfall in performance were to be borne by RGPPL; in this regard, special emphasis was being laid on para 29 of the order dated 18.8.2010; MSEDCL had further submitted that relaxation permitted by the Commission in respect of Kawas GPS and Gandhar GPS of NTPC had to be seen in the light of the facts of those cases, and could not be relied upon as a precedent for other cases; even

otherwise, the power to relax may not be exercised in a manner so as to defeat the express contractual rights of the parties and more so, when there is an admitted breach of the contractual terms by the petitioner; the power to relax may only be used within the four corners of the statutory provisions keeping in mind the contractual rights of the parties; even in terms of Article 5.2(i) of the PPA, full capacity charge was payable at 80% of 2150 MW (i.e. 1720 MW) declared capacity on annualized basis, and for declared capacity lower than this is to be recovered on *pro rata* basis after COD of Block(s)/Station and MSEDCL was required to pay capacity charges in proportion to the allocation of power from RGPPL.

After considering the issues raised, the submissions of the parties made during the course of hearing, as also the written arguments filed by them, the CERC extracted Article 4.3 of the PPA relating to declared capacity or capability, and then observed that Article 4.3 of the PPA had the following provisions regarding declared capacity, namely: (a) the primary fuel to be used for generation and supply of electricity can be LNG/Natural Gas and/or RLNG and normally capacity is to be declared on gas and/or RLNG; and (b) when MSEDCL agrees to supply of power by burning liquid fuel, capacity declared against liquid fuel counts towards APAF and consequently for recovery of fixed charges.

The CERC then extracted Article 5.9 of the PPA relating to Gas Supply Agreement (GSA)/Gas Transportation Agreement (GTA), and observed that the salient features of Article 5.9 of the PPA dated 10.4.2007 were: (a) it noted that it was agreed by the parties to the arrangement already made by RGPPL and in force up to September 2009 for supply of gas; (b) the total requirement of Natural Gas/LNG was envisaged to be procured through short-term /long-term contracts through GAIL, and under the directions of the Central Government; (c) the conditions of GSA/GTA having commercial implications,

such as having bearing on plant availability, contracted quantity, price components, ‘take or pay’ provisions, penalties and damages, etc., were to be separately signed between RGPPL and MSEDCL; (c) for entering into the GSA/GTA contract for gas supply beyond the arrangements existing at the time of execution of the PPA, the contracting terms and price had to be agreed to between RGPPL and MSEDCL.

The CERC then noted that the 2009 Tariff Regulations, notified by the Commission in the exercise of its power under the Electricity Act, 2003, did not lay down any restriction in regard to the source of fuel or price of fuel to be used by the generating station and full recovery of fixed charges for availability of the generating station at or above the threshold levels, irrespective of whether availability was declared on natural gas or RLNG or liquid fuel; therefore, the generating company may make declaration of its capacity based on Natural Gas or RLNG or liquid fuel; the beneficiaries had the option to dispatch or refuse to dispatch the capacity on natural gas, RLNG or liquid fuel; and, in this context, the scheduling procedure specified under IEGC Regulations, 2010 in clauses 6.4.9 and 6.4.16 need also to be noticed.

After extracting Clauses 6.4.9 and 6.4.16 of the IEGC Regulations, 2010, the CERC observed that, as per Article 4.3 of the PPA, the primary fuel for operation of the generating station was LNG/Natural Gas and/ or R-LNG; Article 4.3 of the PPA further provided that normally capacity of the generating station shall be declared on gas and/or RLNG; however, if it was agreed by MSEDCL, RGPPL should make arrangements of liquid fuel for the quantum of electricity required by MSEDCL on liquid fuel; in such a case, the capacity on liquid fuel had to be taken into account for the purpose of Available Declared Capacity and APAF calculations; the agreement with MSEDCL was not only for declaring capacity based on LNG/Natural Gas and/or RLNG, but also for use of liquid fuel as and when agreed upon and, in such a case, the capacity

declared against liquid fuel was taken into consideration towards NAPAF; there was no provision under the PPA to stop RGPPL to declare capacity based on RLNG as the primary fuel; once RGPPL declared its capacity based on RLNG, MSEDCL in its discretion may either agree to dispatch or decline it; in the former situation, MSEDCL becomes liable to pay fixed charges as well as variable charges; however, in the latter case, MSEDCL could not repudiate its liability to pay fixed charges as the consent of MSEDCL was not needed for declaring capacity or availability on RLNG which was one of the primary fuels under the PPA; and any other interpretation would render Article 4.3 of the PPA redundant. The CERC thereafter observed that, according to RGPPL, it had made all efforts within its power and control to source natural gas required for the operation of the generating station at full capacity, but without any fruitful results; therefore, RGPPL entered into contract for purchase of RLNG on 'take and pay' basis; MSEDCL had relied upon Article 5.9 of the PPA which *inter alia* provided that contracting terms and price of gas supply to RGPPL had to be agreed to between RGPPL and MSEDCL; therefore, MSEDCL was not agreeable to requisition power generated by using RLNG or to compute the capacity so declared towards APAF; the interpretation placed by MSEDCL on Article 5.9 was not sustainable since it negated the provisions of Article 4.3 of the PPA; it was established principle of interpretation of contracts that the contract was to be read as a whole and the different provisions of the contract were to be harmoniously interpreted so that effect was given to each one of them and no part of the contract becomes *otiose*; this principle needed to be adhered to while interpreting Articles 4.3 and 5.9 of the PPA; when Article 5.9 is so interpreted it would mean that consent of MSEDCL on the contracting terms of supply of gas and its price was needed to enable it examine the implications on payment of variable charge; the agreement between RGPPL and MSEDCL on the contracting terms and price for supply of fuel to RGPPL, as provided under Article 5.9, was not a necessary condition for declaration of capacity of the generating station under Article 4.3 of the PPA; declaration of

capacity under Article 4.3 of the PPA was independent of the provision of Article 5.9 and was not dependent on any other factor, such as price of fuel, etc; recovery of fixed charges was to be governed by the declared capacity of the generating station; it was true that making arrangement for supply of fuel for the generating station was the responsibility of RGPPL; RGPPL had made arrangements for supply of RLNG since it was not able to arrange supply of domestic gas because of the overall shortage of gas in the country; MSEDCL, in its discretion, may not schedule the capacity declared on RLNG since it had implications on the variable charges; however, it could not disown its liability to pay fixed charges when RGPPL declared capacity based on RLNG as the primary fuel in accordance with Article 4.3 of the PPA.

The CERC concluded holding that, in the light of the above discussions, any declaration of capacity by RGPPL, based on RLNG as the primary fuel, qualified for the computation of availability of the generating station for recovery of fixed charges and, accordingly, the fixed charge recovery be made by the petitioner (RGPPL) based on availability after accounting for declaration of capacity on RLNG; and, in view of the above finding, they did not consider it necessary to get into the issues of relaxation of NAPAF already approved by the Commission or the admissibility of invoking *Force Majeure* clause by RGPPL. The petition was disposed of accordingly.

V. LETTER OF TERMINATION OF THE PPA DATED 08.05.2014:

The letter dated 08.05.2014, addressed by the Appellant-MSEDCL to the 2nd Respondent-RGPPL, relates to the termination of PPA dated 10.04.2007 and the Supplementary Agreements 1, 2, 3 and 4 dated 18.07.2007, 18.07.2007, 22.05.2009 and 10.09.2009 respectively signed between both of them. The said letter dated 08.05.2014 notes that a PPA dated 10.04.2007 was signed between MSEDCL and RGPPL for a period of 25 years from the COD unless the parties with mutual consent agree to extend the agreement (Article

13.0); the said PPA contains the entire express understanding between the parties; it was expressly provided in the said PPA that the net capacity of RGPPL's power station was 2150 MW (Article 2.1.1) out of which 5% power shall be allocated to consumers outside Maharashtra, and the balance 95% capacity to MSEDCL after COD of the respective power block(s)/station (Article 2.2.1).

After extracting the definitions of declared capacity and LNG in the PPA, clause 4.3 thereof which relates to declared capacity and clause *5.9* which relates to Gas Supply Agreement (GSA)/ Gas Transportation Agreement (GTA), it is stated in the said letter that a conjoint reading of the above would show that (a) at the time of entering into the said PPA, the fuel being used by RGPPL was R-LNG being sourced from Petro Net LNG Ltd under the Gas Supply Agreement (GSA) up to September 2009; (b) the PPA envisages that the conditions of GSA/ GTA having commercial implications (for example bearing on Plant availability, contracted quantity, price components, Take or Pay provisions, penalties and damages etc.) was to be signed separately with MSEDCL as a supplementary agreement; (c) RGPPL was required to obtain approval of MSEDCL on contracting terms and price before entering into any GSA/GTA contract; (d) in view of the definition of the term "Declared Capacity" and stipulation contained in clause 5.9 of the P.P.A, only such fuel can be considered available on the basis of which capacity can be declared, for which approval has been taken from MSEDCL as per the stipulation under clause 5.9 of the P.P.A, and a corresponding GSA/GSA has been signed; and (e) in any case, the definition of declared capacity and clauses 4.3 and 5.9 of the PPA had to be read together so as to give efficacy to the whole contract.

The said letter further records that the understanding was given effect to vide various supplementary agreements signed between MSEDCL and RGPPL, the details of which were enumerated below: (i) 18.07.2007 - Supplementary Agreement No.1 - A supplementary agreement was signed

between RGPPL and MSEDCL to be valid till 06:00 hours on the 30th day of September 2009. In the said supplementary agreement, it was acknowledged that GAIL, IOCL and BPCL had entered into the GSA dated 19th March 2007 (along with amendment no.1 dated 11th April 2007), 20th April 2007 and 18th April 2007 respectively with RGPPL for sale and delivery of Re-gassified Liquified Natural Gas (R-LNG) on the terms and conditions contained in the said agreements, and that the said GSAs were considered by RGPPL after due consultation and consent of MSEDCL; and (ii) 22.05.2009 - Supplementary Agreement No.3 - Since the agreement for supply of fuel from Petronet LNG Ltd. was expiring on 30th September, 2009 and the Supplementary Agreement No. 1 between RGPPL and MSEDCL relating to gas supply from KG D6 basin was also expiring on 30th September, 2009, Supplementary Agreement No. 3 was executed between MSEDCL and RGPPL, which incorporated the understanding that RIL and Neco Ltd. (as sellers) and RGPPL (as buyer) shall enter into the Gas Sale and Purchase Agreement ("GSPA") for sale and purchase of Daily Contracted Quantity of 2.7 MMSCMD of gas up to 30.09.2009 and 8.5 MMSCMD of gas from 01.10.2009 to 31.03.2014 from KG Basin field on the terms and conditions contained in the draft GSPA; it was also agreed by and between MSEDCL and RGPPL that RGPPL shall enter into Gas Transportation Agreement (GTA-1) with Reliance gas Transportation Infrastructure Ltd. (RGTIL) for transportation of Daily Contracted Quantity of 2.7 MMSCMD of gas upto 30.09.2009 and 8.5 MMSCMD of gas from 01.10.2009 to 31.03.2014 from Gadimoga to Atakpali on the terms and conditions contained in the draft GTA-1; further, RGPPL shall enter into the Gas Transportation Agreement (GTA-2) with GAIL for transportation of Daily Contracted Quantity of 2.7 MMSCMD of gas upto 30.09.2009 and 8.5 MMSCMD of gas from 01.10.2009 to 31.03.2014 from Atakpadi to Dabhol on the terms and conditions contained in the draft GTA-2; the said Supplementary Agreement No.3 categorically mentions that the said GSPA, GTA-1 and GTA-2 Agreements are being entered into by RGPPL in consultation with MSEDCL to the terms and conditions contained in

the said agreements; the parties i.e. RGPPL and MSEDCL, vide the said Supplementary Agreement No.3, acknowledged and accepted that subject to the terms and conditions contained therein, the terms and conditions of the above GSPA, GTA-1 and GTA-2 shall apply on a back to back basis and shall bind the implementation of the PPA between the parties as related agreements *mutatis mutandis* in the same manner as other Related Agreements referred to in the PPA; this Supplementary Agreement No.3 came into force from the effective date(s) of GSPA, GTA-1 and GTA-2, and shall remain in force till the term of the respective contracts.

It is further stated, in the said letter, that, in terms of PPA, the Gas Supply Agreements between RGPPL and any party supplying the gas to RGPPL, was to be approved by MSEDCL; since the time when there was a huge shortfall in the production of KG D6 gas, there was no occasion when RGPPL entered into any long term agreement for procuring gas in order to generate power and supply power to the MSEDCL under the PPA; accordingly, once the Gas Supply Agreement entered into between MSEDCL and RGPPL (Supplementary Agreement No. 3) came to an end on 31st, there was, in fact, no Gas Supply Agreement subsisting between MSEDCL and RGPPL, since RGPPL was not in a position to procure gas at competitive rates, that is at the rates which would be viable for MSEDCL to supply power to its consumers; in fact, RGPPL had not even suggested either before 31st March, 2014 or post 31st March, 2014, any long term Gas Supply Agreement which can be acceptable to MSEDCL; since during the subsistence of the Supplementary Agreement between MSEDCL and RGPPL to procure gas from RIL and Neco Ltd. could not ensure sufficient supply of gas to the RGPPL due to shortfall in production of gas from the KG D6 basin, RGPPL vide their letter dated 16th December, 2011 informed regarding the tie-up of 2 MMSCMD Spot RLNG from GAIL for the period upto 31st March, 2012; since the said contract was not approved by MSEDCL under Clause 5.9, no such

gas can be procured and no power could be generated from supply of the said gas; thereafter, also RGPPL was suggesting the supply of power on the basis of spot purchase of RLNG on reasonable endeavour basis; however, no approval had ever been granted to RGPPL under Clause 5.9 of the agreement; in terms of the PPA dated 10.04.2007 signed between MSEDCL and RGPPL, generation of power by RGPPL was based upon sourcing of gas and approval of the said source including the commercial terms of the MSEDCL under Clause 5.9; when the original agreement was signed between MSEDCL and RGPPL, RGPPL had a long term agreement for purchase of RLNG from Petro Net LNG Ltd. upto September, 2009; before expiry of the said agreement for supply of RLNG, on 22.05.2009, a supplementary agreement was entered into between RGPPL and MSEDCL for supply of gas from RIL and Neco Ltd. up to 31.03.2014; and thus, according to the agreement dated 10.04.2007, the Gas Supply Agreement between MSEDCL and RGPPL, which had been approved by MSEDCL, was only upto 31.03.2014.

It is further stated that, admittedly, RGPPL was not able to enter into a Gas Supply Agreement, the commercial terms of which were acceptable to MSEDCL; RGPPL had been suggesting for spot purchase of RLNG which spot purchase was in the range of 9.90/KWh which would result in generation of power at 11.40/KWh, that is including the fixed cost and the variable cost whereas the average purchase price for MSEDCL was Rs. 3.54/KWh for FY 2013-14; hence, it was not viable for MSEDCL to accept supply of power on the basis of the spot purchase of gas as suggested by RGPPL; MSEDCL was a distribution licensee for the State of Maharashtra and its duty was to supply power to its consumers at the best available rate; the average rate at which power was being procured by MSEDCL was Rs. 3.54/KWh for FY 2013-14; MSEDCL had a duty towards its consumers and it could not make power so costly for its consumers that it becomes extremely onerous for them to purchase

power from MSEDCL; MSEDCL was in competition with other distribution licensees in the State of Maharashtra, and any unreasonable hike in the rate at which power was being supplied by MSEDCL to its consumers would force consumers to switch to other distribution licensees some of whom were also operating in the same area in which MSEDCL was operating; in the era of open access, every consumer with demand of 1 MW and above, had the liberty to buy power from power exchanges and other sources of generation and because of which, if the rate at which the power was being supplied by MSEDCL became unreasonably high, then it encouraged consumers with demand of 1 MW and above to discontinue buying power from the MSEDCL in order to avail cheaper power from other generation sources or from the power exchanges; MSEDCL was a revenue neutral organization, and whenever power was purchased at an abnormally high rate, the same resulted in a tariff shock to the consumers which had to be borne by the consumers across the State; in such circumstances, it was unjustified on the part of MSEDCL to give tariff shock to the consumers for no fault on the part of MSEDCL and only on the ground that RGPPL was unable to source gas at commercially viable rates; if RGPPL were to supply power on the basis of the Gas Supply Agreement (supplementary Agreement No.3), then the rate at which the power would be procured by MSEDCL would be Rs. 3.90/KWh, which was in any case on the higher side as compared to the rate at which MSEDCL was procuring most of the power for its consumers; however, since MSEDCL had agreed to procure power on the basis of the said gas supply agreement, MSEDCL was bound to accept generation of power on that basis, notwithstanding the fact that generation of electricity, on the basis of the fuel obtained from RIL and Neco Ltd, was higher than the average cost of purchase of electricity by MSEDCL; however, if the spot purchase of fuel were to be permitted by MSEDCL, as suggested by RGPPL, then the total cost of power to be sourced from RGPPL would be Rs. 11.40/KWh as against Rs, 3.90/KWh which was the total cost that MSEDCL would pay if the entire supply had been made under the supplementary

Agreement No.3; thus, MSEDL would be asked to spend a sum of Rs. 12,923,19 crores additionally towards purchase of power, which clearly the consumers of State of Maharashtra were not in a position to bear, and hence MSEDCL was not in a position to approve the said spot purchase of fuel as suggested by RGPPL.

It is, thereafter, stated in the said letter that, in view of the fact that RGPPL was not in a position to procure gas at competitive or commercially viable rates for MSEDCL, no useful purpose would be served in continuing the PPA without there being a corresponding Gas Supply Agreement duly approved by MSEDCL; since RGPPL was not able to indicate any commercially viable source of purchase of gas even after expiry of the Supplementary Agreement No. 3 (Gas Supply Agreement) on 31.03.2014, there was no use in continuing the PPA, and accordingly, MSEDCL was hereby terminating the said PPA dated 10.04.2007 due to the default on the part of the RGPPL to obtain gas at commercially viable rates and due to the fact that RGPPL was not able to get any gas supply agreement approved by MSEDCL in spite of expiry of the last Gas Supply Agreement on 31.03.2014; hence, MSEDCL hereby terminated the PPA dated 10.04.2007 w.e.f 01.04.2014 i.e. the date on which the last Gas Supply Agreement duly approved by MSEDCL expired, and because no gas supply agreement had since been approved by MSEDCL as required in Clause 5.9 of the said PPA; since the entire understanding between the parties i.e. MSEDCL and RGPPL was disrupted, hence MSEDCL had terminated the PPA dated 10.04.2007, reserving all its rights to take action against RGPPL in accordance with the extant law; and the aforesaid letter was without prejudice to all rights and remedies available to MSEDCL in accordance with law.

VI. LETTER OF RGPPL DATED 22.05.2014 IN REPLY THERETO:

In reply thereto RGPPL, vide their letter dated 22.05.2014, informed MSEDCL that they were in receipt of the letter dated 8.5.2014 purporting to terminate the Power Purchase Agreement dated 10.4.2007 entered into between RGPPL and MSEDCL effective from 1.4.2014; the said letter had no legal effect; even on merits, the purported termination of the Power Purchase Agreement dated 10.4.2007 was erroneous and was of no effect; MSEDCL was bound by the terms and conditions contained in the Power Purchase Agreement dated 10.4.2007 including Clause 13 which dealt with the term of the agreement and which provided that the agreement was valid for a period of 25 years from the date of commercial operation of the last unit; the agreement could not, therefore, be pre-maturely terminated at this stage by the unilateral act on the part of MSEDCL, and when there was no default on the part of RGPPL; the agreement could, otherwise, be terminated only by mutual consent of the parties, namely with the consent of RGPPL and MSEDCL; the purported termination of the agreement was, therefore, contrary to the provisions of the Power Purchase Agreement and was of no effect; without prejudice to the above, in the proceedings in Petition No. 183 of 2013 which was pending before the CERC, in the context of payment of capacity charges and energy charges, MSEDCL had purported to raise the issue of tariff for generation and sale of electricity from the project being higher in the event of non-availability of gas from the Krishna - Godavari D-6 Basin; and in the said proceedings, RGPPL had given detailed reasoning as to the liability of MSEDCL to pay capacity charges in the event of non-scheduling of power by MSEDCL when such power was declared available by RGPPL.

After extracting Article 4.3 of the Power Purchase Agreement dealing with declared capacity, RGPPL further stated, in its letter dated 22.05.2014, that the fuels to be used as per the Power Purchase Agreement were Natural Gas/LNG/RLNG or Liquid Fuel of which Primary Fuel was LNG/Natural Gas and/or RLNG; the use of Liquid Fuel was dealt separately; accordingly, RGPPL

was entitled to use RLNG as a primary fuel for generation of electricity under the Power Purchase Agreement; the consent of MSEDCL was not required for the proposed use of RLNG as a primary fuel as distinguished from the use of Liquid Fuel; accordingly, RGPPL was entitled to declare the capacity available on RLNG as a fuel without the consent of MSEDCL; notwithstanding the above, MSEDCL was liable to pay capacity charges if MSEDCL did not wish to avail the power by use of RLNG; the provisions of Clause 5.9 of the Power Purchase Agreement, dealing with approval of Gas Transmission Agreement and Gas Supply Agreement, was in the context of Take or Pay obligation and other obligations related thereto; it was not open to MSEDCL to refuse to grant consent to the Gas Transmission Agreement/ Gas Supply Agreement and then say that it was not liable to pay the capacity charges or it was entitled to terminate the Power Purchase Agreement; all the above aspects were the subject matter of the petition pending before the Central Commission being No. 183 of 2013; MSEDCL, having signed the Power Purchase Agreement, was required to pay the tariff as per the terms and conditions contained in the Power Purchase Agreement; the high cost of RLNG was not on account of any factor attributable to RGPPL; RGPPL had invested in the power plant based on the Power Purchase Agreement entered into with MSEDCL and, in particular, on the basis of the obligations assumed by MSEDCL to service the capital cost through the capacity charges even when MSEDCL does not schedule any power on account of fuel charges being not conducive to the purchase of electricity from RGPPL; and it was not open to MSEDCL to proceed to terminate the Power Purchase Agreement unilaterally on the basis that the purchase of power from RGPPL would increase the expenditure of the power purchase cost as compared to the power available from other sources.

While denying all the allegations contained in the Notice dated 8.5.2014 sent by MSEDCL, RGPPL reiterated that MSEDCL was bound to pay capacity charges and continue with the agreement dated 10.4.2007 even if MSEDCL

did not wish to schedule power on account of the cost of RLNG; the use of RLNG by RGPPL was clearly recognized in the Power Purchase Agreement, and the energy charges for such use was provided as a part of the tariff; in the event, MSEDCL did not wish to schedule power when RLNG was used on account of the price, MSEDCL was still liable to pay capacity charges; the purported termination of the Power Purchase Agreement dated 10.4.2007 was without any merit; MSEDCL would continue to be liable for the obligations assumed under the Power Purchase Agreement dated 10.4.2007; and RGPPL reserved the right to reply on other issues raised in their letter, if required.

VII. LETTER OF RGPPL DATED 03.06.2014:

Again, vide letter dated 03.06.2014, RGPPL informed MSEDCL that they were reiterating their position as conveyed in the earlier letter dated 22.05.2014, and MSEDCL should release all payments due to them.

VIII. LETTER OF MSEDCL DATED 25.07.2014:

Vide their letter dated 25.07.2014, MSEDCL informed RGPPL that MSEDCL had terminated the PPA dated 10.04.2007 with effect from 01.04.2013; hence MSEDCL had no liability towards RGPPL; and the bills dated 06.05.2014, 05.06.2014 and 08.07.2014 and the supplementary bills for electricity duty and MPCD consent fee for 2014-15 dated 21.07.2014 was being returned herewith.

IX. ORDER OF CERC IN PETITION NO. 183/MP/2013 DATED 03.07.2014:

Petition No. 183/MP/2013 was filed by RGPPL, under Section 79(1)(b) and (f) and other applicable provisions of the Electricity Act, 2003 and the Regulations of the Central Commission in respect of sale and purchase of power from the Gas Power Station (1967.08 MW) of RGPPL to Maharashtra State Electricity Distribution Company Ltd praying for the following reliefs: (a) Entertain the petition and adjudicate on the dispute sought to be raised by the

Respondent in regard to its liability to pay capacity charges, energy charges and other charges under the Power Purchase Agreement dated 10.4.2007 read with the CERC Tariff Regulation, 2009 and various other tariff orders; (b) declare that the Respondent-MSEDCL shall be liable to pay the capacity charges, energy charges and other charges as per declaration of availability made by the petitioner, both on domestic gas and /or on RLNG that may be available in terms of the Power Purchase Agreement dated 10.4.2007 as per the existing schedule done by the respondent; (c) declare that the petitioner shall be entitled to the capacity charges as deemed generation charges in respect of the quantum of power declared available by the petitioner on RLNG not scheduled by the Respondent; and (d) direct the respondent to pay the amounts outstanding to the petitioner with Delayed Payment Surcharge immediately to sustain the operation of the petitioner company.

In its order dated 03.07.2014, the CERC noted that the petitioner, in this petition, had submitted that, in terms of the provisions of the Power Purchase Agreement (PPA) dated 10.4.2007 and also as per the 2009 Tariff Regulations notified by the Commission, it was entitled to recover the Annual Fixed Charges based on the capacity declared available, notwithstanding the scheduling by the respondent; it had also submitted that bills had been raised on the respondent for payment of monthly charges in terms of the 2009 Tariff Regulations, the tariff orders issued by the Commission from time to time, the provisions of the PPA dated 10.4.2007 and declaration of availability made by the petitioner, but the respondent had not been making the payments due to the petitioner; they were entitled to claim capacity charges in respect of the declaration of availability made on RLNG by them during 2011-12, in terms of the order of the Commission dated 30.7.2013, and the same was additionally payable as per Regional Energy Accounts.

The Commission then noted that it had admitted the petition and ordered notice on the respondent with directions to complete pleadings in the matter. Accordingly, the respondent has filed its reply and the petitioner had filed its rejoinder to the same. Pursuant to the hearing on 27.2.2014, the respondent had filed additional affidavit raising preliminary objections on the maintainability of the instant petition; during the hearing on 29.5.2014, the learned Senior counsel for the respondent had submitted that the petition was not maintainable since the findings of this Commission in order dated 30.7.2013, with regard to the payment of fixed charges to the petitioner, was the subject matter of Appeal No. 261/2013 filed by the respondent before the Appellate Tribunal for Electricity (Tribunal), and since the prayer for declaration and adjudication by this Commission with regard to payment of fixed charges is already pending before the Tribunal for consideration, the present petition is not maintainable in law; the counsel for the petitioner had objected to the above and had clarified that the reliefs sought for by the petitioner in this petition were different from the issues pending before the Tribunal, and the Commission may adjudicate the disputes as regards the liability of the respondent to pay capacity charges, energy charges and other charges under the Power Purchase Agreement dated 10.4.2007 and the 2009 Tariff Regulations and various other tariff orders of the Commission.

The CERC then examined the question of 'maintainability' of the petition in the background of its earlier order dated 30.7.2013 and the pendency of appeal before this Tribunal. The CERC observed that the petitioner had filed Petition No.166/MP/2012 before the Commission for appropriate directions for resolving the fuel related aspects relating to this generating station with the following prayers: (a) the Commission may be pleased to resolve the issues arising out of the non-availability of domestic gas of the required quantum and the reservations of beneficiaries to allow RGPPL to enter in to contracts for available alternate fuel i.e. RLNG and consequences thereof, (b) revise the

“Normative Annual Plant Availability Factor” for RGPPL for full fixed cost recovery at the actually achieved NAPAF level till fuel supply is restored to the allocated/ contracted quantity with consequential orders of the payment of fixed charges, and (c) direct beneficiaries to pay the fixed charges due to RGPPL.

The CERC, while noticing the similarity in the prayers made by the petitioner in Petition No. 166/MP/2012 and the present petition, observed that, while in the earlier petition the petitioner had sought the intervention of the Commission for resolving the issues arising out of non-availability of domestic gas, the recovery of full fixed charges based on available alternate fuel, i.e RLNG and for direction to beneficiaries to pay fixed charges, the petitioner in the present petition had sought adjudication of disputes relating to the liability of the respondent to pay capacity charges etc in terms of the PPA, the Tariff Regulations and the orders of the Commission; and, in its view, the relief sought for in the present petition was similar to the reliefs prayed for in the earlier petition.

After noting the reliefs granted by it, in its order dated 30.7.2013, the CERC observed that, having decided in its order dated 30.7.2013 that the petitioner was entitled for recovery of fixed charges based on availability after accounting for declaration of capacity on RLNG, the prayer of the petitioner seeking declaration that the respondent MSEDCL was liable to pay capacity charges etc was barred by *res judicata*; the petitioner in this petition had submitted that it was entitled to payment of capacity charges etc in terms of the provisions of the PPA, the 2009 Tariff Regulations and orders of the Commission; the respondent had challenged the Commission's order dated 30.7.2013 before the Tribunal in which the petitioner has been impleaded as the respondent; the Tribunal, while disposing of I.A No.348/2013 (in Appeal No. 261/2013) filed by the respondent-MSEDCL for stay of operation of the order dated 30.7.2013, had observed that the question as to whether the

Commission had correctly interpreted the provisions of the PPA or not could be decided only after hearing the parties; thus, the Tribunal, having been seized of the issue in the said appeal, there was no reason for the petitioner to seek the intervention of the Commission for a declaration that the respondent is liable for payment of capacity charges based on declaration of availability as per terms of the PPA; and the prayer of the petitioner was not maintainable.

The CERC observed that one more prayer of the petitioner was for a direction to the respondent to pay the amounts outstanding to the petitioner along with delayed payment surcharge to sustain operation of the plant; during the hearing of the Appeal No.261/2013 on 28.4.2014, the petitioner had sought the permission of the Tribunal to file an appropriate application for non-payment of amounts by the respondent MSEDCL and the Tribunal had accordingly granted liberty to the petitioner for the same; the Commission found no reason to consider the prayer of the petitioner since the petitioner was already pursuing the remedy before the Tribunal for ensuing payment of the outstanding dues by the respondent MSEDCL; and, based on the above discussions, they found no merit in the submissions of the petitioner; and the petition was accordingly rejected as not maintainable.

X. JUDGEMENT OF THIS TRIBUNAL IN APPEAL NO. 261 OF 2013 DATED 22ND APRIL, 2015: ITS CONTENTS:

MSEDCL filed Appeal No. 261 of 2013, under Section 111 of the Electricity Act, 2003, against the order passed by the CERC in Petition No. 166/MP/2012 dated 30.07.2013 whereby the petition filed by the 2nd Respondent-Generating Company ("RGPPL") was allowed.

After noting the reliefs sought by RGPPL in Petition No.166/MP/2012, this Tribunal in its order dated 22.04.2015 observed that, by the impugned order passed by the CERC, the appellant-MSEDCL was required to pay capacity

charges to RGPPL as per Article 5.2 read with Article 4.3 of the PPA, if the appellant did not schedule power based on declaration of availability of the power of Recycled Liquid Natural Gas (R-LNG); the Commission had also held that the provisions of Article 5.9 of the PPA, dealing with Gas Supply Agreement (GSA) and Gas Transportation Agreement (GTA) and the requirement of taking consent / approval of the appellant to the contracting terms and price related only to the energy charges specified in Article 5.3 of the PPA, and it had no implication to the capacity charges payable as per Article 5.2 read with Article 4.3 of the PPA; the appellant was held liable to pay capacity charges even when they did not give consent to the GSA or the GTA; the contention of the appellant that they could not be made liable to pay capacity charges because they had not given consent or approval to the said GSA/GTA, was not accepted; and the CERC had rejected the contention of the appellant that the implication of the impugned order would result in saddling the consumers of Maharashtra with an annual additional liability of Rs.7772 Crores.

This Tribunal then observed that the main grievance of the appellant against the impugned order were as under: (1) that the CERC had erroneously started on the premise that there was no embargo on the power generating company (RGPPL) under clause 4.3 of the PPA from making capacity declaration based on R-LNG; (2) the right of the appellant to approve the contracting terms and prices before entering into GSA/GTA would have application over both fixed (capacity) charges and variable energy charges because, when the power generating company chooses to adopt R-LNG as a source of fuel which impacts the quantum of declared capacity, this automatically affects plant availability and becomes a matter of commercial implications within the meaning of clause 5.9 of the PPA thereby requiring prior approval and consent of the appellant-distribution licensee; a plain and conjoint reading of the definition of declared capacity along with clause 4.3 and 5.9 of

the PPA revealed that the power generating company should obtain approval of the distribution licensee on contracting terms and prices before entering into any GSA/GTA with Gas Authority of India Ltd. (GAIL); (3) the CERC, by implication, has erroneously linked clause 5.9 of the PPA only to the second part of clause 4.3 dealing with secondary fuel i.e. liquid fuels and has erroneously interpreted the contract in a manner which authorises RGPPL to declare capacity based on R-LNG without any prior approval / consent from the appellant-distribution licensee; the CERC has also taken away the application of clause 21(1)(a) proviso of the PPA which provides for a reduced capacity charge calculation where the plant availability factor achieved in the year is less than 70%; (4) the CERC has erroneously re-written the terms of the contract thereby disrupting the entire commercial understanding between the parties; and by allowing RGPPL to declare capacity based on R-LNG, without prior approval of the appellant, CERC has failed to consider that this would result in a significant tariff shock to all the consumers of the appellant, and the distribution licensee would be failing in its duty to provide consumers with electricity at a reasonable rate/tariff as fixed by the Central Commission in its tariff order.

After noting the relevant facts giving rise to the appeal, the oral and written submissions put forth by Senior Counsel on either side, and having perused the impugned order including the material available on record, the CERC observed that the following issues arise for consideration in this appeal: (i) whether the impugned order was erroneous, being based on an incorrect reading of the provisions of PPA dated 10.04.2007 particularly clause 4.3 and 5.9?; and (ii) whether the appellant was required to pay capacity charge when the appellant did not give consent to GSA/GTA?; and, since these issues were interwoven, they were taking up and deciding them together.

After noting the contentions of the appellant and the 2nd Respondent-RGPPL on the said issues, this Tribunal proceeded to decide whether the appellant was liable to pay capacity charges even if the appellant had not given consent or approval to the said GSA & GTA, and quoted the provisions of Article 4.3, Article 5.9 and Clause 21(1)(a) of the PPA. It then noted the contentions urged on behalf of the appellant, including that a conjoint reading of clause 4.3 and 5.9 of the PPA revealed that a power generating company should obtain approval of the appellant-distribution licensee on the contracting terms and prices before entering into any GSA/GTA with Gas Authority of India Ltd; and the Central Commission, by allowing RGPPL to declare capacity based on R-LNG without prior approval of the appellant, has not considered that it would result in a tariff shock to all consumes of the appellant. It also noted the submission urged on behalf of RGPPL.

While expressing its inability to accept the contentions of the appellant-MSEDCL, this Tribunal observed that Article 4.3 of the PPA, dealing with declared capacity, clearly provides that the primary fuel for RGPPL is LNG/natural gas or R-LNG; normally capacity of the station shall be declared on gas and/or R-LNG for all the three power blocks; however, if agreed by the distribution licensee, the power generating company i.e. the 2nd Respondent-RGPPL shall make arrangements of liquid fuels for the quantum required by MSEDCL, and in such a case the capacity of liquid fuel shall also be taken into account for the purpose of availability of declared capacity and PLF calculation, till the time liquid fuel(s) stock agreed/requisitioned by the distribution licensee is available at the site; it was clear from an analysis of the provisions of Article 4.3 of the PPA that the primary fuel for the 2nd Respondent- power generator was LNG, natural gas or R-LNG, and the normal capacity of the generating station shall be declared on gas or R-LNG; the consent or agreement by a distribution licensee shall be required only in case when the power generator shall make arrangements of liquid fuel(s) for the quantum required by

MSEDCL; thus Article 4.3 clearly provided that, if the power generator had to arrange for liquid fuel(s), then only the agreement or consent or approval of MSEDCL shall be required; in the case on hand, the power generating company, due to heavy scarcity of domestic gas, had to change the nature of primary fuel namely LNG/natural gas to R-LNG; LNG or natural gas or R-LNG were all covered by the definition of primary fuels; there was a shift only from one source of primary fuel, namely natural gas, to another fuel, namely R-LNG; hence, the consent or approval of the Appellant- distribution licensee was not required to have been obtained prior to entering into the GSA/GTA between the 2nd Respondent-power generating company and the gas supplier, namely GAIL; this was not a case of change from LNG/natural gas or R-LNG to liquid fuel, but was a case of change of *inter se* primary fuel, since LNG/natural gas or R-LNG were all primary fuel; Article 4.3 of the PPA did not require the consent or approval of the distribution licensee to enable the 2nd Respondent-power generating company to enter into a contract for GSA/GTA with the gas supplier, namely GAIL; since there was heavy shortage of domestic gas at the relevant time, and the appellant-distribution licensee was not agreeing to schedule power for the declared availability, the 2nd respondent was left with no other option except to enter into GSA/GTA with GAIL in order to generate electricity, for which purpose the plant in question was set up after a lot of efforts between the State Government, the Government of India and different other institutions of the highest level to meet the requirement of electricity of the State as well as the Centre.

This Tribunal further observed that, in the impugned order, the CERC had given cogent and sufficient reasons to arrive at the said conclusion, and the appellant had rightly been held liable to pay capacity charges even if it did not consent for a GSA/GTA to be entered between the 2nd respondent-power generating company and GAIL; the 2nd respondent had rightly been held entitled to capacity charges when the 2nd respondent remained in a position to

generate electricity, and accordingly had declared necessary availability of electricity when the appellant had chosen not to schedule quantum of electricity on the declared availability; this aspect decided by the CERC, in the impugned order, had nothing to do with relaxation of NAPAF for non-availability of gas decided by the CERC in the earlier order; the appellant-distribution licensee had rightly been held to be under the obligation to pay capacity charges so long as the 2nd respondent generator had declared available capacity, irrespective of whether the distribution licensee scheduled the capacity offered by the generator or not; since the generator had made upfront investment in establishing, operating and maintaining the generating station, the capital cost incurred needed to be serviced during the life time of the generating station, through payment of annual fixed charges because such annual fixed charges were determined with respect to specific tariff elements provided therefore, namely, Tariff Regulations, 2009 in the present case; the CERC, in the impugned order, had rightly refused to exonerate the appellant- distribution licensee from paying capacity / fixed charges only because the distribution licensee had refused to give consent to the power generator to enter into GSA/GTA with the gas supplier; if the appellant does not wish to take electricity based on R-LNG, the appellant was required to compensate the 2nd respondent with capacity charges in relation to the quantum of electricity for total declared availability made by the 2nd respondent on gas and/or R-LNG; since the declared capacity was in accordance with Article 4.3 of the PPA, the capacity charges as provided in Article 5.2 of the PPA were payable; they were unable to accept the contention of the appellant that prior approval of the appellant in terms of Article 5.9 of the PPA, for entering into GSA/GTA, was required to be taken because such agreements had financial implications on the appellant; in the present case, the power generator had only shifted the fuel source from natural gas to R-LNG which were the primary fuel, and no such consent or approval of the appellant was required; the contention of the appellant could have been accepted in case there was a change of primary

fuel, namely from LNG/natural gas or R-LNG to liquid fuel; they did not find any perversity or infirmity in any of the findings recorded in the impugned order by the CERC; they approved the findings recorded in the impugned order as there was no reason to deviate from such findings; if there was an agreement between the 2nd respondent and the gas supplier which was based on 'Take or Pay' principle, any charge on account of the principle of Take or Pay is not to be passed on to the distribution licensee; this was not a case of gas supply agreement (GSA) based on the principle of Take and Pay; and, hence, they did not find any infirmity in the impugned order. Both the issues were decided against the appellant. This Tribunal held that the instant appeal was liable to be dismissed, and they were clearly holding that the appellant distribution licensee was required to pay capacity charges to the 2nd respondent- power generating company, even if the appellant did not given consent for GSA/GTA because there was no change of fuel falling under the category of primary fuel to liquid fuel.

This Tribunal passed an order dismissing Appeal No. 261 of 2013, and upholding the impugned order dated 30th July, 2013 passed in Petition No. 166/MP/2012. This Tribunal further held that the appellant was under an obligation to pay capacity charges to the 2nd Respondent power generating company, even if the appellant did not give consent to GSA/GTA because RGPPL, in the place of natural gas or fuel, was using R-LNG (primary fuel).

XI. GROUNDS URGED BY MSEDCL IN CIVIL APPEAL NO. 1922 OF 2023 FILED BEFORE THE SUPREME COURT:

In Para 7 of Civil Appeal No. 1922 of 2023 preferred by them before the Supreme Court, against the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, MSEDCL narrated the relevant facts. Para 7(u) specifically referred to the fact that, on 08.05.2014, the Appellant (MSEDCL) had terminated the PPA when RGPPL, with effect from 01.04.2014 ie the date on which the last GSA duly

approved by the Appellant had expired, and because no GSA had since been approved by the Appellant in terms of Clause 5.9 of the PPA. A copy of the termination notice was also annexed and marked as Annexure A12 to the said Appeal. Para 7(v) of the said Civil Appeal records that, on 22.05.2014, RGPPL disputed the termination letter, and RGPPL had not approached any forum in order to obtain stay or challenge the said termination letter. A copy of the said letter dated 22.05.2014 was annexed and marked as Annexure A12 to the Civil Appeal.

In Para 8 of Civil Appeal No.1922 of 2023, MSEDCL had raised several grounds for preferring the Civil Appeal against the judgement of this Tribunal in Appeal No.261 of 2013 dated 22.04.2015. Ground (MM) is that:-

> *"the Appellant (MSEDCL), on 08.05.2014, had terminated the PPA dated 10.04.2007 with the Respondent No.1 (RGPPL) with effect from 01.04.2014 ie immediately after expiry of the last GSA duly approved by MSEDCL and because no GSA has since been approved by Appellant herein as required in Clause 5.9 of the said PPA and continuing with PPA without GSA would not have served any useful purpose"*.

Ground (NN) is that :-

> "*Respondent No. 1, after termination of PPA, is raising monthly capacity charges bills to Appellant from January, 2019, however Appellant has returned the bills raised by Respondent No.1 as there is no valid contract is in existence between RGPPL and MSEDCL"*

Despite these facts being specifically stated, and grounds being raised in this regard, in the Civil Appeal filed by MSEDCL, the Supreme Court, in its Order in Civil Appeal No. 1992 of 2023 dated 09.11.2023, upheld the judgment of this Tribunal on its merits after analysing the relevant clauses of the PPA, and dismissed the appeal

filed by MSEDCL. The Supreme Court also made it clear that the execution proceedings, pursuant to the Execution Petition filed before APTEL, be continued.

XII. JUDGEMENT OF THE SUPREME COURT IN CIVIL APPEAL NO. 1922 OF 2023 DATED 09.11.2023:

Aggrieved by the judgment of this Tribunal dated 22.04.2015, dismissing the appeal preferred by them against the order of the CERC dated 30th July 2013, MSEDCL preferred Civil Appeal No. 1922 of 2023 before the Supreme Court. In its order, in Civil Appeal No.1922 of 2023 dated 09.11.2023, the Supreme Court took note of the Petition filed by RGPPL under Section 79 of the Electricity Act, the Order of the CERC dated 30th July 2013 holding the appellant-MSEDCL liable to pay fixed charges to RGPPL, the CERC's decision having been upheld by APTEL by the impugned order; that the civil appeal against the APTEL order was disposed of by the Supreme Court by order dated 13 May 2015, whereby the appellant-MSEDCL was granted liberty to move the court when it became necessary; and that the Supreme Court had directed as follows: *"The question raised in the present appeal before this Court at this stage appears to be academic in the absence of any coercive steps against the appellant for recovery. We, therefore, decline to entertain this appeal at this stage. However, we give liberty to the appellant to move this Court once again in the event it becomes so necessary."*

The Supreme Court thereafter noted that, consequently, there was correspondence between MSEDCL and RGPPL regarding liability towards fixed charges; MSEDCL had disclaimed any liability under the Power Purchase Agreement stating that it stood absolved of the fixed charges since the capacity declaration was made by RGPPL based on RLNG, without MSEDCL's consent; RGPPL had filed an execution petition before APTEL seeking payment of Rs 5287.76 crores together with an amount of Rs 1826 crores in accordance with the APTEL order dated 22nd April, 2015; notice was issued on

the execution petition by the order of APTEL dated 25TH November 2022; and thus, in light of the subsequent events and the liberty granted by the Supreme Court, the present appeal had been filed.

After noting the factual background leading up to the filing of the Civil Appeal, the CERC order dated 30th July 2013 and the APTEL judgement and final order dated 22nd April 2015, the Supreme Court observed that the CERC had allowed the petition and held MSEDCL liable to pay fixed capacity charges under the PPA; it held that (i) Clause 4.3 of the PPA permitted use of LNG/Natural gas or RLNG as a 'primary fuel'; (ii) RGPPL was permitted to use even liquid gas, albeit with the consent of the appellant; (iii) the terms of the PPA did not injunct RGPPL from declaring capacity based on RLNG; (iv) the beneficiaries had the option to dispatch or refuse to dispatch the capacity on natural gas, RLNG, or liquid fuel; (v) in the event they choose to refuse the dispatch, they cannot repudiate the liability to pay fixed charges citing the company's failure to obtain approval; (vi) such consent or approval was not necessary for declaring capacity based on the contractually designated primary fuel, including RLNG; (vii) the requirement of seeking the appellant's approval under Clause 5.9 was not a mandatory pre-requisite for making capacity declarations under Clause 4.3; (viii) fixed tariffs were payable on declared capacity; (ix) since RGPPL was unable to obtain domestic gas due to a country-wide shortage, they made arrangements for RLNG; (x) the appellant's decision to not schedule the supply based on RLNG had a bearing on variable charges and not on the fixed charges; and (xi) the appellant was thus liable to pay fixed charges based on the capacity declaration made on RLNG by RGPPL.

The Supreme Court noted the findings of this Tribunal as under: (a) the need to obtain the consent of the distribution licensee arises only when the power generation company makes arrangements based on liquid gas; in the present case, the only change in question was being made from one primary

fuel to another primary fuel i.e. from natural gas to RLNG; both of these were "primary fuel for RGPPL" in accordance with Article 4.3 of the PPA; this change, unlike the change from primary fuel sources to liquid gas, did not require the consent of the distribution company; (b) the PPA did not require the power generation company to obtain the consent of the distribution licensee for entering into the GSA/GTA with GAIL; the plant was set up after significant efforts from the central and state governments; RGPPL was left with no choice but to enter into the GSA/GTA with GAIL in order to overcome the domestic gas shortage; MSEDCL had refused to schedule power for the declared availability based on RLNG to be supplied under the GSA/GTA; (c) RGPPL had declared the necessary availability of electricity when MSEDCL had chosen not to schedule the quantum of electricity on the declared availability; as long as RGPPL had the declared available capacity and irrespective of whether MSEDCL had scheduled the capacity offered by RGPPL, the appellant-MSEDCL was liable to pay the fixed capacity charges; and (d) RGPPL had invested in establishing, operating, and maintaining the generating station; the annual fixed charges were determined with reference to specific tariff requirements stemming from the Tariff Regulations of 2009; and the capital cost invested in the station needed to be serviced by way of the annual fixed charges; APTEL directed that if the appellant-MSEDCL wished to not pay for the electricity from RLNG, it must pay compensation to the first respondent, since it is liable, under Article 5.2 of the PPA, to pay the capacity charges; no prior consent, as envisaged in Article 5.9, was required in order for such liability to arise; APTEL thus held that the appellant-MSEDCL had been rightly ordered to pay the capacity charges notwithstanding the fact that they have not consented to the GSA/GTA with GAIL; and the appeal was thus dismissed.

The Supreme Court then noted the submissions, urged on behalf of MSEDCL, including that (i) the CERC had put Clause 4.3 and Clause 5.9 of the PPA in two separate buckets; according to the PPA (clauses 4.3, and 5.9

read conjointly), the first respondent-RGPPL was obligated to obtain prior approval from the appellant before entering into the GSA/GTA with GAIL; failing this requirement, RGPPL had absolved the appellant of the obligation to pay for the declared capacity to the extent that such declared capacity was attributable to RLNG which, though a primary source of fuel, could have been obtained by RGPPL only after prior consent of the appellant; (ii) placement of the prior approval clause in Clause 5.9 suggested that it applied to Clause 5.2 capacity charges as well as Clause 5.3 energy charges; the impugned decisions made an artificial distinction between the two sub-clauses and the two types of charges and incorrectly subjects only Clause 5.3 (energy charge) and not Clause 5.2 (capacity charge) to the approval requirement in Clause 5.9; the phrase "commercial implication" in Clause 5.9 made the consent requirement applicable to the present GSA/GTA; the commercial implication of "plant availability" was the average of daily declared capacity as a percentage of net capacity; thus, plant capacity stood affected by the decision to adopt RLNG which affects the quantum of declared capacity; thus, the use of RLNG by RGPPL automatically had "commercial implications" and, as such, the prior approval requirement in Clause 5.9 stood invoked; (iii) there was an "organic interlinking" between Clause 5.9, commercial implications, plant availability, declared capacity, and declaration of capacity in terms of choice of fuel as provided in Clause 4.3; and therefore, the compartmentalisation of Clauses 4.3 and 5.9, which is the premise of the impugned decisions was flawed; (iv) the plant availability factor would be less than 70% and, as such, the capacity charges would be reduced in accordance with Clause 21(1)(*a*) of the CERC (Terms and Conditions of Tariff) Regulations, 2009; (v) CERC and APTEL had virtually re-written the contract between the parties which was impermissible under settled principles of contractual interpretation; and (vi) the impugned decisions will impact the customers of the appellant.

The Supreme Court thereafter noted the submissions urged on behalf of RGGPL, including that (i) the capacity declaration using RLNG as well as demanding capacity charges based on such declared capacity were in accordance with Clauses 4.3 and 5.2 of the PPA; (ii) the PPA contained no clause for termination of the PPA, and was thus valid for 25 years from the commercial operation date ("COD"); as such, the appellant was bound by the PPA as a whole and particularly by Clauses 6.6 and 6.7 which stipulated that, even if a dispute is pending, the appellant is bound to pay 95% of the charges during such pendency, which the appellant has failed to do.

The Supreme Court, thereafter, observed that the issue that arose for consideration was whether CERC and APTEL were justified in affixing liability to pay fixed charges on the appellant; the dispute primarily turned on the terms of the PPA; and, for the reasons stated hereafter, they were answering the issue in the affirmative. After extracting certain terms of the PPA such as "Declared Capacity", Clause 2.2.1, Clause 4.3, Clause 5, Clause 5.2 relating to Capacity Charge, Clause 5.3 relating to Energy Charges, Clauses 5.4 to 5.6 and Clause 5.9 relating to Gas Supply Agreement (GSA)/Gas Transportation Agreement (GTA), the Supreme Court observed that the position which emerged from the terms of the PPA was formulated thus: (a) there were two types of tariff charges payable by MSEDCL — capacity charges under Clause 5.2 and energy charges under Clause 5.3; (b) for the former, the rates were fixed, having been finalised at the time of takeover by RGPPL, and were subject to revision by the Government of India or the Government of Maharashtra; (c) for the latter, the rates were to be calculated by way of the formula stipulated in Clause 5.3; (d) MSEDCL was required to schedule the sending of energy from RGPPL, and the energy charges were payable according to the energy scheduled to be sent out from RGPPL to MSEDCL; (e) provisional billing of the two types of charges shall be made until the billing is approved by CERC; and (f) the total gas requirements were to be procured

through GAIL, by way of a GSA/GTA under the directions of the GoI; before entering into the GSA/GTA, RGPPL was supposed to obtain approval from MSEDCL on the terms of the contract and the price since such a GSA/GTA had “commercial implications”.

The Supreme Court, thereafter, observed that RGPPL had consistently stated that the alternate arrangement in the form of GSA/GTA with GAIL and capacity declarations based on RLNG were necessitated on account of the unprecedented nationwide shortage of domestic fuel; but for such an alternate arrangement, RGPPL would have been unable to meet the target availability, which would have in turn affected their ability to recover fixed costs, and jeopardised the viability of the project; the appellant did not dispute the shortage of domestic fuel, but merely objected to the “unilateral” decision to declare capacity based on RLNG, which the appellant stated violated the mandatory approval requirement under Clause 5.9 of the PPA, thereby exonerating it of the liability to pay fixed capacity charges; in accordance with settled principles governing the interpretation of contracts, the PPA was required to be read as a whole; Clause 4.3 had two parts : according to the first, primary fuels include LNG/natural gas and/or RLNG; according to the second, the appellant's agreement was required in case liquid fuels were to be employed; a bare reading of the clause indicated that the requirement to seek such an agreement did not attach to the first part of the clause which envisaged RLNG as a primary fuel; an arrangement involving a transition from one primary fuel to another primary fuel was permissible by the clause, even without the appellant's agreement; the requirement of an agreement, mandated for an arrangement involving liquid fuel, could not be read into the plain text of the former part of Clause 4.3; and thus, the capacity declaration based on RLNG could be done unilaterally, unencumbered by the requirement of the appellant's consent in the latter half or the prior approval requirement under Clause 5.9 of the PPA.

The Supreme Court further held that one must remain mindful of the conspectus of facts that led to the establishment of RGPPL; it was set up consequent upon the failure of M/s Enron International, and M/s Dabhol Power Company to meet the energy needs of the State of Maharashtra; the tariff requirements had been determined based on the need to preserve the viability of the unit; RGPPL was compelled to make alternate arrangements in view of the countrywide shortage of domestic gas, making RLNG a viable and contractually permissible alternative; notably, the appellant had not disputed the circumstances in which this need arose; in the present case, CERC and APTEL had correctly held that the GSA/GTA with GAIL was permissible by the terms of the contract, and the consent or approval of the appellant was irrelevant; Clause 5.9 and Clause 4.3 operated in different spheres and the requirement of the former could not be foisted on an arrangement permissible by the latter; capacity charges mandated under Clause 5.2 hinged on the declared capacity that the station was capable of delivering to its beneficiaries; energy charges, on the other hand, were payable only against the actual energy delivered; the appellant's liability for the former was actual delivery agnostic; it arose as long as the declared capacity was made in terms of the PPA i.e. Clause 4.3; Clause 2.2.2 of the PPA prescribed that, even in case MSEDCL was unable to utilise the entire allocated capacity of RGPPL, or in case MSEDCL failed to comply with the payment obligations in accordance with the PPA, RGPPL shall be entitled to sell power to other parties, without prejudice to its claim for recovery of capacity charges from MSEDCL subject to the provisions of Clause 2.2.2; Clause 2.2.2 indicated the intention of the parties to the PPA to put the capacity charges beyond the realm of actual energy supplied; the appellant's reading implied that such a fixed charge can be avoided and made subject to the consent of the appellant; and such a reading goes against the apparent intention of the parties to treat capacity charges as fixed charges under the PPA.

The Supreme Court thereafter held that a commercial document could not be interpreted in a manner that was at odds with the original purpose and intendment of the parties to the document; a deviation from the plain terms of the contract was warranted only when it served business efficacy better; the appellant's arguments would entail reading in implied terms contrary to the contractual provisions which were otherwise clear; such a reading of implied conditions was permissible only in a narrow set of circumstances; the Supreme Court, in **Transmission Corpn. of A.P. Ltd. v. GMR Vemagiri Power Generation Ltd., (2018) 3 SCC 716**, had held that a commercial document could not 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 of 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; in the present context, bearing in mind the background of the establishment of RGPPL, and the shortfall of domestic gas for reasons beyond the control of RGPPL, such a deviation from the plain terms was not merited and militated against business efficacy as it had a detrimental impact on the viability of RGPPL; and the execution proceedings, pursuant to the abovementioned execution petition before APTEL, be continued. The appeal was dismissed.

XIII. GROUNDS URGED BY MSEDCL IN THE REVIEW PETITION FILED BEFORE THE SUPREME COURT:

MSEDCL sought review of the judgment of the Supreme Court in Civil Appeal No. 1992 of 2023 dated 09.11.2023 by way of RP (C) No. 1997 of 2023 wherein also they specifically raised this plea of the PPA having been terminated as early as on 08.05.2014. Para 4 of the said Review Petition are the grounds raised by

MSEDCL for filing the review petition for the errors apparent on the face of the record. Under Para 4, below the head "Re: Termination of the PPA has not been considered despite attaining finality" are grounds (I) and (J).

Ground (I) reads thus :-

"Because the Impugned Order has failed to address the fact that the appellant had terminated the PPA on 08.05.2014 with effect from 01.04.2014 ie, immediately after expiry of the last GSA duly approved by MSEDCL, since no consent has been sought for any GSA from MSEDCL (as was required in Article 5.9 of the said PPA), thereafter continuing the PPA without GSA would not have served any useful purpose. The impugned judgement does not discuss this aspect".

Ground (J) reads thus:-

"Because the Impugned Order has failed to consider that the PPA is a determinable contract and that RGPPL has not challenged the termination of the PPA before any forum till date. Thus, the said termination has attained finality. Therefore, without prejudice to the contentions as raised hereinabove, MSEDCL cannot be saddled with any liability towards capacity charges from 01.04.2014, particularly considering that there was/is no valid contract existing between the parties from 01.04.2014."

XIV. ORDER OF THE SUPREME COURT IN REVIEW PETITION (CIVIL) NO. 1997 OF 2023 IN CIVIL APPEAL NOS. 1992 OF 2023 DATED 19.03.2024:

In its order, in Review Petition (Civil) No. 1997 of 2023 in Civil Appeal Nos. 1992 of 2023 dated 19.03.2024, the Supreme Court held that, having perused the review petitions, there was no error apparent on the face of record;

and no case for review, under Order 47 Rule 1 of the Supreme Court Rules 2013, had been established. The review petition was, accordingly, dismissed.

XV. ORDER OF THIS TRIBUNAL IN E.P.NO.12 OF 2023 DATED 17.01.2025:

E.P. No.12 of 2023 was filed by RGPPL, under Section 120(3) of the Electricity Act, seeking execution of the judgement of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015. The reliefs sought in the said EP were (a) to allow the Execution Petition; (b) to issue appropriate order(s)/direction(s) to MSEDCL to comply and act upon the findings/ directions of this Tribunal vide Judgement date 22.04.2015 in Appeal No. 261 of 2013; (c) to direct MSEDCL to make payment of Rs. 66,96,47,83,132/- as on November 2023, towards outstanding dues including capacity charges, Late Payment Charges etc. in terms of the PPA and in compliance of the Judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, and/or (d) attach the bank account of MSEDCL to secure enforcement of the Judgement and Order passed by this Tribunal in Appeal No.261 of 2013 dated 22.04.2015.

In its order, in E.P. No.12 of 2023 dated 17.01.2025, this Tribunal noted that, subsequent to orders being reserved in EP No. 12 of 2023, MSEDCL had filed Petition No. 276/MP/2024 before the CERC, along with IA No. 67 of 2024, seeking the following reliefs: (a) declare the invoices raised by RGPPL as void, non-est, and illegal; (b) restrain RGPPL from issuing any further invoices under the terminated PPA dated 10.4.2007, and from uploading any further invoices on the PRAPTI portal seeking payment thereof; (c) direct Grid Controller of India Limited and PFC Ltd to restore MSEDCL's short-term access and full GNA; and (d) restrain the Respondents from taking any coercive steps against MSEDCL in furtherance of such impermissible, inapplicable, void, non-est, and arbitrary invoices, including by way of regulation of GNA and open access under the framework of the LPS Rules.

In its order, in IA No. 67 of 2024 in Petition No. 276/MP/2024 dated 30.09.2024, the CERC had noted that RGPPL had filed Execution Petition No.12/2023 before this Tribunal seeking execution of APTEL's judgment dated 22.04.2015 in Appeal No. 261/2013, and the same was pending consideration; and, needless to state, the decision of the Commission, in this order, shall abide by the decision of APTEL in the said execution proceedings. IA 67 of 2024 was disposed of accordingly.

This Tribunal also noted that IA No. 1671 of 2024 was filed by MSEDCL before this Tribunal on 03.10.2024 to take on record the information and documents filed therewith, which included a copy of Petition No. 276/MP/2024, along with IA No. 67 of 2024, filed by them before the CERC, and the order of the CERC in IA No. 67 of 2024 dated 30.09.2024.

On whether the subject decree was a mere declaratory decree which could not be executed, this Tribunal observed that, in the light of the law declared by the Supreme Court, in **Bhavan Vaja : (1973) 2 SCC 40, and Deep Chand : (2000) 6 SCC 259,** it must take into consideration the pleadings, as well as the proceedings leading up to the decree, in construing the decree; and in case the language of the decree was capable of two interpretations, one of which assists the decree-holder to obtain the fruits of the decree, and the other which prevents him from taking the benefits of the decree, the interpretation which assists the decree-holder should be accepted; and it was necessary to refer to the reliefs sought and those granted by the Commission in the original petition, and in appeal by this Tribunal, for that would establish whether this Tribunal had held that MSEDCL should pay capacity charges (fixed charges) to the Execution Petitioner.

This Tribunal thereafter observed that, in paragraph 8 of the judgement under execution, this Tribunal had framed two issues. The first issue was whether the impugned order (ie order of the CERC in Petition No. 166/MP/2012 dated 30.07.2013) was erroneous being based on incorrect reading of the

provisions of PPA dated 10.04.2007, particularly clause 4.3 and 5.9? The second issue was whether the Appellant (MSEDCL) was required to pay capacity charges when they did not give consent to GSA/GTA. After holding that both the issues were decided against MSEDCL and that the appeal was liable to be dismissed, this Tribunal had observed, in para 16 of its judgment in Appeal No. 261 of 2013 dated 22.04.2015 that *"we clearly hold that the appellant distribution licensee is required to pay capacity charges to the respondent No.2 (execution petitioner), power generating company even if the appellant does not given consent for GSA/GTA because there is no change of fuel falling under the category of primary fuel to the liquid fuel".*

Thereafter, in the order part of the judgment, this Tribunal observed thus ".....*Further, the appellant is under obligation to pay capacity charges to respondent No.2, power generating company, even if the appellant does not give consent to GSA/GTA because the appellant in place of natural gas or fuel is using R-LNG (primary fuel)".*

The relevant sentences in paragraph 16 of the judgment of this Tribunal is *"the appellant distribution licensee is required to pay capacity charges to the respondent No.2, power generating company even if the appellant does not give consent for GSA/GTA".* The relevant sentence in the order part of the judgment is *"the appellant is under obligation to pay capacity charges to respondent No.2, power generating company even if the appellant does not give consent to GSA/GTA".*

This Tribunal further held that, while para 16 of the judgment in Appeal No. 261 of 2013 dated 22.04.2015 holds that MSEDCL is required to pay capacity charges to the Execution Petitioner, the order part of the judgment holds that MSEDCL is under an obligation to pay capacity charges to the Execution Petitioner. Use of the word *"obligated to pay"* in the order part of the judgment as against the words *"required to pay:* in para 16 of the judgment mattered little, as both the words *"required"* and

"obligated" clearly established that MSEDCL should pay capacity charges (fixed charges) to the Execution Petitioner; the above referred italicised sentences make it clear that the judgment of this Tribunal, requiring/obligating MSEDCL to pay capacity charges (fixed charges) to the Execution Petitioner was not a declaratory decree, and there was a specific direction in terms of which MSEDCL had been called upon to pay the Execution Petitioner fixed charges.

This Tribunal thereafter observed that quantification of the capacity charges (fixed charges) to be paid by MSEDCL to the Execution Petitioner fell within the jurisdiction of the executing court and, in computing the amount of fixed charges payable, the executing court could not be said to travel beyond or behind the decree; Section 120(3) of the Electricity Act required an order, made by this Tribunal under the Electricity Act, to be executed as a decree of the civil court, and for this purpose this Tribunal has been held to have all the powers of a civil court; Section 47(1) of the Civil Procedure Code requires the civil court to decide all questions which arise between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree, to be determined by the court executing the decree and not by way of a separate suit; Section 47 CPC enables an Executing Court to determine all questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree; it is only questions which do not relate to the execution, discharge or satisfaction of the decree which are not within the jurisdiction of the Executing Court. **(Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker: AIR 1961 ALL 1 (FB): 1960 SCCOnLine ALL 89);** while MSEDCL has been required/obligated to pay capacity charges (fixed charges) to the Execution Petitioner, the actual quantum of fixed charges, to which the Petitioner was entitled to, was but a matter of computation which exercise could, undoubtedly, be undertaken by this Tribunal in the present execution proceedings.

On the question whether the decree was vague rendering it inexecutable, this Tribunal observed that, in the present case, MSEDCL had not even disputed the amount quantified by RGPPL in the table in Annexure-Y of the Execution Petition; the table in Annexure-Y recorded the capacity charges payable by MSEDCL to RGPPL, for the period up to December 2022, as Rs. 2679,85,88,408/-; as this amount had not even been disputed by MSEDCL, all that was required to be done by the Executing Court was to deduct from this amount, representing capacity charges, the amount realized thereafter by the Execution Petitioner from MSEDCL with respect to such capacity charges; MSEDCL had, in terms of the interim order passed by the CERC in IA No. 67 of 2024 in Petition No. 276/MP/2024 dated 30.09.2024, paid a sum of Rs. 471 Crores to RGPPL; while it was not known whether this sum of Rs.471 Crores was also towards capacity charges for the period prior to December 2022, MSEDCL was entitled to deduct the said amount, if it related to capacity charges for the period prior to December 2022, and make payment of the balance amount to RGPPL towards capacity charges; there was no merit in the submission, urged on behalf of MSEDCL, that the order of this Tribunal, in Appeal No. 261 of 2013 dated 22.04.2015, did not include any direction for payment to be made by MSEDCL to RGPPL towards capacity charges; and the understanding of MSEDCL, as was evident from the Appeal filed by them before the Supreme Court in Civil Appeal No.1922 of 2023, was also that, by its order in Appeal No. 261 of 2013 dated 22.04.2015, this Tribunal had directed MSEDCL to pay capacity charges to RGPPL.

On the question whether the EP should have been filed before the CERC instead of this Tribunal, it was held that, while the conclusion of this Tribunal in the aforesaid judgment, in Appeal No. 261 of 2013 dated 22.04.2015, that MSEDCL was required/ obligated to pay capacity charges (fixed charges) to the Execution Petitioner was undoubtedly a direction to MSEDCL to pay the Execution Petitioner the said charges, it was relevant to note that, even the Appellant understood the aforesaid conclusion of this Tribunal as a direction for

it to pay the Execution Petitioner capacity charges; MSEDCL had preferred Civil Appeal No. 1922 of 2023, against the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, before the Supreme Court; in Para 7 of the said Civil Appeal MSEDCL narrated the relevant facts; Para 7(ee) reads thus:- *"Tribunal has passed the impugned judgement with the following directions:-* (i) *Appellant is directed to pay capacity charges to Respondent No.1 even if the Appellant does not give consent for GSA/GTA because there is no change of fuel falling under the category of primary fuel to the liquid fuel; (ii) Any change on account of principle of "take or pay" is not to be passed on the Appellant herein;* it did appear, therefore, that MSEDCL, having all along understood the judgment of this Tribunal to contain a direction for it to pay the Execution Petitioner capacity charges (fixed charges) was now, only for the purposes of these Execution Proceedings and with a view to avoid its having to make payment in terms of the said judgment, contending that no such direction was issued to it, and the above referred conclusions are merely a declaration of the Execution Petitioner's right, and nothing more.

This Tribunal, thereafter, held that, as the aforesaid conclusion/direction was issued by this Tribunal for the first time in appeal, and no such direction was issued by the CERC in the order appealed against, the aforesaid judgment of this Tribunal was not a mere affirmation of the order of the CERC; while it was possible to contend that a mere order of affirmation would require the execution proceedings to be instituted before the Court/Tribunal which passed the original order, such a situation did not arise in the present case; the exercise of quantification of the amount to be paid in terms of the decree was again a matter which fell within the jurisdiction of the executing court and this Tribunal could, in the light of the powers conferred on it under the second limb of Section 120(3) of the Electricity Act, undertake such an exercise; the Execution Petitioner was justified in invoking the jurisdiction of this Tribunal under Section 120(3) of the Electricity Act, and they could not have approached the CERC in this regard, as the order,

execution of which was sought, was passed by this Tribunal and not by the CERC.

On the question whether relief should be restricted only to the period prior to termination of the PPA by MSEDCL, this Tribunal observed that, though Appeal No. 261 of 2013 was pending on the file of this Tribunal, both when MSEDCL had terminated the PPA and when the correspondence took place between the Petitioner and MSEDCL thereafter, it did appear that neither MSEDCL nor the Execution Petitioner had brought the fact, of alleged termination of the PPA, to the notice of this Tribunal at any stage before the said Appeal was disposed of by order dated 22.04.2015; the judgment of this Tribunal, in Appeal No. 261 of 2013 dated 22.04.2015, was affirmed by the Supreme Court in Civil Appeal No. 1922 of 2003 dated 09.11.2003; it did appear, from the contents of the termination letter dated 08.05.2014, that the reason for termination of the PPA was the inability of the Execution Petitioner to obtain approval, for the Gas Supply Agreement executed by them with GAIL, from MSEDCL after expiry of the last Gas Supply Agreement on 31.03.2014; and the PPA dated 10.04.2014 was terminated by MSEDCL with effect from 01.04.2007 ie the date on which the last Gas Supply Agreement duly approved by MSEDCL had expired, and because no Gas Supply Agreement had been approved by MSEDCL thereafter as required under Clause 5.9 of the PPA; the CERC, this Tribunal and the Supreme Court had all held that Article 5.9 of the PPA had no application and approval of MSEDCL was not required to be obtained by the Petitioner for entering into a Gas Supply Agreement with GAIL for supply of R-LNG which was also a primary fuel like LNG/Natural Gas; it was possibly, for this reason, that MSEDCL did not refer to the termination of the PPA during the course of hearing of Appeal No. 261 of 2013; however, in Civil Appeal No. 1922 of 2023 preferred by them before the Supreme Court, against the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, MSEDCL specifically referred to the fact that, on 08.05.2014, the Appellant (MSEDCL) had terminated the PPA when

Respondent No.1 (RGPPL-Execution Petitioner) with effect from 01.04.2014, ie the date on which the last GSA duly approved by the Appellant had expired, and because no GSA had since been approved by the Appellant in terms of Clause 5.9 of the PPA; a copy of the termination notice was also annexed and marked as Annexure A12 to the said Appeal; in Para 8 of Civil Appeal No.1922 of 2023, MSEDCL had raised several grounds for preferring the Civil Appeal against the judgement of this Tribunal in Appeal No.261 of 2013 dated 22.04.2015. Ground (MM) and (NN) related to termination of the PPA; despite these facts being specifically stated, and grounds being raised in this regard, in the Civil Appeal filed by MSEDCL, the Supreme Court, in its Order in Civil Appeal No. 1992 of 2023 dated 09.11.2023, upheld the judgment of this Tribunal on its merits after analysing the relevant clauses of the PPA, and dismissed the appeal filed by MSEDCL; the Supreme Court also made it clear that the execution proceedings, pursuant to the Execution Petition filed before APTEL be continued; MSEDCL sought review of the judgment of the Supreme Court by way of RP (C) No. 1997 of 2023 wherein also they had specifically raised this plea of the PPA having been terminated as early as on 08.05.2014; RP (C) No. 1997 of 2023 was also dismissed by the Supreme Court, by its order dated 19.04.2024; the validity or otherwise of the letter of termination dated 08.05.2014 was put in issue by the Execution Petitioner in their replies to the said letter; the grounds which were urged by MSEDCL in Petition No. 166/MP/2012, which culminated in an order being passed by the CERC on 30.07.2013, appeared to have formed the basis of terminating the PPA as was stated in their letter dated 08.05.2014; the orders passed by this Tribunal in Appeal No.261 of 2013 dated 22.04.2015, and in the second appeal by the Supreme Court in CA No. 1922 of 2023 dated 09.11.2023, had specifically rejected contentions which formed the basis for termination of the PPA by MSEDCL; the reasons which formed the basis for terminating the PPA, (as is evident from the letter of termination issued by MSEDCL dated 08.05.2014), had been rejected not only by the CERC but also in appeal and second appeal by this Tribunal and the Supreme Court; MSEDCL had now instituted fresh

proceedings, by way of Petition No. 276/MP/2024 before the CERC, questioning the validity of the invoices raised by the Execution Petitioner on the ground that the PPA has been terminated on 08.05.2014; it was only if the CERC were to uphold the validity of termination of the PPA by letter dated 08.05.2014, would MSEDCL then be entitled to the relief sought for in the said petition; and the mere fact that Petition No. 276/MP/2024 has been instituted by MSEDCL before the CERC, that too only in August, 2024 after hearing in the present EP stood initially concluded, would not justify dismissal of the EP on this score.

While making it clear that it had not expressed any conclusive opinion on the merits of Petition No. 276/MP/2024 filed by MSEDCL before the CERC and, in case of their success in the said Petition, the order now passed would not disable MSEDCL from recovering the amounts due to it from the Execution Petitioner in terms of the order passed by the CERC, this Tribunal observed that this did not, however, justify its' refraining from executing a decree in the discharge of its statutory functions under Section 120(3) of the Electricity Act.

This Tribunal further observed that the validity of termination of the PPA, by letter dated 08.05.2014, was neither in issue nor were they required to consider its validity in the present execution proceedings; all that they had observed was that the grounds, which formed the basis of termination of the PPA, appeared to have been considered and held against MSEDCL, by the CERC, this Tribunal and the Supreme Court. This Tribunal made it clear that the afore-said observations made in this regard should not be understood as its conclusive opinion on this issue, for these were matters for the CERC to consider in Petition No. 276/MP/2024, instituted before it by MSEDCL, which Petition was still pending before it for its consideration. It was, likewise, made clear that this Tribunal had not undertaken any examination of the submissions, urged on behalf of the Execution Petitioner, that there was no provision in the PPA enabling parties to unilaterally terminate the PPA as these were also matters which could be urged for consideration before the CERC in Petition No.

276/MP/2024. This Tribunal saw no reason to restrict grant of relief, in this execution proceeding, only to the period prior to the alleged termination of the PPA by MSEDCL.

The Execution Petition was allowed to the extent indicated in the said order, and MSEDCL was directed to pay RGPPL capacity charges of Rs.31,27,48,66,735/-, (Rupees Three Thousand One Hundred and Twenty Seven Crores Forty Eight Lakhs Sixty Six Thousand Seven Hundred and Thirty Five only) less the amount realized of Rs.6,50,28,02,079/- (Rupees Six Hundred and Fifty Crores Twenty Eight Lakhs Two Thousand and Seventy Nine only). Consequently, MSEDCL was directed to pay RGPPL Rs. 2477,20,64,656/- (Rupees Two Thousand Four Hundred and Seventy-Seven Crores Twenty Lakhs Sixty Four Thousand Six Hundred and Fifty Six only), (capacity charges of Rs. 31,27,48,66,735/- minus realization of Rs.6,50,28.02,079/-), within four months from the date of receipt of a copy of the order.

This Tribunal further observed that, in case MSEDCL had paid Rs.471 Crores as directed by the CERC in its order in IA No. 67 of 2024 in Petition No. 276/MP/2024 dated 30.09.2024, and if the said amount was payable towards capacity charges for the period covered by the present EP, MSEDCL may deduct Rs. 471 Crores from Rs. 2477,20,64,656/-, and pay RGPPL Rs. 2006,20,94,656/- (Rupees Two Thousand and Six Crores Twenty Lakhs Ninety Four Thousand Six Hundred and Fifty Six only) within four months from the date of receipt of a copy of this order.

This Tribunal made it clear that, in case payment of Rs. 2477,20,64,656/- (Rupees Two Thousand Four Hundred and Seventy-Seven Crores Twenty Lakhs Sixty Four Thousand Six Hundred and Fifty Six only), or Rs. 2006,20,94,656/- (Rupees Two Thousand and Six Crores Twenty Lakhs Ninety Four Thousand Six Hundred and Fifty Six only), as the case may be, was not made within four months

from the date of receipt of a copy of this order, Bank Account No. 0239256010710 of MSEDCL with Mumbai Industrial Finance Branch of Canara Bank and A/c No. 016020110000033 of MSEDCL at Mumbai Large Corporate Branch of the Bank of India shall stand attached, and the afore-said amounts shall be realized from the said bank accounts. The Execution Petition was, accordingly, disposed of.

XVI. INTERIM ORDER OF THE SUPREME COURT IN CIVIL APPEAL NO.4286 OF 2025 DATED 06.05.2025:

MSEDCL filed Civil Appeal No. 4286 of 2025 against the order of this Tribunal in E.P. No. 12 of 2023 dated 17.01.2025. An interim order was passed by the Supreme Court, in Civil Appeal No. 4286 of 2025, on 06.05.2025. By the interim order MSEDCL was directed to pay half of the amount computed, ie half of Rs. 2477.20 Crores, to RGPPL in six equal monthly instalments beginning 15.07.2025; the instalments were directed to be paid as per the time fixed; and it was made clear that, failure to pay the instalment within time, would render MSEDCL liable to pay interest as fixed and payable by the Discoms to the generating company in terms of the regulations or the tariff order etc. Civil Appeal No. 4286 of 2025 is still pending on the file of the Supreme Court.

XVII. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were put forth by Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, and Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Respondent-RGPPL. It is convenient to examine the rival contentions, urged by Learned Senior Counsel on either side, under different heads.

XVIII. IS PETITION NO.276/MP/2024 BARRED BY PRINCIPLES OF RES JUDICATA?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT MSEDCL:

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, would submit that the proceedings in Civil Appeal No. 1922 of 2023 before the Supreme Court arose out of the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015; this Appeal, filed by the Appellant herein**,** arose out of the Order passed by the CERC in Petition 166/MP/2012 dated 30.07.2013; the scope of the said Petition was limited to the 2nd Respondent-RGPPL's claim of capacity charges for the availability declared on the basis of gas procured from sources unapproved by the Appellant; it is clear from the prayer in the Petition, as well as the CERC Order, that the issues involved in the said proceedings pertained purely to matters of interpretation of the then existing PPA, in particular the inter-play between Articles 4.3 and Article 5.9 of the PPA; the scope of the APTEL Appeal, as has been recorded in the APTEL Order, is on the interpretation of Article 4.3 and 5.9 of the PPA; termination of the PPA, having occurred subsequent to the filing of the APTEL Appeal, the factum of termination of the PPA was not indicated therein; the Petition leading to the CERC Order, and thereafter the filing of the APTEL Appeal occurred before termination of the PPA on 08.05.2014; as such, there was no cause of action to challenge the termination of the PPA or to assert termination of the PPA at the time of the Petition, the CERC Order, or the APTEL Appeal; the validity, consequence and effect of termination of the PPA on payment of capacity charges, in terms of the terminated PPA, was not directly and substantially in issue, nor was any relief claimed in respect of such issue of termination either in the Petition or in the APTEL Appeal.

Sri C.S. Vaidyanathan, Learned Senior Counsel, would further submit that, being aggrieved by the APTEL Order, the Appellant filed Civil Appeal before the Supreme Court; it is settled law that the scope of the Civil Appeal is

limited to the issues raised in the Petition, and the grounds taken before this Tribunal; the said position becomes further clear on a bare perusal of the questions of law and the prayer set out in the Civil Appeal; no adjudication was sought, expressly or impliedly, of the validity of termination of the PPA by the Appellant; however, given that the Civil Appeal was filed subsequent to termination of the PPA, the Appellant, in the interests of justice, merely disclosed the factum of termination of the PPA; although the Supreme Court has, by its order dated 09.11.2023, dismissed the Civil Appeal on interpretation of the then existing PPA, it did not opine or render any finding on the issue of termination of the PPA, as such an adjudication thereof was beyond the scope of the proceedings; however contrary to settled law, and in complete ignorance and misconstruction of the factual matrix set out above, the CERC has grossly erred in holding that mere mentioning of the factum of termination before the Supreme Court amounts to constructive res judicata by virtue of Explanation V to Section 11 of the Code of Civil Procedure, 1908; the Supreme Court, during the Civil Appeal proceedings, did not hear and finally decide the matter of termination of the PPA, nor has it consciously applied its judicial mind on the issue of termination of the PPA, as it was beyond the scope of the said proceedings; in **Pandurang Ramchandra Mandlik v. Shantibai Ramchandra Ghatge & Ors 1989 Supp (2) SCC 627**, the Supreme Court has held that, for a judgement to operate as res judicata, it must be established that the substantial issue was heard and finally decided in the previous judgement; similarly, reference to the factum of termination and grounds raised on that basis in Review Petition No. 1997 of 2023, filed by the Appellant before the Supreme Court, does not constitute constructive *res judicata,* and the provisions of Explanation V are not attracted even qua the pleadings made in the Review Petition; moreover, the order dated 19.03.2024 passed by the Supreme Court in the Review Petition was passed in chambers by circulation, without expressing any opinion on the merits of the issues raised therein; therefore, the Review Order amounted to a summary dismissal of the Review

Petition, which does not amount to *res judicata* by virtue of the law settled by the Supreme Court and the judgement passed by the High Court of Calcutta in **Golab Koer v. Badshah Bahadur**: 1909 (10) CLJ 420 wherein it was held that a review order would not operate as a bar of res judicata for a subsequent suit.

Sri C.S. Vaidyanathan, Learned Senior Counsel, would also submit that the issue of termination of the PPA was not the subject matter of the earlier proceedings; whether before the CERC, this Tribunal or the Supreme Court the issue of termination of the PPA was never judicially or consciously considered; none of the afore-mentioned judicial fora have recorded any facts, arguments, or consideration relating to termination, and there was no adjudication on this point; in **Erach Boman Khavar v. Tukaram Shridhar Bhat & Anr. (2013) 15 SCC 655,** and in **City Municipal Council Bhalki v. Gurappa & Anr. (2016) 2 SCC 200,** it has been held that, for a subsequent suit to be barred by res judicata, the former suit has to be decided on merits on the same substantial questions both on facts and law that would have arisen in the subsequent original suit; principles of res judicata operate in respect of a "subject matter" in dispute, and the subject matter in dispute in the Original Suit and the present Appeal are entirely different; in **Vallabh Das v. Madan Lal** (1970) 1 SCC 761, it has been held that mere identity between some of the issues in the two suits does not bring about an identity in the subject-matter between the two suits and, unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject matter of the second suit is the same as that in the previous suit; any reference to the factum of termination, in the grounds taken by the Appellant before the Supreme Court in the Civil Appeal, is also immaterial as such reference could not have expanded the scope of the said Civil Appeal, as the issue of termination was not an issue in the Petition, and hence beyond the scope of the Civil Appeal as well; evidently, no prayers or reliefs were sought by the Appellant qua the validity of termination of the PPA before the Supreme Court; further, any alleged

commonality of facts between the two proceedings is entirely inconsequential if the reliefs sought are different; and the 2nd Respondent's contention and the CERC's findings in the Impugned Order, that the order of the Supreme Court has effectively decided the issue of termination, and the basis of termination of the PPA is allegedly identical to the contentions raised by the Appellant in the said proceedings, is misconceived and alien to settled law.

Sri C.S. Vaidyanathan, Learned Senior Counsel, would contend that, even otherwise, principles of res-judicata have no application in respect of issues arising out of a subsequent cause of action; termination of the PPA was clearly a subsequent event, which occurred even after the CERC passed its order in the Petition, and as such constitutes a separate cause of action; and reliance is placed on the following judgments in this regard: (a) **N. Suresh Nathan & Ors. v. Union of India & Ors., (2010) 5 SCC 692**; (b) **State of Andhra Pradesh & Ors. v. Chelikani & Ors., 2024 SCC OnLine SC 3432**; (c) **Swamy Atmananda & Ors. v. Sri Ramakrishna Tapovanam, (2005) 10 SCC 51**; and (d) **Krishnadevi Kamathia v. Bombay Environmental Action Group, (2011) 3 SCC 363**.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT-RGPPL:

Sri C. A. Sundaram, Learned Senior Counsel appearing on behalf of the 2nd Respondent-RGPPL, would submit that Petition No. 276/MP/2024, filed by MSEDCL before the CERC, was both time-barred and barred by application of the principles of Constructive Res Judicata; the CERC, by Order dated 12.06.2025, has held the Petition to be barred by the application of Explanation IV & V to Section 11 CPC, while the 2nd Respondent-RGPPL is additionally supporting the CERC's Order on the basis of Explanation III; the CERC has also held that the Petition is time barred; though the prayers of MSEDCL were cleverly worded, seeking to declare the invoices raised by the 2nd Respondent-RGGPL against it as void, non-

est and illegal, the only ground for seeking such relief was that MSEDCL had terminated the PPA dated 10.04.2007 by its termination letter dated 08.05.2014; and a perusal of the Petition clearly shows that the only ground for relief was that MSEDCL has terminated the PPA as per the termination letter dated 08.05.2014.

Sri C. A. Sundaram, Learned Senior Counsel, would further submit that MSEDCL had specifically raised the point of termination of the PPA in CA No.1922 of 2023 (@ Ground MM *and NN)* which was denied by RGPPL in its Reply*;* the same was further reiterated by MSEDCL in its Rejoinder; the Supreme Court dismissed the Civil Appeal by its Judgement dated 09.11.2023; MSEDCL in its R.P No. 1997 of 2024 (*Grounds I and J]* again raised the issue of non-consideration of the alleged termination of PPA which was also dismissed by the Supreme Court by its judgement dated 19.03.2024*;* Explanation III to Section 11 would squarely apply since the matter of termination was put in issue by MSEDCL, was denied by RGPPL, and was considered by the Supreme Court while rendering judgment; this would itself satisfy the test of Explanation III; MSEDCL is repeatedly arguing that the issue of termination was not germane or raised in the original Petition or in Appeal No. 261 of 2013; the fact, however, remains that MSEDCL did raise the issue of termination in the Civil Appeal and in the Review Petition filed before the Supreme Court which were rejected; the Appellant cannot be permitted to start a second round of litigation to deny capacity charges to RGPPL on the very same ground; and this would be a clear abuse of the process of this Tribunal.

Sri C. A. Sundaram, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would also submit that the Order of the Supreme Court in **Chief Administrator and Anr, 1999 SCC (L&S) 660** declining to entertain a second petition, for the relief which was not granted in the first petition even when in the earlier Judgement there is no reference to that relief, would apply to the present case; Explanation V to Section 11 & is squarely applicable; in **State of Karnataka & Anr. (2006) 4 SCC 683,** the Supreme Court has discussed Explanation III & IV to Sec

11 in detail, and has laid down that an adjudication is conclusive not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated, and have had decided as incidental or essentially connected with the subject matter of litigation both as claims and as defences; in **M. Nagabhushana vs State of Karnataka: (2011) 3 SCC 408,** the Supreme Court has laid down that a plea of Constructive Res Judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality to litigation and any proceeding which has been initiated in breach of these principles is *prima facie* an abuse of the process of the Court; the ratio laid down in **Forward Construction & Ors v. Prabhat Mandal (Regd.), (1986) 1 SCC 100** is squarely applicable to the present case; the Supreme Court held that an adjudication is conclusive and final not only as to the actual matter but to every other matter that might and ought to have been litigated and have been decided within the legitimate purview of the original action both as claims or as defences; in **Nahar industrial Enterprises Limited (2009) 8 SCC 646,** and in **Transmission Corporation of A.P. (2004) 5 SCC 551,** it has been held that statutory appeals provided for from the suits amount to substantive rights and have to be seen as one legal proceeding; and, in **Andhra Pradesh Power Coordination Committee v. Lanco Kondapalli Power Limited (2016) 3 SCC 468,** the Supreme Court holds the principles of limitation to be applicable to proceedings under Section 79 (1) (f) & Section 86 (1) (f).

Sri C. A. Sundaram, Learned Senior Counsel, would further submit that in the ***Pandurang Ramachandra Mandl Judgement:*** *1989 Supp (2) SCC 627,* in the ***Erach Boman Khavar Judgement:*** *(2013) 15 SCC* 655, and in the ***City Municipal Council Bhalki judgement:*** *(2016) 2 SCC 200,* the interpretation of Section 11 CPC was called into question and not any of the Explanations; there is no dispute on this proposition but the Judgement is not on Constructive Res Judicata which is the reasoning given by CERC to dismiss MSEDCL's petition; most of the judgments were cases of ex-parte orders; similarly, in the ***N. Suresh***

Nathan Judgement (2010) 5 SCC 692, the Supreme Court, on the facts, found that its earlier Judgement on one issue did not constitute Res Judicata on another distinct issue; once again it is a Section 11 CPC bar that was tested by the Supreme Court, and not Constructive Res Judicata; in the ***Swamy Atmananda Judgement*** (2005) 10 SCC 51, the Supreme Court again dealt with Section 11 Res Judicata and not its explanations i.e. Constructive Res Judicata; in fact, the Judgement supports RGPPL and goes on to discuss the concepts of issue estoppel and estoppel by accord; the ratio laid down at Para 39 supports RGPPL completely and the plea of Res Judicata was upheld; in the **Vallabh Das *Judgement*** (1970) 1 SCC 761, the Supreme Court decided the construction of Order 23 Rule 1 of the CPC which deals with withdrawal of suit with liberty to institute a fresh suit; the Judgement was on Cause of action and discusses interpretation of the term 'subject matter; the judgement is neither on Res Judicata nor on Constructive Res Judicata; in the **State of Andhra Pradesh judgement (2024) SCC OnLine SC 3432,** the Supreme Court has not set at naught the principles of Constructive Res Judicata, but has only held that the Principle of Constructive Res Judicata should not be applied ordinarily in PIL especially when significant public interest is at stake; reliance on the **Golab Koer** *Judgement 1909 (10) CLJ 420* and **Srish Chandra Pal Chowdhury** *Judgement* 1913 SCC OnLine Cal 435 is completely misleading; the terms of Explanation IV to Section 13 of CPC, 1882 is substantially different from Explanation IV to Section 11 in the 1908 Act; reliance on the **Mudumuri Subbaraju Judgement 1988 SCC OnLine AP 23** is of no avail; the ground of termination was, in fact, raised by MSEDCL before the Supreme Court in the Civil Appeal & the Review Petition and rejected; and reliance on **Katragadda Virayya Judgement 1955SCC OnLine AP 279,** is misconceived as the decision does not lay down any binding legal principle beyond a general discussion on the application of Section 11 of the Civil Procedure Code.

JUDGEMENTS RELIED ON UNDER THIS HEAD:

A. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT MSEDCL:

1. In **Pandurang Ramchandra Mandlik v. Shantibai Ramchandra Ghatge & Ors 1989 Supp (2) SCC 627**, the Supreme Court observed that the expression "heard and finally decided" in Section 11 CPC meant a matter on which the court had exercised its judicial mind and had, after argument and consideration, come to a decision on a contested matter; it was essential that it should have been heard and finally decided; what operated as res judicata was the ratio of what was fundamental to the decision but it could not be ramified or expanded by logical extension; in **Vithal Yeshwant v. Shikandarkhan Makhtumkhan: AIR 1963 SC 385**, it was held that, when a court bases its decision on more than one point, each of which would by itself be sufficient for the ultimate decision, the decision on each one of those points would be res judicata; in the instant case what were the points specifically urged and decided were not clear; a court which had no jurisdiction to try a cause could not, by its own erroneous decision, confer on itself competence to decide it, and its decision on the question of jurisdiction could not operate as res judicata; and conversely the decision relating to jurisdiction could not be said to constitute the bar of res judicata where, by an erroneous interpretation of a statute, the Court holds that it had no jurisdiction.

2. In **Golab Koer v. Badshah Bahadur: 1909 (10) CLJ 420,** the Calcutta High Court observed that, in **Foolcoomary Dasi v. Woodoy Chunder Biswas 25 C. 649**, it was ruled that a consent decree could not be set aside on the ground that it was obtained by fraud and misrepresentation, but that a separate suit must be brought for that purpose, as charges of fraud could not properly be tried upon affidavits.

3. In **Erach Boman Khavar v. Tukaram Shridhar Bhat & Anr. (2013) 15 SCC 655,** the Supreme Court held that the principles stated in **Arjun**

Singh v. Mohindra Kumar: AIR 1964 SC 993, and **Satyadhyan Ghosal v. Deorajin Debi, AIR 1960 SC 941**, clearly spelt out that the principle of res judicata operated at successive stages in the same litigation, but the basic foundation of res-judicata rested on delineation of merits, and it had at least an expression of an opinion for rejection of an application; as was evident, there had been no advertence on merits and further the learned Judge has guardedly stated two facets, namely, “not necessary to grant present Judge's summons” and “liberty to the applicant to apply, if necessary”; and, on a seemly reading, the order could not have been treated to have operated as res judicata.

4. In **City Municipal Council Bhalki v. Gurappa & Anr. (2016) 2 SCC 200,** the Supreme Court observed that the principle of res judicata was the need of any judicial system to give finality to the judicial decisions on the disputes between parties; it also aimed to prevent multiplicity of proceedings between the same parties of the same subject-matter of the lis; an issue which was directly and substantially involved in a former suit between the same parties, and had been decided and had attained finality could not be re-agitated before Courts again by instituting suit or proceeding by the same parties on the same subject-matter of the earlier lis; in **Syed Mohd. Salie Labbai v. Mohd. Hanifa, (1976) 4 SCC 780 : AIR 1976 SC 1569,** the Supreme Court had held that, before a plea of res judicata can be given effect, the following conditions must be proved: (*1*) that the litigating parties must be the same; (*2*) that the subject-matter of the suit also must be identical; (*3*) that the matter must be finally decided between the parties; and (*4*) that the suit must be decided by a court of competent jurisdiction; thus, for the bar of res judicata to operate in the subsequent original suit proceedings, the litigating parties must be the same, and the subject-matter of the suit must also be identical; and it has been held, in **Ram Gobinda Dawan v. Bhaktabala, (1971) 1 SCC 387 : AIR 1971 SC 664**, that, for the bar of res judicata to operate in the subsequent original suit

proceedings, the decision in the former suit must have been decided on merits on the same substantial questions both on facts and in law that would arise in the subsequent original suit.

5. While examining the expression "subject matter" in Rule 1 of Order 23 CPC, the Supreme Court, in **Vallabh Das v. Madan Lal (1970) 1 SCC 761,** observed that the expression "subject-matter" was not defined in the Civil Procedure Code; that expression had a reference to a right in the property which the plaintiff sought to enforce; that expression included the cause of action and the relief claimed; unless the cause of action and the relief claimed in the second suit were the same as in the first suit, it could not be said that the subject-matter of the second suit was the same as that in the previous suit; mere identity of some of the issues in the two suits did not bring about an identity of the subject-matter in the two suits; as observed in **Rukhma Bai v. Mahadeo Narayan: ILR 42 Bom 155,** the expression "subject-matter" in Order 23 Rule 1 CPC meant the series of acts or transactions alleged to exist giving rise to the relief claimed; in other words "subject-matter" meant the bundle of facts which had to be proved in order to entitle the plaintiff to the relief claimed by him; and where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit.

6. In **N. Suresh Nathan & Ors. v. Union of India & Ors., (2010) 5 SCC 692**, the Supreme Court noted that, in the earlier judgement in **N. Suresh Nathan: 1992 Supp (1) SCC 584,** the Supreme Court had set aside the order of the Tribunal after declaring that Section Officers/Junior Engineers, having three years' service in the grade after they acquired degree in Civil Engineering or equivalent, would become qualified or eligible for promotion to the 50% vacancies meant for the category of degree-holders or equivalent; it had not

declared any law on how these Section Officers/Junior Engineers, who had become qualified or eligible for promotion to the post of Assistant Engineer under the category of degree-holders or equivalent, would be considered for such promotion; Section 11 CPC titled “Res judicata” stated that no court shall try any issue which was directly or substantially in issue between the same parties and which had been heard and finally decided by a competent court; thus, unless an issue directly and substantially raised in the former case was heard and decided by the competent court, the principle of res judicata would not be attracted; and the decision in **N. Suresh Nathan: 1992 Supp (1) SCC 584**, therefore, did not constitute res judicata on the issue regarding the manner in which Section Officers/Junior Engineers who were qualified or eligible for consideration for promotion to the post of Assistant Engineer would be considered for promotion.

7. In **State of Andhra Pradesh & Ors. v. Chelikani & Ors., 2024 SCC OnLine SC 3432**, the Supreme Court noted that the plea of *res judicata* was rejected by the High Court, but it had upheld the plea of constructive *res judicata;* in **Forward Construction Company v. Prabhat Mandal (Regd.), (1986) 1 SCC 100,** the Supreme Court, relying upon Explanation (IV) to Section 11 CPC had observed that any matter that might or ought to have been made a ground of attack in a former suit is deemed to have been made a matter directly or substantially an issue in the said suit; therefore, *res judicata* impacted not only the actual matter determined, but every other matter which the parties might or ought to have litigated and have decided as incidental to, or essentially connected with the subject matter of the litigation; it included every matter coming into the legitimate purview of the original action, both in respect of the matters of claim and defence; the judgment explained that the underlying principle in Explanation (IV) was that, where the parties have had an opportunity of controverting a matter, that should have been taken to be the same thing as if the matter had been actually controverted and

decided; however, in the said case the contention, relying upon Explanation (IV), was rejected observing that when a matter has been constructively in issue, it cannot be said to have been actually heard and decided; it was also observed that Explanation (VI) to Section 11 would apply when the conditions mentioned in that Explanation were satisfied; this meant that the Court should be satisfied that the decision in the litigation shall bind all persons interested in the right litigated; the onus of proving want of *bona fides* in respect of the previous litigation is on the parties seeking to avoid the said decision; in the said case, this Court approved the decision of the High Court that Section 11 will not be applicable in view of the finding recorded by the High Court that the first Writ Petition was not a *bona fide* one.

After referring to **All India Manufacturers Organisation**, **V. Purushotham Rao v. Union of India,** and **National Confederation of Officers Association of Central Public Sector Enterprises v. Union of India,** the Supreme Court, in **State of Andhra Pradesh & Ors. v. Chelikani & Ors., 2024 SCC OnLine SC 3432**, observed that constructive *res judicata* applied only when the cause of action was identical; in the present case, the causes of action in the two litigation proceedings could not be considered identical, as the first litigation focused on the allotment and its terms and conditions; GoM Nos. 243 and 244 were separate and distinct from the allotment itself; and challenging these notifications constituted a separate and independent cause of action.

8. In **Swamy Atmananda & Ors. v. Sri Ramakrishna Tapovanam, (2005) 10 SCC 51**, the Supreme Court observed that the object and purport of the principle of res judicata, as contained in Section 11 CPC, was to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties; once the matter which was the subject-matter of lis stood determined by a

competent court, no party could thereafter be permitted to reopen it in a subsequent litigation; such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment; the principle of res judicata envisaged that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment; the doctrine of res judicata was conceived not only in larger public interest which required that all litigation must, sooner than later, come to an end but is also founded on equity, justice and good conscience.

9. In **Krishnadevi Kamathia v. Bombay Environmental Action Group, (2011) 3 SCC 363**, the Supreme Court held that, even if an order is void, it was required to be so declared by a competent forum and it was not permissible for any person to ignore the same merely because in his opinion the order was void; in **State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth Naduvil: (1996) 1 SCC 435 : AIR 1996 SC 906, Tayabbhai M. Bagasarwalla v. Hind Rubber Industries (P) Ltd. [(1997) 3 SCC 443: AIR 1997 SC 1240 , M. Meenakshi v. Metadin Agarwal: (2006) 7 SCC 470]** and **Sneh Gupta v. Devi Sarup: (2009) 6 SCC 194** , the Supreme Court held that whether an order is valid or void, cannot be determined by the parties; for setting aside such an order, even if void, the party had to approach the appropriate forum; in **State of Punjab v. Gurdev Singh: (1991) 4 SCC 1** the Supreme Court held that a party aggrieved by the invalidity of an order had to approach the court for relief of declaration that the order against him was inoperative and, therefore, not binding upon him; the Supreme Court had placed reliance upon the judgment in **Smith v. East Elloe RDC: 1956 AC 736 : (1956) 1 All ER 855**, wherein it was held that an order, even if not made in good faith, is still an act capable of legal consequences; it bears no brand of invalidity on its forehead; unless the necessary proceedings are taken at law

to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders; in **Sultan Sadik v. Sanjay Raj Subba: (2004) 2 SCC 377 : AIR 2004 SC 1377,** the Supreme Court took a similar view observing that once an order is declared non est by the court only then the judgment of nullity would operate *erga omnes* i.e. for and against everyone concerned; such a declaration is permissible if the court comes to the conclusion that the author of the order lacks inherent jurisdiction/competence and therefore, it comes to the conclusion that the order suffers from patent and latent invalidity; thus, even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it; it has to approach the court for seeking such declaration; the order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason; and the order may be void for one purpose or for one person, it may not be so for another purpose or another person.

10. In **Srish Chandra Pal Chowdhury:** 1913 SCC OnLine Cal 435, the appellant's suit was dismissed, among others, on the ground that the suit was barred by *res judicata*. On a review petition being filed, the District Judge held that the matter in issue between the parties, having been heard and decided in the course of the proceedings in review, the present suit could not be entertained. Before the Calcutta High Court it was contended that the learned District Judge had fallen into error. The Calcutta High Court was of the opinion that this contention must prevail; it was true that the parties to the present suit were also parties to the application for review; but an application for review was not a suit within the meaning of Section 13 of the Code of Civil Procedure, and neither that section nor any doctrine of constructive *res judicata* could rightly

be applied to cases of the present kind; and the present suit was not barred by reason of the decision in the previous application for review.

11. In **Mudumuri Subbaraju: 1988 SCC OnLine AP 23,** the Andhra Pradesh High Court expressed its inability to accede to the submission that the cause of action had arisen to the petitioners on the day when the writ petition was filed, that the Section 6 declaration, if it was published beyond three years, shall be illegal and invalid, thereby rendering the Section 4 (1) notification itself liable to be quashed, and since that ground was available to the petitioners on the day when the earlier writ petition came up for final hearing, and inasmuch as the petitioners failed to raise the same, the bar of constructive res-judicata operated, and the petitioners were precluded from raising the said ground now.

While holding that this contention was highly misconceived, the Andhra Pradesh High Court observed that no cause of action could be said to have arisen to the petitioners on the day when the earlier writ petition was filed; the cause of action, if any, could be said to have arisen for the first time on 23-9-1984 when the Amendment Act 68 of 1984 came into being, by virtue of which, for the first time, it was made obligatory on the part of the authorities concerned to issue the Section 6 declaration within three years from the date of draft notification issued under Section 4 (1) of the Act, and therefore a fresh cause of action had arisen to the petitioners on 23-9-1984; they could have, if so advised, filed a fresh writ petition; they could have even, if they so desired, raised a new ground with the permission of the court; but their failure to do so could not be said to come within the mischief of Explanation 4 to Section 11 C.P.C; the principle of “might and ought to have been raised”, as postulated under Explanation 4, must be held to be one with reference to the cause of action said to be available at the time when the lis commences, and not at the time when the lis comes up for final hearing; if that be so, it would still be open to the petitioners to raise the said plea even in this writ petition for the first time

challenging the legality of the Section 4 notification itself, as admittedly the Section 6 declaration in this case had been published beyond three years from the date of sec, 4 (1) notification, and therefore, Section 4 (1) notification must be quashed, and the writ petition must be allowed.

12. In **Katragadda Virayya: 1955 SCC OnLine AP 279,** the Andhra Pradesh High Court referred with approval to the judgement of the Calcutta High Court, in **Srish Chandra Pal Chowdhery v. Triguna Prasad Pal Chowdhry: (1913) I.L.R. 40 Cal. 541**, to hold that an application for review is not a suit and a decision of a question arising in an application for review cannot operate as res judicata.

B. JUDGEMENTS RELIED ON BEHALF OF THE 2ND RESPONDENT-RGPPL:

1. In **Chief Administrator and Anr, 1999 SCC (L&S) 660***,* the Supreme Court noted that in the earlier petition filed by the respondent in OA No. 7 of 1988, that very relief was sought, but the same was not granted, in that, there was no reference to that relief; counsel for the respondent stated that it was on account of the fact that it was not pressed; the relief was sought in view of Explanation V to Section 11 of the CPC; therefore, if the relief was sought and was not granted by the Court for whatever reason, a fresh petition seeking the very same relief could not have been entertained; the Tribunal was in error in entertaining the second petition and granting the relief which was not granted in the earlier petition merely because in the judgment of the earlier petition, there was no reference to that relief; and the rule of res judicata should apply in such cases.

2. In **State of Karnataka v. All India Manufacturers Organisation, (2006) 4 SCC 683,** the Supreme Court observed that Res judicata was a doctrine based on larger public interest and was founded on two grounds: one being

the maxim *nemo debet bis vexari pro una et eadem causa* (no one ought to be twice vexed for one and the same cause (P. Ramanatha Aiyer: *Advanced Law Lexicon*, (Vol. 3, 3rd Edn., 2005) at p. 3170) and second, public policy that there ought to be an end to the same litigation (Mulla: *Code of Civil Procedure*, (Vol. 1, 15th Edn., 1995) at p. 94); Section 11 of the CPC was not the foundation of the principle of *res judicata*, but merely a statutory recognition thereof and hence, the section was not to be considered exhaustive of the general principle of law (**Kalipada De v. Dwijapada Das, (1929-1930) 57 IA 24 : AIR 1930 PC 22 at p. 23**0; the main purpose of the doctrine was that once a matter has been determined in a former proceeding, it should not be open to parties to re-agitate the matter again and again; Section 11 CPC recognised this principle and forbid a court from trying any suit or issue, which was *res judicata*, recognising both "cause of action estoppel" and "issue estoppel".

On whether the issues and findings in **Somashekar Reddy: (1999) 1 KLD 500 : (2000) 1 Kant LJ 224 (DB)**, actually constituted *res judicata* for the present litigation, the Supreme Court, in **State of Karnataka v. All India Manufacturers Organisation, (2006) 4 SCC 683**, observed that Section 11 CPC undoubtedly provided that only those matters that were "directly and substantially in issue" in the previous proceeding would constitute *res judicata* in the subsequent proceeding; Explanation III to Section 11 CPC provided that for an issue to be *res judicata* it should have been raised by one party and expressly denied by the other; further, Explanation IV to Section 11, stated that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit; the spirit behind Explanation IV was brought out in **Henderson v. Henderson [(1843-60) All ER Rep 378,** wherein it was held that the plea of res judicata applied, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which

properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time; in **Greenhalgh v. Mallard: (1947) 2 All ER 255 (CA),** it was held that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that *it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them;* the judgment in **Greenhalgh: (1947) 2 All ER 255 (CA)** was approvingly referred to by the Supreme Court in **State of U.P. v. Nawab Hussain [(1977) 2 SCC 806;** combining all these principles, a Constitution Bench of the Supreme Court in **Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra: (1990) 2 SCC 715** expounded on the principle laid down in **Forward Construction Co v. Prabhat Mandal (Regd.), (1986) 1 SCC 100, :(1986) 1 SCC 100**, by holding that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with the subject-matter of the litigation, and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence.

3. In **M. Nagabhushana vs State of Karnataka: (2011) 3 SCC 408,** the Supreme Court held that the principles of res judicata are of universal application as they are based on two age-old principles, namely, *interest reipublicae ut sit finis litium* which means that it is in the interest of the State that there should be an end to litigation and the other principle is *nemo debet bis vexari, si constat curiae quod sit pro una et eademn causa* meaning thereby that no one ought to be vexed twice in a litigation if it appears to the court that it is for one and the same cause; this doctrine of res judicata is common to all civilised system of jurisprudence to the extent that a judgment after a proper trial by a

court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest; that principle of finality of litigation is based on high principle of public policy; in the absence of such a principle, great oppression might result under the colour and pretence of law inasmuch as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions; this may compel the weaker party to relinquish his right; the doctrine of res judicata has been evolved to prevent such an anarchy; that is why it is perceived that the plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation; and this principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues which have become final between the parties.

4. In **Forward Construction Co. v. Prabhat Mandal (Regd.), (1986) 1 SCC 100,** the Supreme Court held that the High Court was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition; Explanation IV to Section 11 CPC provided that any matter which might and ought to have been made the ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit; an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence; the principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided; it was true that where a matter has been

constructively in issue it cannot be said to have been actually heard and decided; it could only be deemed to have been heard and decided.

The Supreme Court further held that it is only when the conditions of Explanation VI are satisfied that a decision in the litigation will bind all persons interested in the right litigated and the onus of proving the want of bona fides in respect of the previous litigation is on the party seeking to avoid the decision; the words “public right” have been added in Explanation VI in view of the new Section 91 CPC and to prevent multiplicity of litigation in respect of public right; in view of Explanation VI it cannot be disputed that Section 11 applies to public interest litigation as well, but it must be proved that the previous litigation was the public interest litigation not by way of a private grievance; and it has to be a bona fide litigation in respect of a right which is common and is agitated in common with others.

5. In **Nahar industrial Enterprises Limited (2009) 8 SCC 646,** the Supreme Court held that a plaintiff of a suit will have a vested right of appeal; an appeal is the “right of entering a superior court, and invoking its aid and interposition to redress the error of the court below” and “though procedure does surround an appeal the central idea is a right”.

6. In **Transmission Corporation of A.P. (2004) 5 SCC 551,** the Supreme Court observed that the appeal is the right of entering a superior court and invoking its aid and interposition to redress an error of the court below; though procedure does surround an appeal the central idea is a right; the right of appeal has been recognised by judicial decisions as a right which vests in a suitor at the time of institution of original proceedings; the Supreme Court, in **Garikapati Veeraya v. N. Subbiah Choudhry: AIR 1957 SC 540** following the decision of the Privy Council in **Colonial Sugar Refining Co. Ltd. v. Irving: 1905 AC 369 (PC)** and on a review of earlier authorities deduced the following five propositions regarding an appeal viz.: (*i*) the legal

pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding; (*ii*) the right of appeal is not a mere matter of procedure but is a substantive right; (*iii*) the institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the carrier of the suit; (*iv*) the right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of filing of appeal; and (*v*) this vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary intendment and not otherwise; therefore, if the right of appeal is a substantive right which is really a step in a series of proceedings all connected by an intrinsic unity and is to be regarded as one legal proceeding and further being a vested right such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences.

7. In **Andhra Pradesh Power Coordination Committee v. Lanco Kondapalli Power Limited (2016) 3 SCC 468,** the Supreme Court noted that, in **Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755**, the Supreme Court had held that all disputes between the licensee and generating companies required adjudication only by the State Commission which was alone competent to either adjudicate the disputes or refer them for arbitration and to appoint an arbitrator; it was the State Commission or its nominee under Section 86(1)(*f*) of the Electricity Act, 2003 and not the Chief Justice or his nominee under Section 11 of the Arbitration and Conciliation Act, 1996 who would have the authority to appoint an arbitrator if it decided to refer the disputes to arbitration; in view of the detailed discussion in **M.P. Steel**

Corpn. v. CCE, (2015) 7 SCC 58, the Limitation Act is, by itself, inapplicable to proceeding or action brought before the State Commission; the State Commission or the Central Commission have been entrusted with large number of diverse functions, many being administrative or regulatory and such powers do not invite the rigours of the Limitation Act; only for controlling the quasi-judicial functions of the Commission under Section 86(1)(*f*), it will not be possible to accept the contention of the appellants that by Section 175 the Electricity Act, 2003 adopts the Limitation Act either explicitly or by necessary implication; `a statutory authority like the Commission is also required to determine or decide a claim or dispute either by itself or by referring it to arbitration only in accordance with law and thus Sections 174 and 175 of the Electricity Act assume relevance; since no separate limitation has been prescribed for exercise of power under Section 86(1)(*f*) nor this adjudicatory power of the Commission has been enlarged to entertain even time-barred claims, there is no conflict between the provisions of the Electricity Act and the Limitation Act to attract the provisions of Section 174 of the Electricity Act; in such a situation, on account of the provisions in Section 175 of the Electricity Act or even otherwise, the power of adjudication and determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law; in the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by the law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that, in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of the law of limitation; a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court; but in an appropriate case, a specified period may be excluded on account of the principle underlying the

salutary provisions like Section 5 or Section 14 of the Limitation Act; and such limitation upon the Commission, on account of this decision, would be only in respect of its judicial power under clause (*f*) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory.

C. ANALYSIS:

Section 11 CPC, titled “Res judicata”, states that no court shall try any Suit or issue in which the matter, directly and substantially in issue, has been directly and substantially in issue in a former Suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent Suit or the Suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

i. PRINCIPLES OF RES JUDICATA: ITS SCOPE AND OBJECT:

The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment. (**Swamy Atmananda & Ors. v. Sri Ramakrishna Tapovanam, (2005) 10 SCC 51).** A judgment, after a proper trial by a court of competent jurisdiction, should be regarded as a final and conclusive determination of the questions litigated, and should for ever set the controversy at rest. (**M. Nagabhushana vs State of Karnataka: (2011) 3 SCC 408).** The rule of res judicata is a universal doctrine laying down the finality of litigation between the parties. So far as the parties are concerned, they will always be bound by the said decision. In other words, either of the parties will not be

permitted to re-open the issue decided by such a decision. **(Supreme Court Employees' Welfare Assn. v. Union of India, (1989) 4 SCC 187)**.

The principles of res judicata are based on two age-old principles, namely, *interest reipublicae ut sit finis litium* which means that it is in the interest of the State that there should be an end to litigation and the other principle is *nemo debet bis vexari, si constat curiae quod sit pro una et eademn causa* meaning thereby that no one ought to be vexed twice in a litigation if it appears to the court that it is for one and the same cause. This doctrine requires a judgment, after a proper trial by a court of competent jurisdiction, to be regarded as a final and conclusive determination of the questions litigated and should for ever set the controversy at rest. **(M. Nagabhushana v. State of Karnataka, (2011) 3 SCC 408).** The afore-said principle has gradually developed and expanded further by bringing within its compass more such litigation. This shows that the sphere of res judicata as enshrined in Section 11 CPC is not exhaustive, and is ever growing. **(Madhvi Amma Bhawani Amma v. Kunjikutty Pillai Meenakshi Pillai, (2000) 6 SCC 301).**

The plea of res judicata, though technical, is based on the public policy of putting an end to repeated litigation. One important consideration of this public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice. **(Bhanu Kumar Jain v. Archana Kumar, (2005) 1 SCC 787; Hope Plantations Ltd: (1999) 5 SCC 590).** Vexatious litigation would be put to an end, and the valuable time of the court saved. These principles would apply, therefore, to all judicial proceedings whether civil or otherwise. It applies equally to quasi-judicial proceedings

before tribunals other than civil courts. **(Sulochana Amma v. Narayanan Nair, (1994) 2 SCC 14).**

In the absence of the principle of finality of litigation, great oppression might result under the colour and pretence of law inasmuch as there will be no end to litigation and a malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. The doctrine of res judicata has been evolved to prevent such an anarchy. That is why the plea of res judicata is held not to be a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues which have become final between the parties. (**M. Nagabhushana vs State of Karnataka: (2011) 3 SCC 408)**. The doctrine of res judicata is conceived not only in larger public interest which requires that all litigation must, sooner than later, come to an end but is also founded on equity, justice and good conscience. (**Swamy Atmananda & Ors. v. Sri Ramakrishna Tapovanam, (2005) 10 SCC 51).**

An issue which was directly and substantially involved in a former suit between the same parties, and has been decided and has attained finality, cannot be re-agitated before Courts again, by instituting suit or proceeding by the same parties on the same subject-matter of the earlier lis, as it would be barred by the principles of Res-Judicata. (**City Municipal Council Bhalki v. Gurappa & Anr. (2016) 2 SCC 200).** For the bar of res judicata to operate in the subsequent suit or proceedings, the issue in the former suit or proceeding must have been decided on merits on the same substantial questions both on facts and law that would arise in the subsequent suit or proceedings (**Ram Gobinda Dawan v. Bhaktabala, (1971) 1 SCC 387: AIR 1971 SC 664**). It is the decision on an issue which operates as res judicata. **(Madhvi Amma**

Bhawani Amma v. Kunjikutty Pillai Meenakshi Pillai, (2000) 6 SCC 301; Pawan Kumar Gupta v. Rochiram Nagdeo: (1999) 4 SCC 243).

In a later suit between the same parties or their privies in a court competent to try such subsequent suit in which the issue has been directly and substantially raised and decided, the judgment and decree in the former suit would operate as res judicata. **(Sulochana Amma v. Narayanan Nair, (1994) 2 SCC 14).** When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. **(Satyadhyan Ghosal v. Deorajin Debi, 1960 SCC OnLine SC 15 : AIR 1960 SC 941)**

Section 11 operates as a bar to try the same issue once over. In other words, it aims to prevent multiplicity of proceedings and accords finality to an issue, which directly and substantially had arisen in the former suit between the same parties or their privies, been decided and became final, so that parties are not vexed twice over. **(Sulochana Amma v. Narayanan Nair, (1994) 2 SCC 14)**. Once parties have undergone adjudication of an issue in a suit, that would be final as between the parties irrespective of whether that suit was filed earlier in point of time or later, and no Court can try that issue any further in another suit even if that suit had been instituted at an earlier point of time. It is the finality of the decision which creates the bar, and such finality is not dependent upon whether the suit in which the issue had been decided had been filed before or after the suit in which the same issue has arisen. (**Isup Ali v. Gour Chandra, (1923) 37 Cal LJ 184): AIR 1923 Cal 496; Vishnu Sugar Mills Ltd. v. I.S.P. Trading Co., AIR 1984 Cal 246; R. Govindasamy v. Kasthuri Ammal, 1998 SCC OnLine Mad 241).**

Before a plea of res judicata can be given effect to, the following conditions must be established: (*1*) that the litigating parties must be the same; (*2*) that the subject-matter of the suit also must be identical; (*3*) that the matter must be finally decided between the parties; and (*4*) that the suit must be decided by a court of competent jurisdiction. (**Syed Mohd. Salie Labbai v. Mohd. Hanifa, (1976) 4 SCC 780 : AIR 1976 SC 1569).** In other words— (*i*) There must be two suits—one former suit and the other subsequent suit; (*ii*) The court which decided the former suit must be competent to try the subsequent suit; (*iii*) The matter directly and substantially in issue must be the same either actually or constructively in both the suits; (*iv*) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the former suit; (*v*) The parties to the suits or the parties under whom they or any of them claim must be the same in both the suits; (*vi*) The parties in both the suits must have litigated under the same title. (**Saroja v. Chinnusamy, (2007) 8 SCC 329: 2007 SCC OnLine SC 1049).**

In order to apply the general principles of res judicata, the court must first find whether an issue in a subsequent suit, was directly and substantially in issue in the earlier suit or proceedings, was it between the same parties, and was it decided by such court. Thus, there should be an issue raised and decided, not merely any finding on an incidental question for reaching such a decision. **(Madhvi Amma Bhawani Amma v. Kunjikutty Pillai Meenakshi Pillai, (2000) 6 SCC 301).**

Unless an issue directly and substantially raised in the former case was heard and finally decided by the competent court, the principles of res judicata would not be attracted. (**N. Suresh Nathan & Ors. v. Union of India & Ors., (2010) 5 SCC 692).** The expression “heard and finally decided” in Section 11 CPC means a matter on which the court has exercised its judicial mind and has, after argument and consideration, come to a decision on a contested

matter. It is essential that it should have been heard and finally decided. What operates as res judicata is the ratio of what was fundamental to the decision, but it cannot be ramified or expanded by logical extension. (**Pandurang Ramchandra Mandlik v. Shantibai Ramchandra Ghatge & Ors 1989 Supp (2) SCC 627)**. The basic foundation of res-judicata rests on delineation of merits, and it has at least an expression of an opinion for rejection of an application. **(Erach Boman Khavar v. Tukaram Shridhar Bhat & Anr. (2013) 15 SCC 655).**

The principle of res judicata operates on the Court. It is the Courts which are prohibited from trying the issue which was directly and substantially in issue in the earlier proceedings between the same parties, provided the Court trying the subsequent proceeding is satisfied that the earlier court was competent to dispose of the earlier proceedings and that the matter had been heard and finally decided by such Court. (**Pondicherry Khadi & Village Industries Board v. P. Kulothangan, (2004) 1 SCC 68).**

In considering whether Petition No.276/MP/2024 filed by the Appellant before the CERC, in which the impugned order was passed, is barred by the principles of res-judicata, it is necessary for us to examine the issue involved and the decision taken in the earlier round of litigation between the same parties. The reliefs sought by RGPPL, in Petition No. 166/MP/2012, was for the CERC to resolve issues arising out of non-availability of domestic gas for the required quantum and the reservation of beneficiaries (among whom was MSEDCL) to allow RGPPL to enter into contracts for available alternate fuel i.e. R-LNG and the consequences thereof; and to direct the beneficiaries (among whom was MSEDCL) to pay the fixed charges due to RGPPL.

In the said petition, RGPPL stated that, against allocation of the designated quantity of 8.5 MMSCMD of gas, they were getting only 3.6 MMSCMD of gas in totality; in order to supplement the shortfall in domestic

gas, RGPPL had entered into a gas tie up with GAIL for supply of R-LNG, and had offered capacity based on R-LNG to MSEDCL; MSEDCL had not given consent to schedule power generated on the basis of R-LNG; MSEDCL had contended that RGPPL required its permission for signing any contract for procurement of R-LNG; in terms of Article 4.3 of the PPA primary fuel includes R-LNG; if MSEDCL does not take electricity generated by use of R-LNG, RGPPL should be held entitled to fixed charges on the basis of capacity declaration/ deemed generation; and there was a need to resolve the matter relating to use of R-LNG as primary fuel for generation and supply of electricity in order to ensure full fixed charge recovery which was essential for viability of a project which had been revived and put to beneficial use in abnormal circumstances.

It is in the context of the afore-said issues raised and the relief sought by RGPPL, that the CERC, in Para 25 of its order in Petition No. 166/MP/2012 dated 30.07.2013, observed that the interpretation placed by MSEDCL on Article 5.9 of the PPA was not sustainable since it negated the provisions of Article 4.3 thereof; the principle of harmonious interpretation, giving effect to each provision of the contract and ensuring that no part of the contract became otiose, should be adhered to while construing Article 4.3 and 5.9 of the PPA; the agreement between RGPPL and MSEDCL on the contracting terms of supply of fuel to RGPPL, as provided under Article 5.9, was not a necessary condition for declaration of capacity of the generating station under Article 4.3 of the PPA; declaration of capacity under Article 4.3 of the PPA was independent of the provisions of Article 5.9 and was not dependent on any other factor, such as price of fuel, etc; recovery of fixed charges was to be governed by the declared capacity of the generating station; RGPPL had made arrangements for supply of RLNG, since it was not able to arrange supply of domestic gas because of the overall shortage of gas in the country; and while MSEDCL could, in its discretion, refrain from procuring the capacity declared

on RLNG since it had implications on the variable charges, it could not disown its liability to pay fixed charges when RGPPL declared capacity, based on RLNG as the primary fuel, in accordance with Article 4.3 of the PPA. The CERC further observed, in Para 26 of its order dated 30.07.2013, that any declaration of capacity by RGPPL, based on RLNG as the primary fuel, qualified for computation of availability of the generating station for recovery of fixed charges and, accordingly, fixed charge recovery be made by RGPPL based on availability after accounting for declaration of capacity on RLNG.

In short, while holding that RGPPL could declare capacity and supply electricity on the primary fuel of RLNG in terms of Article 4.3, and that Article 5.9 did not disable them from doing so, the CERC further observed that declaration of capacity by RGPPL, based on RLNG as primary fuel, qualified for computation of availability of the generating station for recovery of fixed/capacity charges. The CERC made it clear that fixed charges could be recovered by RGPPL, based on availability, after accounting for declaration of capacity on RLNG.

Not only did the CERC hold that declaration of capacity by RGPPL, based on R-LNG as primary fuel, qualified for recovery of fixed charges, it also held that fixed charges recovery could be made by RGPPL based on availability after accounting for declaration of capacity on R-LNG. The very same issue forms the basis of the Letter of Termination dated 08.05.2014 relying on which MSEDCL, in Petition No. 276/MP/2024, sought to have the invoices raised by RGPPL quashed on the ground that the PPA was terminated by letter dated 08.05.2014. Since the reliefs sought in Petition No. 276/MP/2024 is to have the invoices raised by RGPPL, claiming capacity/ fixed charges, quashed consequent on the PPA having been terminated by letter dated 08.05.2014, and in as much as the basis for termination of the PPA by letter dated 08.05.2014 is that RGPPL cannot supply power based on R-LNG as the

primary fuel, the issue involved in Petition No. 276/MP/2024 is the very same issue raised and decided by the CERC in its earlier order in Petition No. 166/MP/2012 dated 30.07.2013. We find it difficult, therefore, to agree with the submission urged on behalf of the Appellant that this issue does not constitute res-judicata.

ii. **ISSUE ESTOPPEL:**

Even otherwise, this issue raised in the subsequent proceedings in Petition No. 276/MP/2024, is hit by issue estoppel. While Res judicata debars a court from exercising its jurisdiction to determine the lis, if it has attained finality between the parties, the doctrine of issue estoppel is invoked against the party in cases where such an issue, if decided against a party, would estop him from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by accord. **(Bhanu Kumar Jain v. Archana Kumar, (2005) 1 SCC 787; Thoday v. Thoday: (1964) 1 All ER 341; Hope Plantations Ltd: (1999) 5 SCC 590).** In any view of the matter, the afore-said order of the CERC, in Petition No. 166/MP/2012 dated 30.07.2013, was binding inter-parties including on both MSEDCL and RGPPL, since the said order continued to remain in force even during the pendency of Appeal No. 261 of 2013, and was thereafter affirmed by this Tribunal, and in further appeal by the Supreme Court.

It does also appear that MSEDCL, in issuing the letter of termination dated 08.05.2014, acted contrary to and in complete disregard of the binding decision of the CERC in its order in Petition No. 166/MP/2012 dated 30.07.2013. As noted hereinabove, the basis for termination of the PPA dated 10.04.2007, as stated in the letter of MSEDCL dated 08.05.2014, in short is (a) the last Gas Supply Agreement approved by MSEDCL expired on 31.03.2014 and there was no Gas Supply Agreement approved by MSEDCL, as required under Clause 5.9 of the PPA, thereafter; and (b) purchase of power at an

abnormally high rate would result in a tariff shock to its consumers. The first ground is ex-facie contrary to the findings recorded by the CERC, in its order dated 30.07.2013, that Clause 5.9 of the PPA had no application when RGGPL entered into a Gas Supply Agreement with GAIL for supply of RLNG. The second ground, as shall be detailed later, has been rejected in the judgement of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015.

While the Letter of Termination dated 08.05.2014 was not, and could not have been, the subject matter of Petition No. 166/MP/2012, since the said letter was only issued during the pendency of Appeal No. 261 of 2013, the fact remains that the very basis, of the letter of termination dated 08.05.2014, is that consent of MSEDCL was required in terms of Article 5.9 of the PPA for supply of power based on R-LNG as the primary fuel. Curiously, the Termination Letter dated 08.05.2014 makes no reference to the order of the CERC in Petition No. 166/MP/2012 dated 30.07.2013, or to the interpretation of Article 5.9 of the PPA by the CERC which had held that generation of electricity from RLNG did not need approval of MSEDCL under Article 5.9 of the PPA. Failure to refer to the order of the CERC dated 30.07.2013, or to the construction placed by the said Commission on Article 5.9 of the PPA, while issuing the Termination Letter on 08.05.2014, contrary to the findings of the CERC which was binding on MSEDCL, casts a cloud on the said letter of termination itself, and on the bonafides of MSEDC in issuing the said letter.

iii. PRINCIPLES OF RES JUDICATA APPLY TO ISSUES ARISING FOR DECISION IN A PROCEEDING:

The expression “suit”, as used in Section 11 CPC, is not defined in the Civil Procedure Code. Black’s Law Dictionary defines ‘suit’ to mean any proceeding by any party or parties against another in a court of law. A “suit” instituted before the competent Civil Court can, possibly, be equated with a petition filed before the Regulation Commission under Sections 79/86 of the

Electricity Act, and an appeal to this Tribunal, under Section 111(1) of the Electricity Act, with a first appeal under Section 96 CPC.

Emphasis placed on behalf of the Appellant on the word “Suit” in Section 11 CPC, to contend that the said provision is inapplicable to Appeals, matters little as the said provision not only refers to suits but also to issues. Section11 CPC would bar a court, on the principles of res-judicata, from trying any issue, in which the matter directly and substantially in issue in a former proceeding is in issue in the present proceedings, between the same parties and when such issues have been heard and finally decided by such court/tribunal.

The object and purport of the principle of res judicata, as codified in Section 11 CPC, is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which is the subject-matter of the lis stood determined by a competent court, no party can, thereafter, be permitted to reopen it in a subsequent litigation. (**Swamy Atmananda & Ors. v. Sri Ramakrishna Tapovanam, (2005) 10 SCC 51).** The doctrine of *res judicata* applies not only to the actual decision in the case, but also to the facts and grounds for that judgment as pleaded by the parties. Anything which is fundamental to the decision of the earlier suit is also part of the *res judicata* created by the judgment. If in any Court of competent jurisdiction, a decision is reached, a party is estopped from questioning it in a new legal proceeding. This principle also extends to any point which was in substance the ratio of and fundamental to the decision. **(Zingu Deorao Umale v. Mahadeo Parashramji, 1947 SCC OnLine MP 41: AIR 1948 Nag 358).**

The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable

diligence, might have brought forward at the time. **(Zingu Deorao Umale v. Mahadeo Parashramji, 1947 SCC OnLine MP 41: AIR 1948 Nag 358).** A previous decision of a competent court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision: the decision on law cannot be dissociated from the decision on facts on which the right is founded. **(Supreme Court Employees' Welfare Assn. v. Union of India, (1989) 4 SCC 187; Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy [(1970) 1 SCC 613).**

Once an issue of fact has been judicially determined finally between the parties by a court of competent jurisdiction, and the same issue comes directly in question in subsequent proceedings between the same parties, then the person cannot be allowed to raise the same question which already stands determined earlier by the competent court. **(Amarendra Komalam v. Usha Sinha, (2005) 11 SCC 251 : 2005 SCC OnLine SC 705).** It may be that the same set of facts may give rise to two or more causes of action. If, in such a case, a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process. (**Pondicherry Khadi & Village Industries Board v. P. Kulothangan, (2004) 1 SCC 68; State of U.P. v. Nawab Hussain: (1977) 2 SCC 806).**

The matter in issue, if it is one purely of fact decided in the earlier proceeding by a competent court, must, in a subsequent litigation between the same parties, be regarded as finally decided and cannot be reopened. A mixed question of law and fact, determined in the earlier proceeding between the same parties, may not, for the same reason, be questioned in a subsequent proceeding between the same parties. **(Supreme Court Employees' Welfare**

Assn. v. Union of India, (1989) 4 SCC 187; Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy [(1970) 1 SCC 613).

Insofar as questions of fact are concerned, the court is not concerned with the correctness or otherwise of the earlier judgment while determining the application of the rule of res judicata. **(Rajendra Jha v. Presiding Officer, Labour Court, 1984 Supp SCC 520; Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy [(1970) 1 SCC 613**). If the question of law is related to the fact in issue, an erroneous decision on such a question of law may operate as res judicata between the parties in a subsequent suit or proceeding, if the cause of action is the same. (**Supreme Court Employees' Welfare Assn. v. Union of India, (1989) 4 SCC 187**).

In **Trilok Singh v. Savitri Devi, 1971 SCC OnLine All 368 : AIR 1972 All 52,** the Allahabad High Court held that the counsel for the appellant had contended that the finding that the wife was turned out from the husband's house after being beaten, as recorded in the suit for restitution of conjugal rights, would not have the effect of res judicata in the subsequent suit for judicial separation, in as much as in the former suit the Court had only to find out whether the wife could legally be compelled to go to her husband while in the latter suit the court had to find out whether the wife was guilty of desertion as defined in the Explanation to Section 10 of the Hindu Marriage Act; it seemed that the counsel wanted to make out that in a suit for restitution of conjugal rights different facts have to be found out that the suits were different in nature, hence a finding recorded in the suit for restitution of conjugal rights being inherently on different set of facts relevant for the purpose of the suit would not operate as res judicata in the latter suit for judicial separation; the two suits being based on different causes of actions, namely one on desertion, while the other on the existence of the legal status of marriage and the refusal or neglect of the wife to perform her marital obligation.

The Allahabad High Court further observed that, in this argument of the learned counsel, there did not appear to be any substance as in its ultimate analysis the argument was based on the fact that the relief in the two suits differed; merely because the reliefs in the two suits between the same parties, filed one after the other, were different in nature, a finding on an issue in the earlier filed suit on a matter in controversy between the parties, and necessary for its decision, would operate as res judicata in the latter suit if the same matter is in issue between the parties and necessary for the decision of the latter suit also; and it would always be so, no matter the relief claimed in the latter suit also was different in form and nature.

iv. SECTION 11 CPC IS NOT EXHAUSTIVE OF THE PRINCIPLES OF RES JUDICATA:

The doctrine of res judicata is codified in Section 11 CPC. Section 11 CPC generally comes into play in relation to civil suits. Even if we were to proceed on the premise that Section 11 CPC does not per se apply, it must be borne in mind that, apart from the codified law, the doctrine of res judicata has been applied in various other kinds of proceedings and situations by courts in India. If by any judgment or order, any matter in issue has been directly and explicitly decided, the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. **(Workmen v. Board of Trustees, Cochin Port Trust, (1978) 3 SCC 119).** The sphere of res judicata as enshrined in Section 11 CPC is not exhaustive, it is ever growing. **(Madhvi Amma Bhawani Amma v. Kunjikutty Pillai Meenakshi Pillai, (2000) 6 SCC 301)**.

Section 11 CPC is not the foundation of the principle of *res judicata*, but is merely a statutory recognition thereof, and hence the Section is not to be considered exhaustive of the general principle of law (**Kalipada De v. Dwijapada Das, (1929-1930) 57 IA 24 : AIR 1930 PC 22**; **State of**

Karnataka v. All India Manufacturers Organisation, (2006) 4 SCC 683). Even where Section 11 CPC does not apply, the principle of res judicata has been applied by courts (or tribunals) for the purpose of achieving finality in litigation. The result of this is that the original court (or tribunal) as well as any higher court (or tribunal) must in any future litigation proceed on the basis that the previous decision was correct. **(Satyadhyan Ghosal v. Deorajin Debi, 1960 SCC OnLine SC 15 : AIR 1960 SC 941).**

The provisions of Section 11 CPC are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit, and on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court (or tribunal) competent to decide it, will operate as res judicata in a subsequent regular proceeding. **(Union of India v. Nanak Singh, 1968 SCC OnLine SC 77; Gulabchand Chhotalal Parikh v. State of Gujarat: AIR 1965 SC 1153).**

v. ARE THE PRINCIPLES OF RES JUDICATA APPLICABLE ONLY TO SUITS AND NOT APPEALS?

Emphasis placed, on behalf of MSEDCL, on the word “suit” in Section 11 CPC to contend that the said provision does not apply to appeals overlooks the fact that an appeal under Section 111 of the Electricity Act is a continuation of the original proceedings before the Regulatory Commission. An appeal lies to this Tribunal under Section 111(1) of the Electricity Act against the order passed by the Regulatory Commission. An appeal under Section 111(1) is akin to a first appeal under Section 96 CPC as power is conferred on this Tribunal, under Section 111(3) of the Electricity Act, to confirm, modify, or set aside the order appealed against. In exercising its powers under Section 111(3), this Tribunal is also entitled to re-appreciate the evidence on record.

A first appeal is a valuable right of the appellant, and is a continuation of the proceedings of the original court. The first appellate court is required to address itself to all issues raised in the appeal (**Malluru Mallappa v. Kuruvathappa, (2020) 4 SCC 313**), and has a co-extensive power with that of the trial court. **(T.N. Alloy Foundry Co. Ltd. v. T.N. Electricity Board, (2004) 3 SCC 392; LIC v. Sanjeev Builders (P) Ltd., (2022) 16 SCC 1).** As an appeal is a continuation of original proceedings, the dispute remains sub-judice within the judicial hierarchy until finally adjudicated. (**Malluru Mallappa v. Kuruvathappa" (2020) 4 SCC 313 and "Ramnath Exports (P) Ltd. v. Vinita Mehta" (2022) 7 SCC 678**).

An appeal is the "right of entering a superior court, and invoking its aid and inter-position to redress the error of the court below" and "though procedure does surround an appeal the central idea is a right". (**Nahar industrial Enterprises Limited (2009) 8 SCC 646; Transmission Corporation of A.P. (2004) 5 SCC 551).** The following propositions, among others, must be borne in mind regarding an appeal (*i*) the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding; (*ii*) the right of appeal is not a mere matter of procedure but is a substantive right; (*iii*) the institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the carrier of the suit; and (*iv*) the right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences. **(Garikapati Veeraya v. N. Subbiah Choudhry: AIR 1957 SC 540; Colonial Sugar Refining Co. Ltd. v. Irving: 1905 AC 369 (PC)).**

The rule of *res judicata* applies equally to appeals and miscellaneous proceedings as it does to original suits and where, after commencement of the trial of an issue, a final judgment on the same issue is pronounced by a

competent Court of jurisdiction in another case, it operates as *res judicata*. **(M.C.A.R.C.S. ChockaIlnga Tevar Firm v. K.A. Sankarappa Naicker, 1941 SCC OnLine Mad 381; Balkishan v. Kishan Lal [(1888) I.L.R. 11 All. 148 (F.B.)**. Judgments, coming into existence during the pendency of proceedings, by way of appeal or revision cannot be excluded from the operation of the rule of *res judicata,* if such judgments have become final. **(Balkishan v. Kishan Lal [(1888) I.L.R. 11 All. 148 (F.B.); Rangachariar v. Rangaswami Ayyangar [(1935) I.L.R. 59 Mad. 777; Krishnan Nair v. Kambi: 1937 M.W.N. 299; and M.C.A.R.C.S. ChockaIlnga Tevar Firm v. K.A. Sankarappa Naicker, 1941 SCC OnLine Mad 381).**

Section 11 of the Civil Procedure Code operates against both the parties to a suit as the principle of res judicata is an inhibition against the Court. (**R. Govindasamy v. Kasthuri Ammal, 1998 SCC OnLine Mad 241).** Though Appeal No. 261 of 2013 remained pending before this Tribunal till it was finally disposed of on 22.04.2015, nearly one year after the Letter of Termination dated 08.05.2014 was issued, no steps were taken by MSEDCL, (the respondent in Petition No. 166/MP/2012 filed by RGPPL before the CERC, and the Appellant in Appeal No. 261 of 2013), to amend its grounds in the said Appeal to contend that the order of the CERC dated 30.07.2013 necessitated being set aside also on the ground that the PPA dated 10.04.2007 was terminated by letter dated 08.05.2014. It is well settled that amendments are largely permitted at the appellate stage with a view to avoid multiplicity of proceedings. (**Anthonysamy v. Christoraj, 2013 SCC OnLine Mad 1172**) and, ordinarily, an amendment once incorporated relates back to the date of the suit. **(Siddalingamma v. Mamtha Shenoy: (2001) 8 SCC 561; Sampath Kumar v. Ayyakannu, (2002) 7 SCC 559).**

In **State of Maharashtra v. Hindustan Construction Co. Ltd., (2010) 4 SCC 518,** the Supreme Court held that Order 41 Rules 2 & 3 CPC, confer power

on the appellate court to grant leave to amend the memorandum of appeal. In **Harcharan v. State of Haryana: (1982) 3 SCC 408**, the Supreme Court held that, to highlight the real controversy, it may become necessary to amend the pleadings; when an appeal is preferred, the memorandum of appeal has the same position like the plaint in a suit; while the plaintiff is held to the case pleaded in the plaint, in the case of a memorandum of appeal the same situation obtains in view of Order 41 Rule 3, and the appellant is confined to and also would be held to the memorandum of appeal.

As termination of the PPA was also on the very same ground that approval of MSEDCL was required under Article 5.9 of the PPA for any Gas Supply Agreement executed by RGPPL with third parties, even for procurement of RLNG which was intended to be used as primary fuel by RGPPL for supply of electricity to MSEDCL, this ground of termination of the PPA ought to have been raised by MSEDCL by way of an amendment to the grounds of appeal.

Accepting the submission urged on behalf of the MSEDCL, may result in absurd consequences. If the word “suit” in Section 11 CPC were held to apply only to original proceedings before the Commission, then even if the afore-said contention had been permitted to be raised in Appeal (consequent on its amendment) and such an issue was decided in the said appeal, it would still require the Commission or this Tribunal, in a subsequent round of litigation with respect to the very same issue, not to apply the doctrine of res judicata on the technical plea that these issues had only been decided in an Appeal by this Tribunal, and not in the original Petition instituted before the Commission. Likewise, if the Supreme Court, in its order in Civil Appeal No.1922 of 2023 dated 09.11.2023, had expressed its opinion on the letter of termination dated 08.05.2014, would MSEDCL then also be entitled to contend that no reliance should be placed on those observations, since they were issues raised for the first time in the Civil Appeal filed before the Supreme Court, and not before the

Commission? It goes without saying that, if such a contention had been decided at the appellate stage on its being raised for the first time in an appeal, the findings recorded in the appellate order would nonetheless bind parties to the proceedings, and the issue so decided could not have been raised in subsequent proceedings inter-parties. If that be so, there is no reason why Explanation IV to Section 11 CPC should not be made applicable at the appellate stage, since the very object sought to be achieved by application of this rule of Constructive Res Judicata is to give finality to decisions of courts/tribunals, and avoid repeated litigation on the very same subject matter.

vi. EXPLANATION IV TO SECTION 11 CPC:

Explanation IV to Section 11 states that any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The spirit behind Explanation IV to Section 11 CPC was brought out in **Henderson v. Henderson [(1843-60) All ER Rep 378,** wherein it was held that the plea of res judicata applied, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. (**State of Karnataka v. All India Manufacturers Organisation, (2006) 4 SCC 683**).

In **State of U.P. v. Nawab Hussain: (1977) 2 SCC 806,** the Supreme Court referred with approval to **Greenhalgh v. Mallard: (1947) 2 All ER 255 (CA),** wherein it was held that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that *it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.* (**State of**

Karnataka v. All India Manufacturers Organisation, (2006) 4 SCC 683). In view of Explanation IV to Section 11 CPC, any matter that might or ought to have been made a ground of attack in a former suit is deemed to have been made a matter directly or substantially an issue in the said suit. Therefore, *res judicata* impacts not only the actual matter determined, but every other matter which the parties might or ought to have litigated and have decided as incidental to, or essentially connected with the subject matter of the litigation. It includes every matter coming into the legitimate purview of the original action, both in respect of the matters of claim and defence. The underlying principle in Explanation IV is that, where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. (**Forward Construction Co. v. Prabhat Mandal (Regd.), (1986) 1 SCC 100).** An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with the subject-matter of the litigation, and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. (**Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra: (1990) 2 SCC 715; Forward Construction Co: (1986) 1 SCC 100; State of Karnataka v. All India Manufacturers Organisation, (2006) 4 SCC 683**).

The earlier judgment would operate as res judicata notwithstanding that one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. (**Forward Construction Co. v. Prabhat Mandal (Regd.), (1986) 1 SCC 100).**

The rule of constructive res judicata postulates that, if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action. **(Devilal Modi v. STO, 1964 SCC OnLine SC 17).** It would be impermissible to permit any party to raise an issue, inter se, where such an issue under the very Act has been decided in an early proceeding. Even if res judicata, in its strict sense, may not apply but its principle would be applicable. Parties who are disputing in the present proceedings, if they were parties in an early proceeding under the very same Act raising the same issue, would be stopped from raising such an issue both on the principle of estoppel and constructive res judicata. **(Vijayabai v. Shriram Tukaram, (1999) 1 SCC 693).**

Where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. **(Zingu Deorao Umale v. Mahadeo Parashramji, 1947 SCC OnLine MP 41: AIR 1948 Nag 358).**

When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided. **(Ramchandra Dagdu Sonavane v. Vithu Hira Mahar, (2009) 10 SCC 273; Workmen v. Board of Trustees, Cochin Port Trust, (1978) 3 SCC 119)**

Failure of MSEDCL to amend Appeal No. 261 of 2013 to include therein a challenge to the order of the CERC in Petition No. 166/MP/2012 dated 30.07.2013, also on the ground that the PPA dated 10.04.2007 stood terminated by MSEDCL's letter dated 08.05.2014, would bar such a contention being subsequently raised in Petition No. 276/MP/2024 before the CERC in view of Explanation IV to Section 11 CPC or on principles analogous thereto.

vii. RULE OF RES JUDICATA IS NOT INFLUENCED BY TECHNICAL CONSIDERATIONS OF FORM:

What is of significance, in the application of the doctrine of res judicata, is its substance and not its form. The Rule of res judicata "while founded on ancient precedent is dictated by a wisdom which is for all time", and the application of this Rule by Courts "should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law". "The raison d'etre of the Rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest; and to allow persons who had deliberately chosen a position to reprobate it and to blow hot now when they were blowing cold before would be to completely ignore the whole foundation of the Rule. (**Iftikhar Ahmed v. Syed Meharban Ali, (1974) 2 SCC 151; M. Nagabhushana v. State of Karnataka, (2011) 3 SCC 408; Sheoparsan Singh v. Ramnandan Prasad Narayan Singh: AIR 1916 PC 78).**

The plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues which have become final between the parties. **(M. Nagabhushana v. State of Karnataka, (2011) 3 SCC 408).** While applying the principles of res judicata, the court should not be hampered by any technical rules of interpretation. Any

proceeding which has been initiated in breach of the principle of res judicata is prima facie a proceeding which has been initiated in abuse of the process of court. **(M. Nagabhushana v. State of Karnataka, (2011) 3 SCC 408).**

In **Nazim Ali v. Anjuman Islamia Chhatarpur, (1999) 3 SCC 91,** the only question in the earlier proceedings was whether the plot on which the Tazia as placed was wakf property, on that question, no satisfactory proof was placed by the defendants before the Court and, therefore, the Supreme Court had earlier agreed with the view of the High Court but did not upset any of the findings recorded by the courts below which were affirmed by the High Court. While holding that it was not open to the parties to raise this question once over again, particularly when the "Badi Takia" was held to be a vast extent of property in which there was a mosque which alone was shown to have been dedicated for the purpose of wakf, the Supreme Court noticed the basis upon which the High Court disposed of the matter, and observed that when those findings had become final and not disturbed by the Supreme Court in the earlier proceedings, the District Judge was justified in holding that the proceedings were barred by res judicata.

It was, however, contented by the respondents, in the subsequent proceedings before the Supreme Court, that the previous suit was in respect of only a plot measuring 6′ × 6′ and not the entire property of the "Badi Takia". In this context the Supreme Court observed that a careful examination of the pleadings in the previous suit would indicate that, though the plaintiffs had not raised the issue as to the entire property in the "Badi Takia", the defendants (respondents) had raised a plea that the entire property in the "Badi Takia" was wakf property and, therefore, the suit was liable to be dismissed; hence, even before the Supreme Court, the point agitated and put in issue was that the entire property in the "Badi Takia" was wakf property which was rejected by stating that though the mosque and the school were wakf property, that

inference would not result in holding that the entire “Badi Takia” is wakf property as no proof had been placed to reach any such conclusion and thus the conclusion or the findings of the High Court affirming that of the trial court were not upset or modified in any manner.

The Supreme Court further held that the findings of the High Court, as to the nature of the property having remained unaltered, the claim of the respondents in the suit being contrary was barred by the principles of res judicata; and, as that point stood decided against the respondents, therefore, on the principles of res judicata, it was not open to the High Court to re-examine that aspect of the matter.

A hyper-technical application of the said doctrine is impermissible, since the object underlying the principles of res judicata is to give finality to a litigation, and not permit parties to keep agitating the same issue, albeit in a modified form, over and over again.

In its order in Appeal No. 261 of 2013 dated 22.04.2015, this Tribunal observed that, under Article 4.3 of the PPA, the primary fuel for power generation by RGPPL was LNG, Natural Gas or R-LNG and the normal capacity of the generating station shall be declared on gas or R-LNG; since consent or agreement by MSEDCL was required only in cases where the generator made arrangements for liquid fuel, change in the primary fuel from LNG/ Natural Gas to R-LNG did not require the consent of MSEDCL; RGPPL was not required to obtain consent of MSEDCL prior to entering into GSA/ GTA with GAIL; RGPPL was rightly held by CERC to be entitled to capacity charges when it remained in a position to generate electricity, and had declared necessary availability of electricity which MSEDCL had chosen not to schedule; MSEDCL was rightly under the obligation to pay capacity charges as long as RGPPL declared available capacity irrespective of whether MSEDCL scheduled the capacity offered by RGPPL or not; since RGPPL had made

upfront investment in establishing, operating and maintaining the generating station, the capital cost incurred needed to be serviced during the life time of the generating station through payment of annual fixed charges; the CERC had, in the impugned order, rightly refused to exonerate MSEDCL from payment of capacity/ fixed charges, after noting that MSEDCL had refused to give consent to RGPPL to enter into GSA/ GTA with the gas supplier; since the capacity declared by RGPPL was in accordance with Article 4.3 and Article 5.2 of the PPA, such charges were payable; and prior approval of MSEDCL in terms of Article 5.9 of the PPA, for entering into GSA/ GTA, was not required to be taken. This Tribunal also expressed its inability to accept the contention of MSEDCL that prior approval of MSEDCL, in terms of Article 5.9 of the PPA, for entering into GSA/ GTA was required to be taken because such Agreements had financial implications on the Appellant.

Thus, while the ground of termination based on Article 5.9 was specifically rejected both by the CERC in its order in Petition No. 166/MP/2012 dated 30.07.2013, and this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, the other reason for termination, that purchase of power at a high rate would result in a tariff shock to the consumers, did not also find favour with this Tribunal which, in its order in Appeal No. 261 of 2013 dated 22.04.2015, had expressed its inability to agree with MSEDCL that their prior approval in terms of Article 5.9 was required to be taken because such Agreements had financial implications on them.

While holding that the Appellant-MSEDCL was required to pay capacity charges to RGPPL even if they did not give consent for the GSA/ GTA, since there was no change of fuel, falling under the category of primary fuel, to liquid fuel, this Tribunal further observed that MSEDCL was under an obligation to pay capacity charges to RGPPL even if the Appellant did not give consent for the GSA/ GTA. The said order of this Tribunal required MSEDCL to pay

capacity charges to RGPPL. This order dated 22.04.2015, which was subsequently affirmed by the Supreme Court, has attained finality and is binding inter-parties.

viii. JUDGEMENT INTER-PARTIES IS BINDING AND CANNOT BE OVER-TURNED IN COLLATERAL PROCEEDINGS:

It is well settled that an order passed by a Court of competent jurisdiction, after adjudication on merits of the rights of the parties, binds the parties or the persons claiming right, title or interest from them. Its validity can be assailed only in an appeal or review. Its validity cannot be questioned in subsequent proceedings. (**Sushil Kumar Metha Vs. Gobind Ram Bohra :(1990) 1 SCC 193).** A decision, which has attained finality, is binding between the parties, and they are not to be permitted to reopen the issue decided thereby. (**Supreme Court Employees Welfare Association Vs. Union of India: AIR 1990 SC 334).** Such orders bind the parties in a subsequent litigation or before the same Court at a subsequent stage of the proceedings. (**Barkat Ali v. Badrinarain: AIR 2001 Rajasthan 51).** An order of a Court/Tribunal of competent jurisdiction, directly upon a point, creates a bar, as regards a plea, between the same parties in some other matter in another Court/Tribunal where the said plea seeks to raise afresh the very point that was determined in the earlier order. (**Swamy Atmananda v. Sri. Ramakrishna Tapovanam: (2005) 10 SCC 51: AIR 2005 SC 2392; Ishwar Dutt v. Land Acquisition Collector: (2005) 7 SCC 190).** Issues which have been concluded inter-parties cannot be raised again in proceedings inter-parties. (**State of Haryana Vs. State of Punjab: 2004(12) SCC 673).**

The judgment of a competent Court, which has attained finality, is binding inter-parties and cannot be re-agitated in collateral proceedings. Such an order or judgment of a Court/Tribunal, even if erroneous, is binding inter-parties. The binding character of judgments, of Courts of competent jurisdiction, is in

essence a part of the rule of law on which administration of justice is founded. (**The Direct Recruit Class-II Engineering Officers' Association v. State of Maharashtra: (1990) 2 SCC 715; U.P. State Road Transport Corporation v. State of U.P: (2005) 1 SCC 444)**. Once a matter, which was the subject-matter of a lis, stood determined by a competent Court, no party can thereafter be permitted to reopen it in a subsequent litigation. (**Swamy Atmananda v. Sri. Ramakrishna Tapovanam : (2005) 10 SCC 51 : AIR 2005 SC 2392; Ishwar Dutt v. Land Acquisition Collector : (2005) 7 SCC 190; Vidya Sagar Singh v. G.B. Pant University of Agriculture and Technology, 2019 SCC OnLine Utt 473; Jagmohan Singh v. National Insurance Company Limited, 2019 SCC OnLine Utt 269).**

A decision inter-parties cannot be overturned in collateral proceedings. A decision can be set aside in the same lis on a prayer for review or an application for recall. Overruling of a decision takes place in a subsequent lis where the precedential value of the earlier decision is called in question. It is open to a court of superior jurisdiction or strength, before which a decision of a Bench of lower strength is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate. (**Bharat Sanchar Nigam Ltd. and Ors. vs. Union of India and Ors: (2006) 3 SCC 1).**

The Appellant-MSEDCL cannot wriggle out of its financial obligations to pay capacity charges to RGPPL, in terms of the binding judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, by now seeking to re-open the entire issue contending that the PPA itself stood terminated. Since MSEDCL had issued the Letter of Termination dated 08.05.2014 even during the pendency of Appeal No. 261 of 2013, their failure to amend their Appeal, and take the additional ground of the PPA having been terminated, would

disentitle them from now seeking to avoid fulfilling its financial obligations in terms of, and in compliance with the directions in, the order of this Tribunal dated 22.04.2015, more so when the said order, having been affirmed in appeal by the Supreme Court, has attained finality.

ix. EXPLANATION III TO SECTION 11 CPC:

Aggrieved by the order passed by this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, MSEDCL filed Civil Appeal No. 1992 of 2023 before the Supreme Court. In Para 7 of the said Appeal, MSEDCL narrated the relevant facts. Para 7 (U) refers to the termination notice dated 08.05.2014 and it is stated that the PPA was terminated with effect from 01.04.2014 ie the date on which the last GSA approved by the MSEDCL had expired, and since no GSA had been approved thereafter by MSEDCL in terms of Clause 5.9 of the PPA. A copy of the said termination notice dated 08.05.2014 was annexed and marked as Annexure A-12 to the said Civil Appeal. Para 7 of the appeal also records the reply given thereto by RGPPL on 22.05.2014 as also to MSEDCL's contention that RGPPL had not approached any forum challenging the termination letter or of their having obtained any stay thereon.

Para 8 of the said Civil Appeal contains the grounds urged by MSEDCL in challenge to the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015. Ground (MM) thereunder is that MSEDCL had terminated the PPA with RGPPL on 08.05.2014 after expiry of the last GSA approved by MSEDCL ie 01.04.2014 and because no GSA had since been approved by MSEDCL as required under Clause 5.9 of the said PPA, and continuing with the PPA without a GSA would not have served any useful purpose. Further, in ground (NN), it was contended by MSEDCL that RGPPL, after termination of the PPA, was raising monthly capacity charges on the Appellant from January 2019, however the Appellant had returned the bills raised by RGPPL as there was no valid contract existing between them.

It is also relevant to note that the Appellant herein filed RP (C) No. 1997 of 2023 seeking review of the order of the Supreme Court in Civil Appeal No. 1992 of 2023 dated 09.11.2023. In the said Review Petition, MSEDCL specifically raised the contention that the PPA had been terminated on 08.05.2014. Para 4 of the Review Petition are the grounds raised by MSEDCL that the earlier order of the Supreme Court suffered from errors apparent on the face of record. Under Para 4, below the head “re: termination of PPA has not been considered despite attaining finality” are grounds L&J.

Ground L is that the impugned order (Order of the Supreme Court in Civil Appeal No. 1992 of 2023 dated 09.11.2023) had failed to address the fact that the Appellant had terminated the PPA on 08.05.2014 with effect from 01.04.2014, ie immediately after expiry of the last GSA duly approved by MSEDCL, since no consent had been sought for any GSA from MSEDCL (as was required in Article 5.9 of the said PPA), thereafter continuing the PPA without GSA would not have served any useful purpose; and the impugned judgment does not discuss this aspect. Ground (J) is that the impugned order had failed to consider that the PPA is a determinable contract and that RGPPL has not challenged termination of the PPA before any forum till date. Thus, the said termination had attained finality. Therefore, without prejudice to the contentions raised hereinabove, MSEDCL cannot to be saddled with any liability towards capacity charges from 01.04.2014, particularly considering that there was/ is no valid contract existing between the parties from 01.04.2014.

Explanation III to Section 11 CPC provides that, for an issue to be *res judicata,* it should have been alleged by one party in the former Suit and either denied or admitted, expressly or impliedly, by the other. Even where a point is not properly raised by the Appellant, but both parties have without protest chosen to join issue upon that point, the decision on that point would operate as res judicata between the parties. **(Krishna Chandra v. Challa Ramanna,**

AIR 1932 PC 50; Midnapore Zamindary Co. Ltd. v. Naresh Narayan Roy, (1924) 11 AIR PC 144; and **Mt. Sitabai v. Hari: AIR 1938 Nag 401(DB)).** We, therefore, find considerable force in the submission urged on behalf of RGPPL, by Sri C.A. Sundaram, Learned Senior Counsel, that, since termination of the PPA vide letter dated 08.05.2014 was alleged by MSEDCL in Civil Appeal No. 1992 of 2023 and in RP (C) No. 1997 of 2023 filed by them before the Supreme Court, and was refuted by RGPPL in its reply thereto, Explanation III to Section 11 CPC would apply.

Though there is no specific reference in the order, in Civil Appeal No. 1992 of 2023 dated 09.11.2023, to the letter of termination dated 08.05.2014, the Supreme Court not only upheld the judgment of this Tribunal, in Appeal No.261 of 2013 dated 22.04.2015, on its merits including on the non-applicability of Article 5.9 of the PPA, and dismissed the Appeal filed by MSECL, it also made it clear that the execution proceedings, pursuant to the Execution Petition filed before this Tribunal, be continued.

Despite grounds, relating to termination of PPA, having been raised by MSEDCL, the Supreme Court, in its order in RP (C) No. 1997 of 2023 dated 19.03.2024, observed that, having perused the review petition, there was no error apparent on face of the record; and no case for review under Order 47 Rule 1 of the Supreme Court Rules 2013 had been established". The review petition was, accordingly, dismissed. The order of the Supreme Court, in RP (C) No. 1997 of 2023 dated 19.03.2024, is not a dismissal simpliciter or a dismissal without reasons of the Review Petition, for the Supreme Court has specifically recorded that it had perused the review petition and found no error apparent on the face of record and no case for review, under Order 47 Rule 1, had been established.

x. APPLICATION OF THE RULE OF RES JUDICATA TO REVIEW PROCEEDINGS:

It is, however, contended on behalf of MSEDCL, relying on the judgement of the Calcutta High Court in **Srish Chandra Pal Chowdhury:** 1913 SCC OnLine Cal 435, and the Andhra Pradesh High Court in **Katragadda Virayya Judgement 1955 SCC OnLine AP 279,** that, as an application for review is not a suit within the meaning of the Code of Civil Procedure, neither the Code nor any doctrine of constructive *res judicata* could be applied to such cases, and neither would the present suit be barred by reason of the decision in the previous application for review nor would a decision of a question arising in an application for review operate as res judicata.

In **Workmen v. Board of Trustees, Cochin Port Trust, (1978) 3 SCC 119**, the Supreme Court held, albeit in the context of writ proceedings, that, even if one writ petition is dismissed in limine by a non-speaking one word order "dismissed", another writ petition would not be maintainable because even the one-word order must necessarily be taken to have decided impliedly that the case is not a fit one for exercise of the writ jurisdiction of the High Court, and another writ petition from the same order or decision will not lie.

The basis for the conclusion in the afore-said High Court judgements, that the principle of res judicata does not apply to review proceedings, is that a review petition is not a suit. It is however contended, on behalf of RGPPL, that a review petition before the Supreme Court would stand on a different footing, and having raised such a contention in the Review Petition before the Supreme Court, and as the order of the Supreme Court in RP (C) No. 1997 of 2023 dated 19.03.2024 is not a dismissal simpliciter or a dismissal without reasons of the Review Petition, it is impermissible for MSEDCL to now contend that the order passed in the Review Petition does not constitute res judicata.

xi. PRINCIPLES OF RES JUDICATA APPLIES EVEN WHERE AN ISSUE HAS BEEN IMPLICITLY DECIDED:

While the Supreme Court, in its order in Civil Appeal No. 1992 of 2023 dated 09.11.2023, has not specifically adverted to MSEDCL's claims regarding termination of the PPA, the very fact that the order of this Tribunal has been affirmed on a detailed analysis of the provisions of the PPA would go to show that this contention has been implicitly rejected by the Supreme Court. The principle of res judicata also comes into play when, by the judgment and order, a decision on a particular issue is implicit in it, that is it must be deemed to have been necessarily decided by implication. Then also the principle of res judicata on that issue is directly applicable. **(Ramchandra Dagdu Sonavane v. Vithu Hira Mahar, (2009) 10 SCC 273; Workmen v. Board of Trustees, Cochin Port Trust, (1978) 3 SCC 119),**

xii. EXPLANATION V TO SECTION 11 CPC:

Explanation V to Section 11 CPC stipulates that any relief claimed, that is not expressly granted, shall, for the purpose of this Section, be deemed to have been refused. In view of Explanation V to Section 11 CPC, if the relief was sought and was not granted by the Court for whatever reason, including that there was no reference to that relief in the earlier judgment, a fresh petition seeking the very same relief cannot be entertained as the rule of res judicata would apply in such cases. (**Chief Administrator and Anr, 1999 SCC (L&S) 660).** Since MSEDCL had specifically raised the contention, regarding termination of the PPA, in the Civil Appeal filed by them before the Supreme Court, and as the said Appeal stood rejected by order dated 09.11.2023, the submission, urged on behalf of RGPPL, that Explanation (v) to Section 11 CPC would apply, cannot be readily brushed aside.

It is true that the words "heard and finally decided" used in Section 11 CPC would require a conscious and reasoned decision. As noted hereinabove, it is now settled law in the light of several judgments of the Supreme Court that principles of res judicata are not confined only to the principles codified in

Section 11 but goes far beyond. Since the very basis of the Letter of Termination dated 08.05.2014 is MSEDCL's understanding of the scope and ambit of Article 5.9 of the PPA, which understanding has been faulted by the CERC, this Tribunal and the Supreme Court, the very foundation, of the Letter of Termination dated 08.05.2014, stands removed by the afore-said judicial pronouncements which are binding on MSEDCL. In any event, it is impermissible for this Tribunal, which is lower in hierarchy to the Supreme Court, to examine whether, despite such a contention having been specifically raised by MSEDCL in the Civil Appeal, non-reference thereto in the order of the Supreme Court dated 09.11.2023, would mean that the Supreme Court has deliberately chosen not to consider these aspects.

Yet another reason why we may have to hold against the Appellant is because of the consequences which would ensue if we were to uphold their contention. As noted hereinabove this Tribunal, in its order in Appeal No. 261 of 2013 dated 22.04.2015, has directed payment of fixed charges by MSEDCL to RGPPL. If termination of the PPA by letter dated 08.05.2014, despite its very foundation having been removed by the afore-said judicial pronouncements, were to be upheld, it would mean that MSEDCL would, on or after 01.04.2014 (or at the latest after 08.05.2014), no longer be required to pay fixed charges to RGPPL. This would, in turn, result in the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015 being implicitly over-ruled in collateral proceedings (ie in Appeal No.232 of 2025 filed against the order of the CERC in Petition No.276/MP/2024 dated 12.06.2025) despite the directions in the judgement of this Tribunal, in Appeal No. 261 of 2013 dated 22.04.2015, for MSEDCL to pay RGPPL capacity/ fixed charges, having been affirmed by the Supreme Court in its order in Civil Appeal No.1922 of 2023 dated 09.11.2023. Accepting the afore-said submission of MSEDCL would also mean that even the afore-said judgement of the Supreme Court should be held to have been implicitly over-ruled as a result of the termination of the PPA dated 10.04.2007,

by the letter of MSEDCL dated 08.05.2014, despite the issue of termination having been raised by MSEDCL in the Civil Appeal filed by them before the Supreme Court. It would also require us to permit MSEDCL to take advantage of its own wrong in failing to draw this Tribunal's attention to the termination of the PPA, in the earlier Appeal No. 261 of 2013, by not having the appeal duly amended. Whether failure of MSEDCL to do so was by design or negligence, matters little. The contention urged on behalf of the Appellant, in Petition No. 276/MP/2024 filed by them before the CERC, that the invoices raised by RGPPL is non-est, does not therefore merit acceptance.

Pursuant to the order of the Supreme Court, in Civil Appeal No. 1992 of 2023 dated 09.11.2023, RGPPL filed EP No.12 of 2024 before this Tribunal. It is during the pendency of these execution proceedings that MSEDCL filed Petition No. 276/MP/2024 before the CERC, the dismissal of which, by order dated 12.06.2025, has resulted in the present appeal ie Appeal No. 232 of 2025 being filed by them before this Tribunal.

In its order, in EP No. 12 of 2023 dated 17.01.2025, this Tribunal considered various objections raised thereto on behalf of the Appellant-MSEDCL. This Tribunal, thereafter, noted that the Appellant-MSEDCL had raised the issue of termination of the PPA, vide letter dated 08.05.2014, in Civil Appeal No. 1922 of 2023 and in RP (C) No. 1997 of 2023 both of which were dismissed by the Supreme Court; the grounds urged by MSEDCL in Petition No. 166/MP/2012, which culminated in the order passed by the CERC on 30.07.2013, seemed to form the basis of terminating the PPA as stated in MSEDCL's letter dated 08.05.2014; by its order in Appeal No. 261 of 2013 dated 22.04.2015, and in Civil Appeal No. 1922 of 2023 dated 09.11.2023, this Tribunal and the Supreme Court had specifically rejected contentions which formed the basis for termination of the PPA by MSEDCL; and the reasons, which formed the basis for terminating the PPA, had been rejected not only by

the CERC but also in appeal and second appeal by this Tribunal and the Supreme Court.

After noting that MSEDCL had instituted fresh proceedings by way of Petition No. 276/MP/2024 before the CERC questioning the validity of the invoices raised by RGPPL on the ground that the PPA had already been terminated, this Tribunal observed that it was only if the CERC were to uphold the validity of termination of the PPA, would MSEDCL then be entitled to the relief sought for in the said Petition; and the mere fact that Petition No. 276/MP/2024 had been instituted by MSEDCL before the CERC, that too only in August, 2024 after hearing in the EP stood initially concluded, would not justify dismissal of the EP on this score.

While making it clear that that they had not expressed any conclusive opinion on the merits of Petition No. 276/MP/2024 and, in case of their success in the said Petition, the order passed in the EP would not disable MSEDCL from recovering the amounts due to it from RGPPL in terms of the order passed by the CERC, this Tribunal further observed that pendency of the petition did not justify this Tribunal refraining from executing a decree in the discharge of its functions under Section 120(3) of the Electricity Act, more so as the validity of termination of the PPA was not in issue nor was its validity required to be considered in the execution proceedings. The EP was allowed and MSEDCL was directed to pay the amounts, referred to the in the said order, to RGPPL.

Aggrieved thereby MSEDCL filed Civil Appeal No. 4286 of 2025. The Supreme Court passed an interim order therein on 06.05.2025 directed MSEDCL to pay half of the amount computed ie half of Rs. 2477.20 Crores to RGPPL by way of six equal monthly instalments beginning from 15.07.2025. The Supreme Court further observed that instalment shall be paid as per the time fixed; upon failure to pay the instalment within time; and MSEDCL shall be liable to pay interest as fixed and payable by the Discoms to the generating

company in terms of the regulations of the tariff order etc. Civil Appeal No. 4286 of 2025 is still pending adjudication before the Supreme Court.

Accepting the submission, urged on behalf of MSEDCL, that, consequent on termination of the PPA vide their letter dated 08.05.2014, they are no longer liable to pay capacity/fixed charges to RGPPL, would also result in the order of this Tribunal in EP No. 12 of 2023 dated 17.01.2025 and the interim order of the Supreme Court in Civil Appeal No. 4286 of 2025 dated 06.05.2025 being rendered unenforceable and of no effect. Such a course of action, which the Appellant-MSEDCL commends for us to adopt, would result in setting at naught the binding judgments/orders of this Tribunal and the Supreme Court, that too in collateral proceedings. Adoption of such a course is impermissible.

Viewed from any angle, we are satisfied that the CERC was justified in holding, albeit for reasons stated in the present order apart from those assigned in the impugned order, that Petition No. 276/MP/2024 filed by MSEDCL before the CERC is barred by the principles of *res judicata*.

XIX. TERMINATION OF THE PPA: ITS CONSEQUENCES:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-MSEDCL:

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, would submit that the impugned order fails to recognise that the Appellant had no liability towards any invoices raised by the 2nd Respondent as the Power Purchase Agreement dated 10.04.2007 stood terminated with effect from 01.04.2014; as such, any invoices raised by the 2nd Respondent, or claims made for the period thereafter, are without any contractual or legal backing and are hence bad in law; on 08.05.2014, due to prolonged and incurable failure of the 2nd Respondent to ensure reliable and continuous power supply to the Appellant, the Appellant was constrained to

terminate the PPA with effect from 01.04.2014; and the said termination was not challenged by the 2nd Respondent-RGPPL before any competent court, and has thus attained finality.

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, would further submit that it was the Appellant's case, in Petition No. 276/MP/2024, that the invoices issued from FY 2014-15 onwards are non-est as the PPA stood terminated with effect from 01.04.2014 by virtue of the Appellant's Termination Letter; and the invoices, raised prior to termination of the PPA, stand satisfied in view of the understanding between the parties reached pursuant to the PMO meeting dated 17.08.2025, and the consequent waivers and concessions admittedly received by the 2nd Respondent; the CERC also failed to recognise that the Appellant had no liability towards any invoices raised by the 2nd Respondent under the terminated PPA from 01.04.2014, as the PPA stood terminated from the said date; any invoices raised by the 2nd Respondent, or claims made for the period thereafter, are without any contractual or legal backing, and are hence bad in law; the CERC has erroneously and arbitrarily failed to appreciate that the 2nd Respondent had failed to challenge termination of the PPA before any court or forum till date; approximately ten years have elapsed since termination of the PPA and, as such, termination of the PPA has attained finality; and any potential belated challenge to such termination would not only be bad on merits but is impermissible for being barred by the law of limitation.

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, would also submit that, merely by raising invoices post-termination without any declaration that the termination was invalid, the 2nd Respondent cannot seek enforcement of the PPA which has been terminated (**I.S. Sikandar v. K Subramani and Ors. (2013) 15 SCC 27)**; in **Krishnadevi Kamathia v. Bombay Environmental Action Group, (2011) 3**

SCC 363, the Supreme Court held that, even if an order is void, it is required to be declared so by a competent court; a party cannot ignore the same merely because in its opinion the action is void; as such, even if the 2nd Respondent was of the view (albeit erroneously) that termination of the PPA by the Appellant was illegal, it ought to have challenged it before the competent forum and sought a declaration to that effect; and it could not have merely "repudiated" or "ignored" such termination without approaching the competent court.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT-RGPPL:

Sri C. A. Sundaram, Learned Senior Counsel appearing on behalf of the 2nd Respondent-RGPPL, would submit that Explanations III, IV and V to Section 11 of CPC are relevant; since the issue of termination as well as repudiation was brought before the Supreme Court, and the grounds of termination were the very same that were being argued for the purpose of interpretation of the PPA, namely what should be the construction of Article 4.3 and 5.9 of the PPA, when the Supreme Court conclusively held that RGPPL's interpretation of Article 4.3 and 5.9 was correct and MSEDCL's insistence to obtain its approval for entering into GSA by RGPPL was not necessary for RGPPL to claim capacity charges, the issue of termination is deemed to be rejected; additionally, the Supreme Court held that, as per Article 2.2.2 of the PPA, RGPPL does not lose its right to recover capacity charges even if it sells power to third parties; therefore, the intention of the parties to the PPA was to put recovery of capacity charges beyond the realm of actual energy supply; further, the Supreme Court held that MSEDCL's reading goes against the apparent intention of the parties to treat capacity charges as fixed under the PPA; the Supreme Court directed for the E.P to continue; MSEDCL's contentions that the Supreme Court was oblivious of either the alleged termination of the PPA or the repudiation of the same by RGPPL, goes against a plain reading of the Judgement dated 09.11.2023 by which the Supreme Court declared conclusively that RGPPL,

under the very same PPA, was entitled to recover its capacity charges; it is MSEDCL that is inferring the Judgement to be applicable only till the purported termination, ignoring that there is no such restriction in the Judgement; this argument of MSEDCL also begs the question as to why MSEDCL sought a review emphasizing the issue of termination; if the Supreme Court had confined its Judgement till the date of the purported termination, either the fact of termination or the grounds raised on the same were wholly unnecessary; at the very least, till 09.11.2023, no Court can go into the issue of termination as a ground or a defence to the payment of capacity charges under the PPA dated 10.04.2007; even for the period subsequent to 09.11.2023, any declaration sought by MSEDCL on its termination would *ex facie* be barred both by limitation, and also the interpretation of Articles 5.9 and 4.3 made by the Supreme Court in its Judgement dated 09.11.2023; MSEDCL's contention that it had no occasion to raise the issue of termination before APTEL, in Appeal No. 261 of 2013, is factually incorrect; the last pleading filed by MSEDCL in the said Appeal was on 31.07.2014, and the Order was reserved on 24.03.2015, nearly a year after the purported termination; the issue of PPA termination was directly and substantially an issue that MSEDCL ought to have raised since it would have directly affected the recovery of capacity charges by RGPPL in terms of PPA, the matter which was being adjudicated under Appeal No. 261 of 2013; and in fact, in C.A No.4228 of 2015 also, MSEDCL, in the factual portion, had stated that it had terminated the PPA on 08.05.2014 and RGPPL had repudiated it on 22.05.2014.

C. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT-MSEDCL UNDER THIS HEAD:

1. In **I.S. Sikandar v. K Subramani and Ors. (2013) 15 SCC 27,** the Supreme Court held that, since the plaintiff did not perform his part of the contract within the extended period in the legal notice, the agreement of sale was terminated as per notice dated 28-3-1985, and thus there was termination of the agreement of sale between the plaintiff and Defendants 1-4 w.e.f. 10-4-

1985; as could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of agreement of sale as bad in law; in the absence of such prayer by the plaintiff, the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of the agreement of sale and consequential relief of decree for permanent injunction was not maintainable in law; and the relief sought for by the plaintiff, for grant of decree for specific performance of execution of the sale deed in respect of the suit schedule property in his favour on the basis of non-existing agreement of sale, was wholly unsustainable in law.

2. In **Krishnadevi Kamathia v. Bombay Environmental Action Group, (2011) 3 SCC 363,** the Supreme Court observed that, even if an order is void, it requires to be so declared by a competent forum; and it is not permissible for any person to ignore the same merely because in his opinion the order is void; in **State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth Naduvil: (1996) 1 SCC 435 : AIR 1996 SC 906 , Tayabbhai M. Bagasarwalla v. Hind Rubber Industries (P) Ltd: (1997) 3 SCC 443 : AIR 1997 SC 1240 , M. Meenakshi v. Metadin Agarwal: (2006) 7 SCC 470** and **Sneh Gupta v. Devi Sarup: (2009) 6 SCC 194 ,** the Supreme Court has held that whether an order is valid or void, cannot be determined by the parties, and for setting aside such an order, even if void, the party has to approach the appropriate forum; in **State of Punjab v. Gurdev Singh: (1991) 4 SCC 1,** the Supreme Court held that a party aggrieved by the invalidity of an order had to approach the court for relief of declaration that the order against him is inoperative and, therefore, not binding upon him; in **Sultan Sadik v. Sanjay Raj Subba: (2004) 2 SCC 377 : AIR 2004 SC 1377**, the Supreme Court took a similar view observing that, once an order is declared non est by the court, only then the judgment of nullity would operate *erga omnes* i.e. for and against everyone concerned; such a declaration is permissible if the court comes to

the conclusion that the author of the order lacks inherent jurisdiction/competence, and therefore it comes to the conclusion that the order suffers from patent and latent invalidity; thus, even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it; it has to approach the court for seeking such declaration; the order may be hypothetically a nullity, and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason; the order may be void for one purpose or for one person, and it may not be so for another purpose or another person.

C. ANALYSIS:

Reliance placed on behalf of the Appellant-MSEDCL, on **I. S. Sikandar vs. K. Subramani: (2013) 15 SCC 27,** is misplaced. The said judgement has been considered and distinguished in a subsequent judgement of the Supreme Court in **K. S. Manjunath and Others vs. Moorasavirappa Muttanna Chennappa Batil: (2025) INSC 1298.** It is settled law that when a decision rendered by an earlier Bench is interpreted subsequently by another Bench of the Supreme Court, the lower courts in the hierarchy must follow the latter decision**. (Sakinala Harinath v. State of A.P., 1993 SCC OnLine AP 195 : (1994) 1 AP LJ 1 : (1993) 3 ALT 471 (APHC FB)).**

a. JUDGEMENT OF THE SUPREME COURT IN K. S. MANJUNATH AND OTHERS VS. MOORASAVIRAPPA MUTTANNA CHENNAPPA BATIL: (2025) INSC 1298:

In **K.S. Manjunath And Others V. Moorasavirappa Muttanna Chennappa Batil (Judgement in Civil Appeal No. 13507–13508 OF 2025 dated 10.11.2025): 2025 INSC 1298,** the Supreme Court examined the failure

of the Appellant to challenge the legality and validity of termination of the Agreement to Sell (ATS) in the suit, in the light of the submission of the subsequent purchasers that the Original Suit No. 36 of 2007 filed by the original vendees, *inter alia* seeking specific performance of ATS, was not maintainable because the original vendees failed to also seek a declaration from the Court in respect of whether the notice of termination of the ATS was invalid. In order to fortify their submissions, the subsequent purchasers had relied upon the decision of the Supreme Court in ***I.S. Sikandar***.

After referring to its earlier decision in ***Annamalai v. Vasanthi***: **2025 SCC OnLine SC 2300**, the Supreme Court, in **K.S. Manjunath And Others**, observed that the following principles of law were discernible: (i) unilateral termination of the agreement to sell by one party was impermissible in law except in cases where the agreement itself is determinable in nature in terms of Section 14 of the Specific Relief Act, 1963; (ii) If such unilateral termination of a non-determinable agreement to sell is permitted as a defence, then virtually every suit for specific performance can be frustrated by the defendant by placing an unfair burden on the plaintiff, who despite performing his part of the obligations and having showcased his readiness and willingness, would be required to also seek a separate declaration that the termination was bad in law; in such cases, the burden cannot be cast upon the plaintiff to challenge the alleged termination of the agreement; where a party claims to have valid reasons to terminate or rescind a non-determinable agreement to sell, with a view to err on the side of caution, it should be the terminating party, if at all, who ideally should approach the court and obtain a declaration as to the validity of such termination or rescission, and not the non-terminating party; however, this must not mean that the defendant (the terminating party) in such cases would be mandatorily required to seek a declaration because Sections 27 and 31 of the Act of 1963 respectively, while using the phrase “may sue”, merely give an option to any person to have the contract rescinded or adjudged as void or voidable; (iii)

once the alleged termination of a non-determinable agreement in question is found to be not for *bona fide* reasons, and as being done in a unilateral manner on the part of the defendant, it cannot be said that any declaration challenging the alleged termination was required on part of the plaintiff; (iv) If a contract itself gives no right to unilaterally terminate the contract or such right has been waived, and a party still terminates the contract unilaterally, then that termination would amount to a breach by repudiation, and the non-terminating party can directly seek specific performance without first seeking a declaration; and (v) in the event it is found that termination of agreement to sell by the defendant was not valid, then such an agreement to sell will remain subsisting and executable.

Relying on the Commentary on Indian Contract Act and Specific Relief Act by Pollock & Mulla (17th Edition), the Supreme Court, in **K.S. Manjunath And Others,** observed that determinable contracts derive their existence from the determination clause envisaged in the contract; there are essentially three types of determination clauses, *viz*. (i) termination for a cause that allows a party to terminate the contract if the other party breaches a specific term or if a specified event occurs, (ii) termination for convenience that allows a party to end the contract without having to give a reason, and (iii) termination upon expiry of the term of the contract; the law, regarding contracts that are determinable, came up for consideration in **Indian Oil Corporation v. Amritsar Gas Service and Ors*:* (1991) 1 SCC 533**, wherein the Supreme Court held a contract would be determinable in nature if one of the clauses of the contract permitted either party to terminate the same without assigning any reason, and by sending a 30 day notice to the other party; the Madras High Court, in ***A Murugan and Others v Rainbow Foundation Ltd and Ors***: **2019 SCC OnLine Mad 37961**, had further elaborated on the aspect of determinable contracts; for the purpose of ascertaining determinability, the court bifurcated contracts into several categories: (i) contracts that are unilaterally and inherently revocable or capable of being

dissolved such as licenses and partnerships at will; (ii) contracts that are terminable unilaterally on a "without cause" or "no fault" basis; (iii) contracts that are terminable forthwith for cause or that cease to subsist "for cause", without a provision for remedying the breach; (iv) contracts which are terminable for cause subject to a breach notice being issued and an opportunity to cure the breach being given; and (v) contracts without a termination clause, which could be terminated for breach of a condition but not a warranty, as per applicable common law principles; the Madras High Court further held that the above mentioned (iii), (iv) and (v) categories of contract were not determinable contracts; and although (iv) and (v) categories were *terminable,* yet the same could not be said to be in nature *determinable*; in ***Narendra Hirawat & Co. v. Sholay Media Entertainment Pvt. Ltd:*** **(2020) SCC OnLine Bom 391**, the Bombay High Court observed that the phrase *"a contract which is in its nature determinable"* would mean a contract which is determinable at the sweet will of a party to it, without reference to the other party or without reference to any breach committed by the other party or without any eventuality or circumstance; in other words, the phrase would contemplate a *unilateral right* in a party to a contract to determine the contract without assigning any reason; the Delhi High Court, in ***DLF Home Developers Limited v. Shipra Estate Limited***: **2021 SCC OnLine Del 4902**, held that the question whether a contract is in its nature determinable must be answered by ascertaining whether the party, against whom it is sought to be enforced, would otherwise have the *right to terminate or determine* the contract when the other party is willing to perform and is not in default; in other words, where a contract cannot be terminated so long as the other party remains willing to perform its part, such a contract is not determinable and, in equity, is specifically enforceable; in ***Affordable Infrastructure & Housing Projects (P) Ltd. v. Segrow Bio Technics India (P) Ltd:*** **2022 SCC OnLine Del 4436**, the Delhi High Court observed that almost all contracts can be terminated by a party, if the other party fails to perform its obligations, and such contracts cannot be stated to be determinable solely because it can be terminated

by a party if the other party is in breach of an obligation; the non-defaulting party would in equity be entitled to seek performance of that contract; the question whether a contract is in its nature determinable must be answered by ascertaining whether the party against whom it is sought to be enforced would otherwise have a right to terminate or determine the contract, even though the other party is ready and willing to perform the contract and is not in default; and the Bombay High Court, in ***Kheoni Ventures (P) Ltd. v. Rozeus Airport Retail Ltd:*** **2024 SCC OnLine Bom 773**, observed that, in order to arrive at the conclusion whether or not a contract was determinable, it should be ascertained whether the parties had the *right to terminate* it on their own, without the stipulation of any contingency and without assigning any reason.

Adverting to the facts of the case before it, the Supreme Court, in **K.S. Manjunath And Others**, observed that the ATS in question did not contain any clause enumerating the events of default under which the ATS could be terminated; nor was it the case of the parties that time was made the essence of contract; there was nothing on record to indicate that the original vendors had performed their part of the obligation; and despite such stipulations, the original vendors issued the notice of termination dated 10.03.2003 upon the original vendees purporting to terminate the ATS on two grounds; the notice also called upon the original vendees to take back the earnest money paid and to treat the ATS as cancelled within one month, failing which the ATS would be deemed to have been cancelled and the original vendors would be at liberty to deal with the land.

The Supreme Court, in **K.S. Manjunath And Others,** found it difficult to accept that either of the grounds constituted a valid basis for terminating the ATS; the pendency of a civil suit and an order of *status quo* therein could not by itself frustrate the ATS; since the original vendees had no role to play in the institution or continuance of the Original Suit, they could not have been made to suffer the

consequences of a litigation to which they were complete strangers; likewise, the death of one of the original vendors did not and could not have absolved the other remaining vendors of their obligations; the legal heirs could have very well stepped into the shoes of the deceased vendor and performed the contract; the reasons assigned, therefore, appeared not only tenuous but also wholly extraneous to the obligations of the original vendors; the original vendees immediately responded to the notice of termination by way of their detailed reply dated 21.03.2003 denying the validity of the termination and refuted the grounds stated therein; in the reply, the original vendees asserted that they had already performed their obligations by making substantial payment etc; they further made it clear that in such circumstances there was no question of refund of earnest money; despite such a categorical stance of the original vendees, no response was sent by the original vendors to further assign reasons or substantiate the termination; the original vendors chose to remain silent; and this conduct on the part of the original vendors could not be countenanced as a *bona fide* exercise.

The Supreme Court, in **K.S. Manjunath And Others,** was of the view that the ATS being non-determinable in nature, no unilateral expression of termination could have lawfully extinguished the obligations undertaken thereunder; the grounds cited in the notice of termination were pressed into service more as a matter of convenience to the original vendors rather than as a consequence of any breach or failure attributable to the original vendees; the pendency of an earlier suit and the death of one of the vendors were circumstances wholly extraneous to the performance of the ATS and incapable in themselves of furnishing a lawful foundation for termination; such grounds merely afforded a convenient pretext to the original vendors to disown their obligations; and the law ought not be read in a manner to permit the original vendors to invoke convenience as a cloak for such unilateral cancellation of the ATS.

After distinguishing the judgement in ***I.S. Sikandar*** on facts, the Supreme Court, in **K.S. Manjunath And Others**, further observed that the case before it stood on an entirely different footing; the alleged termination was not preceded by any call upon the original vendees to perform their obligations nor was any opportunity granted to the original vendees to tender the balance sale consideration or secure execution of the sale deed; on the contrary, the original vendors sought to terminate the ATS citing reasons entirely extraneous to the performance of the original vendees; in ***I.S. Sikandar,*** the termination was an outcome of the purchaser's repeated failure to perform his contractual obligations despite reminders and extensions, thereby rendering the agreement determinable. In contrast, the termination in the present case was a unilateral act of convenience on the part of the original vendors unconnected with any default on the part of the original vendees in the performance of ATS; this unilateral termination was effected without any preceding notice, without opportunity to the original vendees of further performance, and without refund of earnest money; as explained in ***Brahm Dutt***, unilateral cancellation of an agreement to sell is impermissible except where the agreement is determinable within the meaning of Section 14 of the Act of 1963; and this principle now stands affirmed by the Supreme Court also in ***Balwinder Sarpal*** and ***S.K. Ravichandran*** respectively.

On perusal of the clauses of the ATS, the Supreme Court, in **K.S. Manjunath And Others,** observed that none of the terms thereof conferred upon either party any right to unilaterally terminate or rescind the contract, whether for cause, for convenience, or on the happening of any contingency; the ATS was not a contract conferring any right upon either party to bring it to an end at will; its life and performance were tethered to the completion of certain obligations; none of the clauses of the ATS envisaged that the same could be terminated on any cause or no-cause basis, much less that the original vendors could retain the amounts already paid by the original vendees; in ***A. Murugan,*** the Madras High Court had categorised contracts into five broad

classes depending on their ease of determinability; out of those, the first two i.e., (i) contracts inherently revocable such as licences and partnerships at will, and (ii) contracts terminable unilaterally on a "without-cause" basis, were held to be determinable in nature; the remaining classes, namely, (iii) contracts terminable for cause without provision for cure, (iv) contracts terminable for cause with notice and opportunity to cure, and (v) contracts without a termination clause but terminable only for breach of a condition, were all held not determinable in nature; further, as laid down in ***DLF Home***, the question whether a contract is in its nature determinable lies in ascertaining whether the party against whom specific performance is sought had the right to terminate the contract even when the other party was ready and willing to perform; this meant that, if the contract could not be terminated so long as the other party stands willing to perform, it is not determinable in its nature and would, in equity, be specifically enforceable; the same reasoning was followed in ***Affordable Infrastructure***, where it was held that a contract terminable for breach cannot merely for that reason be regarded as determinable, otherwise, no contract could ever be specifically enforced; applying these principles, the ATS in the present case could not be said to be a determinable contract; viewed in light of the classification as set out in ***A. Murugan***, the ATS would squarely fall within category (v) as mentioned above; the ATS was devoid of any clause enabling termination for convenience or otherwise empowering either party to terminate unilaterally; the only conceivable circumstance in which ATS could be brought to an end in the present case was upon a breach of a condition by either of the parties; thus, the original vendors did not possess any contractual right to terminate the ATS in the absence of default by the original vendees; the grounds cited in the notice of termination could not be said to be based on any default or breach by the original vendees; the original vendees had performed their part by paying a substantial amount; and they were also ready and willing to perform the terms of ATS.

b. PRINCIPLES GOVERNING UNILATERAL TERMINATION OF THE PPA:

The following principles of law govern unilateral termination of an agreement: (i) unilateral termination of the agreement by one party is impermissible in law except in cases where the agreement itself is determinable in nature in terms of Section 14 of the Specific Relief Act, 1963; (ii) If such unilateral termination of a non-determinable agreement is permitted as a defence, then virtually every suit for specific performance can be frustrated by one party by placing an unfair burden on the other party to the agreement, who despite performing his part of the obligations and having showcased his readiness and willingness, would be required to also seek a separate declaration that the termination was bad in law; in such cases, the burden cannot be cast upon the other party to challenge the alleged termination of the agreement; where a party claims to have valid reasons to terminate or to rescind a non-determinable agreement, it should be the terminating party, if at all, which, with a view to err on the side of caution, should ideally approach the court and obtain a declaration as to the validity of such termination or rescission, and not the non-terminating party; however, this would not mean that the defendant (the terminating party) in such cases would be mandatorily required to seek a declaration because Sections 27 and 31 of the Specific Relief Act, 1963 respectively, while using the phrase “may sue”, merely give an option to any person to have the contract rescinded or adjudged as void or voidable; (iii) once the alleged termination of a non-determinable agreement is found to be not for *bona fide* reasons, and as being done in a unilateral manner on the part of one of the parties, it cannot be said that any declaration, challenging the alleged termination, was required to be sought by the other party; (iv) If a contract itself gives no right to unilaterally terminate the contract or such right has been waived, and a party still terminates the contract unilaterally, then that termination would amount to a breach by repudiation, and the non-terminating

party can directly seek specific performance without first seeking a declaration; and (v) in the event, it is found that termination of the agreement by a party was not valid, then such an agreement will remain subsisting and executable. (**K.S. Manjunath And Others V. Moorasavirappa Muttanna Chennappa Batil (Judgement in Civil Appeal No. 13507–13508 OF 2025 dated 10.11.2025): 2025 INSC 1298);** ***Annamalai v. Vasanthi***: **2025 SCC OnLine SC 2300**).

In cases where the contract does not contain a termination clause, it is only if a party fails to discharge its obligations thereunder, can the other party then be entitled to terminate the contract. In order to ascertain whether a contract is in its nature determinable, it must be enquired whether a party has the right to terminate the contract even when the other party is ready and willing to perform his obligations thereunder. If the contract cannot be terminated, so long as the other party is willing to perform its obligations under the said agreement, it is not determinable in its nature.

It is not in dispute that the PPA dated 10.04.2007 does not contain a termination clause. It is also not in dispute that termination of the said PPA by MSEDCL, by way of its letter dated 08.05.2014, is unilateral. As noted hereinabove, the two grounds, which formed the basis of termination of the PPA dated 10.04.2007, by way of the letter of MSEDCL dated 08.05.2014, are (1) the last Gas Supply Agreement approved by MSEDCL expired on 31.03.2014 and there was no Gas Supply Agreement approved by MSEDCL, as required under Clause 5.9 of the PPA, thereafter; and (2) purchase of power by MSEDCL from RGPPL, at an abnormally high rate, would result in a tariff shock to its consumers. As detailed hereinabove, while the first ground was rejected by the CERC in its order in Petition No.166/MP/2012 dated 30.07.2013, thereafter by this Tribunal in Appeal No. 261of 2013 dated 22.04.2015, and ultimately by the Supreme Court in its order in Civil Appeal

No.1922 of 2023 dated 09.11.2023, the second ground has been rejected by this Tribunal in its order in Appeal No. 261of 2013 dated 22.04.2015.

As held by the Supreme Court, in **K.S. Manjunath And Others,** if such unilateral termination of a non-determinable agreement is permitted to be taken as a defense by MSEDCL, that too for reasons which have been explicitly rejected by the CERC, this Tribunal and the Supreme Court, then they would be permitted to gain an undue advantage, and an unfair burden would be placed on RGPPL which, despite performing its contractual obligations and having expressed its readiness and willingness to continue doing so, would still be required to seek a separate declaration that the termination of the PPA was bad in law. As emphasized in **K.S. Manjunath And Others,** in such a situation, the burden ought not be placed on RGPPL to challenge termination of the PPA. On the contrary, it is MSEDCL which should, ideally, have approached the CERC seeking a declaration as to the validity of such termination, and not RGPPL.

The Supreme Court, in **K.S. Manjunath And Others,** distinguished the earlier judgement in ***I.S. Sikandar,*** holding that the factual foundation in the said judgement was materially distinct from the circumstances of the case before it, and the ratio thereof was inapplicable; in ***I.S. Sikandar***, the purchaser had defaulted in performing his part of the contract despite being afforded multiple opportunities by the vendors; the vendors therein had, by way of a legal notice, specifically called upon the purchaser to tender the balance sale consideration and complete execution of the sale deed within a stipulated period; upon the purchaser's failure to comply, the vendors further extended the time, coupled with a caveat that if the purchaser did not perform his obligations by the extended date, the agreement would stand terminated; it was only after the purchaser again defaulted, despite such repeated opportunities, that the vendors had terminated the agreement; and, in such circumstances, the Supreme Court, in ***I.S. Sikandar***, had held that the purchaser could not maintain a suit for specific performance

without first seeking a declaration that the termination was invalid, since by his own conduct he had allowed the agreement to become determinable and its termination was rooted in his own breach.

In the present case the very basis for termination of the PPA dated 10.04.2007, as stated in MSEDCL's letter dated 08.05.2014, has been rejected by the CERC, this Tribunal and the Supreme Court, and these orders have attained finality; akin to the Appellants in **K.S. Manjunath And Others,** who had sought specific performance of the Agreement, RGPPL had, in Petition No.166/MP/2012 filed by it before the CERC, prayed that the Commission resolve the issues arising out of non-availability of domestic gas of the required quantum and the reservations of beneficiaries (including MSEDCL) to allow RGPPL to enter into contracts for available alternate fuel i.e. RLNG and the consequences thereof; and to direct the beneficiaries (including MSEDCL) to pay the fixed/capacity charges due to RGPPL. The claim of RGPPL for payment of fixed/capacity charges was in terms of the PPA dated 10.04.2007, and RGPPL had sought interpretation of the relevant clauses of the said PPA, and for MSEDCL to perform its obligations under clauses 4.3 and 5.2 of the said PPA. Long before the PPA was terminated by letter dated 08.05.2014, RGPPL had, by filing Petition No. 166/MP/2012 before the CERC, in effect sought a direction to MSEDCL to specifically perform its obligations, under clauses 4.3 and 5.2 of the PPA dated 10.04.2007, to pay the fixed/capacity charges due to RGPPL. Unlike in ***I.S. Sikandar,*** where the termination was an outcome of the purchaser's repeated failure to perform his contractual obligations despite reminders and extensions, thereby rendering the agreement determinable, termination of the PPA, in the present case, was a unilateral act of convenience on the part of MSEDCL unconnected with any default on the part of RGPPL in the performance of its obligations under the PPA.

As held in **K.S. Manjunath And Others,** following **Brahm Dutt**, unilateral cancellation of an agreement is impermissible except where the agreement is determinable within the meaning of Section 14 of the Specific Relief Act, 1963 or where the party which has suffered such termination has defaulted in complying with its contractual obligations. In cases where the agreement is non-determinable in nature, no unilateral expression of termination would lawfully extinguish the obligations undertaken thereunder especially when the party, which has suffered the termination, has not contravened any provisions of the agreement and has been ever ready and willing to perform its' obligations under the said agreement. Not unlike in **K.S. Manjunath And Others,** the grounds cited by MSEDCL, in the letter of termination dated 08.05.2014, were held by the CERC, this Tribunal and the Supreme Court, as not amounting to acts of breach or failure attributable to RGPPL, and were therefore incapable of furnishing a lawful foundation for termination of the PPA; such grounds merely afforded a convenient pretext to MSEDCL to disown their obligations under the said PPA; and the law ought not be read in a manner to permit MSEDCL to invoke convenience as a cloak for such unilateral termination of the PPA. Reliance placed, on behalf of MSEDCL, on ***I.S. Sikandar*****,** is therefore of no avail.

Having acted in flagrant violation of the binding order of the CERC in Petition No.166/MP/2012 dated 30.07.2013, in terminating the PPA by letter dated 08.05.2014 on the very same ground which was earlier rejected by the CERC in its order dated 30.07.2013, MSEDCL cannot now be heard to contend that even if termination of the PPA is void, it is required to be so declared by a competent Tribunal ie the CERC on a petition filed by RGPPL seeking such a declaration; and it is not permissible for RGPPL to ignore the same merely because in its opinion termination of the PPA, vide MSEDCL's letter dated 08.05.2014, is void. Reliance placed, on behalf of MSEDCL, on **Krishnadevi Kamathia v. Bombay Environmental Action Group, (2011) 3 SCC 363,** is wholly misplaced.

XX. ABSENCE OF A TERMINATION CLAUSE IN THE PPA: ITS EFFECT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT MSEDCL:

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, would submit that the key contention raised by the 2nd Respondent in the Petition, wherein the order dated 30.07.2013 was passed, was that the said termination is invalid as the PPA did not contain any termination clause; without prejudice to the submission that any challenge to the termination on any ground whatsoever is now barred by limitation, even on merits the said contention of the 2nd Respondent is without any basis and is contrary to settled law; and it is settled law that all commercial contracts are inherently determinable in nature, and absence of an express termination clause is immaterial (**Rajasthan Breweries itd. v. Stroh Brewery Company, 2000 (55) DRJ (DB) 68; Chaurangi Builders and Developers Pvt. Ltd. v. Maharashtra Airport Development Company Ltd., 2013 SCC Online Bom 15**).

B. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT MSEDCL:

1. In **Rajasthan Breweries itd. v. Stroh Brewery Company, 2000 (55) DRJ (DB) 68,** the appeals before the Division Bench of the Delhi High Court were preferred against the order passed by the Single Judge dismissing the application filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996 seeking ad interim temporary injunction staying the two notices of termination of two agreements, and also restraining the respondent from executing any fresh contract of a similar nature with any third party. The Appellant's application was dismissed on the ground that the injunction prayed for was statutorily prohibited on a conjoint reading of Section 41 and Section

14(i)(c) of the Specific Relief Act since the contracts in question were determinable in nature.

The appellant's case was that the contracts in question were not determinable in nature as contemplated by Section 14(i)(c) of the Specific Relief Act since there was no clause in the agreement, which permitted the respondent to terminate the agreements by giving a notice of a few days; the contracts, which were determinable in nature, had always been understood to mean those contracts, which could be put to an end by sending a notice of a few days; the contracts in question did not contain such a clause; to the contrary, the subject contracts specifically stated and recognised that the respondent had granted to the appellant an exclusive license to produce Stroh Bee for a term of seven years, which term was renewable successively for a period of three years at each time; if the decision rendered by the Single Judge wats taken to be the correct law, then in almost all commercial contracts the remedy of injunction would be barred.

The appellant had filed a petition under Section 8 of the Arbitration and Conciliation Act, 1996 seeking reference of disputes mentioned in the petition for adjudication through the process of arbitration. Simultaneously, an application under Section 9 of the Act for ad interim temporary injunction was also filed. The cause of action is stated to have arisen to the appellant, to file the aforementioned applications, on the respondent's issuing letters terminating both the agreements on the ground that the appellant had failed to meet the respondent's quality and standards, inconsistent production resulting in frequent product shortages in the market, late and insufficient payment of dues due to respondent under the agreement and apparent insolvency of the appellant. The appellant's case was that the grounds stated in the letter terminating the agreement were non-existent and were false; and because of the action on the part of the respondent terminating the agreement disputes

had arisen requiring reference and adjudication in accordance with the terms of agreement.

The Single Judge considered the preliminary objection raised on behalf of the respondent of the bar contained in Section 14(i)(c) read with Section 41(1) of the Specific Relief Act, which was upheld and on that basis application for interim relief was dismissed.

It is in this context that the Division Bench held that the application filed by the appellant, which had given rise to the instant appeal, was presented under Section 9 of the Act which enabled a party before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced, in accordance with Section 36, to apply to a Court, amongst others, for an interim measure or protection in respect of any of the matters enumerated in clauses (a) to (e), one of which is “such other, interim measure or protection as may appear to the Court to be just and convenient”; Section 9 of the Act says that the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it; the application by the appellant was filed under Section 9 of the Act prior to commencement of the arbitration proceedings; the effect of breach of a contract by a party seeking to specifically enforce the contract under the Indian law is enshrined in Section 16(c) read with Section 41(e) of the Specific Relief Act, 1963; clause (e) of Section 41 of the Specific Relief Act provided that injunction cannot be granted to prevent the breach of contract, the performance of which would not be specifically enforced; clause (c) of Section 41 enumerated the nature of contracts, which could not be specifically enforced; clause (c) to sub-section (1) of Section 14 stated that a contract which is in its nature determinable cannot be specifically enforced; the Single Judge thus was justified in holding that, if it was found that a contract which by its very nature was determinable, the same not only could not be enforced but in respect of

such a contract no injunction could also be granted and this was the mandate of the law; this, however, was subject to an exception, as provided in Section 42, that where a contract comprised an affirmative agreement to do a certain act coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting and injunction to perform the negative agreement; and the Single Judge had considered various covenants of the agreement, and had extracted clauses relating to Technical Assistance Agreement under which the respondent could terminate the contract.

The Division Bench, after noting that it was taken through various clauses and it was not disputed and had also rightly been pointed out by the Single Judge that there was no negative covenant in the agreements in question, observed that as there was no negative covenant, it was observed by the Single Judge that agreements could be terminated by the respondent on the happening of any of the events mentioned in clause 8 of the Technical Assistance Agreement and under similar corresponding clause in the Technical Know-how Agreement; and, accordingly, the Single Judge had held that, since the agreement was determinable at the behest of the respondent, the same was determinable in nature and was revocable at the option of both the parties at the happening of any of the events mentioned therein.

The Division Bench expressed its inability to accept the submissions put forth on behalf of the appellant that when a contract is determinable by the parties, the same cannot be treated as a contract referred to in clause (c) to sub-section (1) of Section 14, a contract which in its nature is determinable; the agreements in the instant case were also terminable by the respondent on happening of certain events; while the question whether termination was wrongful or not, whether the events have happened or not, and whether the

respondent is or is not justified in terminating the agreement are yet to be decided, there was no manner of doubt that the contracts were, by their nature, determinable.

The Division Bench further held that, even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which was a private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice; at the most, in case ultimately it was found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and, in that view of the matter, the Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement; such an injunction was statutorily prohibited with respect of a contract, which was determinable in nature; the application being under the provisions of Section 9(ii)(e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(i)(c) read with Section 41 of the Specific Relief Act; and it was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which was otherwise determinable in respect of which the prayer was made specifically to enforce the same.

2. In **Chaurangi Builders and Developers Pvt. Ltd. v. Maharashtra Airport Development Company Ltd., 2013 SCC Online Bom 1530,** the Bombay High Court held that, in its prima facie view, the respondent was justified in terminating the contract; even though there was no provision in the contract entered into between the parties permitting either party to terminate the contract, since events of default on the part of one party had already

occurred, other party was entitled to terminate the contract under the provisions of the Indian Contract Act; if the submission of the petitioner was accepted, in the absence of a specific clause permitting either of the party to terminate the contract even if breaches were committed was accepted, no contract could be terminated even if one party had committed breach and the other party would have to continue his contractual rights; in such a situation, the provisions of the Indian Contract Act would be attracted; and, in its prima facie view, the respondent was justified in terminating the contract.

C. ANALYSIS:

It is not in dispute that the subject PPA does not contain a termination clause. The effect of absence of such a clause in the PPA, more so when RGPPL, which has suffered as a consequence of such termination, has always been ready and willing to perform its obligations under the PPA, was considered by the Supreme Court in **K.S. Manjunath & others,** which judgement has been considered in great detail under the earlier head.

In the present case, not only is there no termination clause in the PPA dated 10.04.2007, but RGPPL also claims to be ever ready and willing to perform its obligations of supplying power, under the said PPA, to MSEDCL using R-LNG as the primary fuel. Supply of power by RGPPL, on such power being scheduled by MSEDCL, would require the latter, in terms of the PPA dated 10.04.2007, not only to pay capacity/fixed charges but also variable charges for the quantum of power supplied by RGPPL. Failure to schedule power would confine MSEDCL's financial liability, under the PPA dated 10.04.2007, only to payment of capacity/ fixed charges. The very premise, on which the Letter of Termination dated 08.05.2014 is based, has been rejected by the CERC, this Tribunal and the Supreme Court in the earlier round of litigation. It is impermissible for MSEDCL, in such circumstances, to again start a fresh round of litigation seeking to have the issue re-opened by now

contending, after more than a decade, that the PPA it had terminated on 08.05.2014, required RGPPL to subject its validity to challenge before the CERC, and their failure to do so is fatal. In the light of the subsequent judgement of the Supreme Court, in **K.S.Manjunath & others,**, reliance placed on behalf of the Appellant-MSEDCL on the earlier High Court judgements, in **Rajasthan Breweries itd. v. Stroh Brewery Company, 2000 (55) DRJ (DB) 68** and **Chaurangi Builders and Developers Pvt. Ltd. v. Maharashtra Airport Development Company Ltd., 2013 SCC Online Bom 15,** is misplaced and is of no avail.

XXI. SHOULD THE 2ND RESPONDENT HAVE SOUGHT A DECLARATION THAT THE PPA IS STILL SUBSISTING?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT MSEDCL:

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, would submit that, on the basis of a non-existing agreement, the 2nd Respondent ought not claim capacity charges; therefore, the proceedings before the CERC in the Petition had to be confined to the period ending 31.03.2014; any claim for capacity charges beyond that date would amount to seeking specific performance of the PPA, which had already been terminated; if the 2nd Respondent intended to assert that the PPA was still subsisting, they ought to have sought a declaration that the termination was invalid and, consequently, claimed capacity charges on that basis; hence, the claim for capacity charges beyond 2014 is not maintainable in the absence of such a declaration; and in a catena of decisions it has been held that a subsequent event may give rise to a fresh cause of action and, when a fresh cause of action arises, the principle of res judicata will have no application. Reliance is placed on the following judgements on this issue: (a) **Shamanur Sugars Limited v. BESCOM, 2014 SCC OnLine APTEL 6**; (b) **Thakuruddin**

Ramjash v. Sourendra Nath Mukherjee, 1981 SCC OnLine Cal 200; and (c) **Mudunuri Subbaraju v. State of Andhra Pradesh** (Andhra Pradesh High Court), 1988 SCC OnLine AP 23.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT-RGPPL:

Sri C. A. Sundaram, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that it is incorrect for MSEDCL to contend that RGPPL should start a fresh round of litigation seeking to negative the alleged termination of the PPA by MSEDCL and unless this is done, there is a finality to the termination; RGPPL has repudiated the termination by its letter dated 22.05.2014 and continued to honor the PPA without committing any default; and reliance placed by MSEDCL on **Shamanur Sugars Limited Judgement 2014 SCC OnLine APTEL 6** and the **Sushma Rameshwar Ubale Judgement 2011 SCC OnLine Born 253** are misplaced since it requires this Tribunal to hold that the termination, which was for identical reasons of interpretation of Article 4.3 and 5.9 of the PPA, was a separate cause of action.

C. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT MSEDCL:

1. In **Shamanur Sugars Limited v. BESCOM, 2014 SCC OnLine APTEL 6**, this Tribunal held that it was settled law, as held in **State of Haryana v. M.P. Mohla, (2007) 1 SCC 457 and Uma Shanker v. Sarabjeet, (1996) 2 SCC 371**, that the subsequent event may give rise to a fresh cause of action and, when such a fresh cause of action arises, the principle of res-judicata will have no application; Limitation Act would not apply to authorities other than courts; therefore, this claim cannot be rejected on the basis of the Limitation Act; but it was settled law that, if there were any latches on the part of the party in

approaching the State Commission which lacked bona fides, the same may be considered for deciding the right of the party.

2. In **Thakuruddin Ramjash v. Sourendra Nath Mukherjee: 1981 SCC OnLine Cal 200,** the Division Bench of the Calcutta High Court, after noting that the lease executed in the defendant's favour regarding the disputed land along with the structures was for a period of 15 years expiring on 31st December, 1964 which period was over, and while the previous suit was filed there was no decision in that case, held that, simply because the previous suit was filed, there cannot be any question of res judicata; in **V. Das v. Madanlal: AIR 1970 SC 987,** it has been stated that mere identity of some issues will not do; the cause of action and relief claimed in the second suit must be the same as the first one; the cause of action of the first suit was the alleged determination of the lease; but a new cause of action arose after the determination of the lease on 31-12-1964 by efflux of time, within the meaning of Cl. (a) of S. 111 of the T.P. Act.

3. In **Mudunuri Subbaraju v. State of Andhra Pradesh** (Andhra Pradesh High Court), **1988 SCC OnLine AP 23**, the Division Bench of the Andhra Pradesh High Court found it hard to accede to the submission that the cause of action had arisen to the petitioners on the day when the aforesaid writ petition was filed to contend that Section 6 declaration, if it was published beyond three years, shall be illegal and invalid, thereby rendering the Section 4 (1) notification itself liable to be quashed, and since that ground was available to the petitioners on the day when the earlier writ petition came up for final hearing, viz., 31-12-1985, and inasmuch as the petitioners had failed to raise the same, the bar of constructive res-judicata operated, and the petitioners were precluded from raising the said ground now.

While holding that this contention was highly misconceived, the Andhra Pradesh High Court observed that no cause of action could be said to have

arisen to the petitioners on the day when the earlier writ petition was filed; the cause of action, if any, could be said to have arisen for the first time on 23-9-1984 when the Amendment Act 68 of 1984 came into being, by virtue of which, for the first time, it was made obligatory on the part of the authorities concerned to issue the Section 6 declaration within three years from the date of the draft notification issued under Section 4 (1) of the Act, and therefore a fresh cause of action had arisen to the petitioners on 23-9-1984; they could have as well, if so advised, filed a fresh writ petition; they could have even, if they so desired, raised a new ground with the permission of the court; but their failure to do so could not be said to come within the mischief of Explanation 4 to Section 11 C.P.C; the principle of "might and ought to have been raised", as postulated under Explanation 4, must be held to be one with reference to the cause of action said to be available at the time when the lis commences, and not at the time when the lis comes up for final hearing; and, if that be so, it would still be open to the petitioners to raise the said plea even in this writ petition for the first time challenging the legality of the Section 4 notification itself, as admittedly the Section 6 declaration in this case had been published beyond three years from the date of sec, 4 (1) notification.

D. ANALYSIS:

As detailed under the earlier heads, the earlier proceedings constitute res judicata. It is un-necessary for us, therefore, to delve any further into the question whether or not RGPPL should have sought a declaration when we have already held that MSEDCL ought to have amended its Appeal No.261 of 2013, and should have raised an additional ground therein that they were not liable to pay fixed/capacity charges also because they had terminated the PPA vide letter dated 08.05.2014.

Even otherwise, as noted under the earlier head, the law laid down by the Supreme Court, in **K.S. Manjunath And Others,** would require us to hold

that, if such unilateral termination of a non-determinable PPA is permitted as a defence by MSEDCL, that too for reasons which have been explicitly rejected by the CERC, this Tribunal and the Supreme Court, then an unfair burden would be placed on RGPPL which, despite performing its part of the obligations and having always expressed its readiness and willingness to do so, would still be required to further seek a separate declaration that the termination of the PPA, vide letter dated 08.05.2014, is illegal; in such a situation, the burden ought not be placed on RGPPL to challenge termination of the PPA; and, on the other hand, it is MSEDCL which should, ideally, have approached the CERC seeking a declaration as to the validity of such termination.

XXII. ARE THE CLAIMS OF THE 2ND RESPONDENT, FOR THE PRE-TERMINATION PERIOD, MISCONCEIVED?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT MSEDCL:

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, would submit that, even in respect of invoices raised for periods prior to termination of the PPA, viz. FY 2013-14, the Appellant is not liable to pay the sum of Rs. 1400 Crore, or any other sum claimed by the 2nd Respondent; any liability of the Appellant for such period stands discharged by virtue of various concessions granted to the 2nd Respondent by the Appellant and the Government of Maharashtra, in furtherance of the minutes of the meeting held at the Hon'ble Prime Minister's Office on 17.08.2015, and the various payments to the tune of over Rs. 972 Crore, which the Appellant was constrained to make to avoid regulation of its open access under the LPS Rules; the 2nd Respondent's claim for LPS on the said invoices is also grossly misplaced, as it was decided that the GoM had agreed to support the 2nd Respondent in the revival of its project to supply power to the Indian Railways

on the clear understanding that the past claims of the 2nd Respondent shall be kept in abeyance.

B. ANALYSIS:

On the issue relating to the claims of the 2nd Respondent for the pre-termination period which the Appellant contends is misconceived and without any basis, we had, in the daily proceedings dated 31.10.2025 in the present appeal, recorded the submission of Shri C. S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, that, while the submissions under this head were not being given up by MSEDCL, the Appellant-MSEDCL did not seek adjudication on this aspect in the present appellate proceedings instituted against the orders of the CERC, since this issue is pending adjudication before the Supreme Court in Civil Appeal No.4286 of 2025 preferred by the Appellant-MSEDCL against the order passed by this Tribunal in EP No. 12 of 2023 dated 17.01.2025. In the light of this submission of Shri C. S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, it is unnecessary for us to examine these aspects in the present appellate proceedings.

XXIII. NON-CONSIDERATION OF IA SEEKING AMENDMENT AND WHETHER THE CLAIMS AND INVOICES RAISED BY THE 2ND RESPONDENT ARE VOID AND ILLEGAL EVEN AS PER THE PROVISIONS OF THE TERMINATED PPA:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT MSEDCL:

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, would submit that the Appellant had also filed I.A. No. 99/IA/2024 in Petition No. 276/MP/2024, seeking to amend the Petition to add an additional ground that the invoices are also illegal as they are in

contravention of Articles 2.2.2 and 2.2.3 of the terminated PPA and Rule 9 of the LPS Rules, which required the 2nd Respondent to adjust the surplus gains, over and above energy charges made by it while selling power to third parties, from any claims towards capacity charges from the Appellant; the said Amendment Application was filed even prior to the commencement of arguments in the matter; the Impugned Order suffers from serious procedural lapses since the CERC has failed to render any dispensation in regard to the Amendment Application; despite listing of the Amendment Application for hearing before the CERC on 09.12.2024 and on 16.01.2025, reply to the said Amendment Application being filed by the 2nd Respondent on 16.12.2024, and a Rejoinder thereto being filed by the Appellant on 03.01.2025, the CERC has failed to render any finding regarding the said application in the Impugned Order; non-consideration of the averments in the said Amendment Application, despite its being listed on more than one occasion before the CERC, goes to the root of the matter; and passing of the Impugned Order, without considering the Amendment Application, is a serious procedural lapse and an ex-facie violation of principles of natural justice, rendering the Impugned Order a nullity, and is liable to be set aside.

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, would further submit that, strictly in the alternative and without prejudice to the foregoing fact that the PPA has been terminated, it is also the Appellant's case that the said invoices are also illegal and bad in law as the 2nd Respondent has failed to comply with the provisions of even the terminated PPA, which it has been seeking to illegally enforce; any invoices raised under the terminated PPA ought to have been in line with Clause 2.2.3 thereof; Clause 2.2.3 of the terminated PPA categorically states that, in case of default in payment of bills beyond 90 days from the presentation of bills, the 2nd Respondent may re-allocate power to other parties under the aegis of the Government of India at the risk and cost of the Appellant; however, the said

clause also states that the Appellant shall be liable to pay capacity charges, to the 2nd Respondent, only till the time power is re-allocated to a third party; Clause 2.2.3 further provides that the surplus over the energy charges recovered from sale of such power to other parties shall be adjusted against the capacity charge liability of the Appellant; the 2nd Respondent re-allocated power to the Indian Railways in 2015, thus triggering the applicability of Clause 2.2.3 of the PPA; the 2nd Respondent has, thereafter, also been selling power on the trading exchange which must also be accounted for in terms of Clause 2.2.3; the 2nd Respondent has failed to make any such adjustment in its illegal invoices raised on the Appellant, as was required to be done even as per the terminated PPA; and the aforesaid legal position is also endorsed by the legal opinion dated 16.12.2024 issued by the Attorney General of India on the aforementioned issue.

Sri C.S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, would also submit that, in addition to the aforesaid non-compliance with the provisions of the terminated PPA, the 2nd Respondent has also failed to give effect to the tariff order dated 08.03.2021 passed by the CERC in Petition No. 434/GT/2020, truing-up the tariff for FY 2014-2019 control period, and also the order dated 25.10.2021 passed by the CERC in Petition No. 410/GT /2020, by which the CERC determined the tariff for FY 2019 - 2024 control period; the 2nd Respondent has not disputed the afore-mentioned contentions of the Appellant, and has merely stated that the afore-mentioned issues are the subject matter of reconciliation; and such admission by the 2nd Respondent conclusively demonstrates that it has only selectively sought to apply the provisions of the terminated PPA by not making the necessary adjustment as required under Article 2.2.3 of the PPA, and has failed to even comply with the tariff orders passed by the CERC, rendering its invoices and claims non-est and void on this account as well.

B. SUBMISSIONS URGED ON BEHALF OF THE 2ND RESPONDENT-RGPPL:

Shri C. A. Sundaram, Learned Senior Counsel appearing on behalf of the 2nd Respondent-RGPPL, would submit that the very same issues are under examination by the Supreme Court in Civil Appeal No. 4286 of 2025 filed against the order passed by this Tribunal in EP No. 12 of 2023 dated 17.01.2025; and, since this issue is under consideration by the Supreme Court, the Appellant cannot, simultaneously, raise this issue before this Tribunal.

C. ANALYSIS:

Para 17 of the impugned order passed by the CERC, in Petition No. 276/MP/2024 dated 12.06.2025, refers to what transpired during the hearing held on 09.12.2024. It is recorded therein that the Learned Senior Counsel appearing on behalf of MSEDCL had pointed out that, while IA No. 99 of 2024 was filed seeking to amend the petition and since reply has been filed by the Respondent-RGPPL, MSEDCL may be granted two weeks' time to file its rejoinder; Learned Senior Counsel for the Respondent-RGPPL did not oppose the said request of MSEDCL, but had pointed out that the reliefs sought for in the IAs were not maintainable being consequential in nature, which may arise only after a decision in the main petition; and he prayed that the Commission may dispose of the main petition after hearing the parties. It is further recorded that the Commission, after hearing the Learned Senior Counsel for both sides, had permitted MSEDCL to file its rejoinder, and in response MSEDCL had filed its rejoinder vide affidavit dated 03.01.2025.

Para 19 of the impugned order records as to what transpired during the hearing held on 16.01.2025. It is recorded that, after hearing the Learned Senior Counsel on both sides at length, the Commission had reserved its orders in the petition; at the request of the Learned Senior Counsel, the

Commission had permitted the parties to file their respective notes of arguments; and, while MSEDCL filed its note of arguments dated 15.01.2025, RGPPL had filed its written submissions on 14.02.2025. Para 20(a) to (c) of the notes of arguments filed by MSEDCL have been extracted in the impugned order, which read thus:

"(a) As per the settled law, the principles of res-judicata have no application in respect of the issues arising out of a subsequent cause of action. The termination of the PPA was a subsequent event, which occurred after this Commission passed an order in the original proceedings, and as such, indisputably constituted a separate cause of action. Reliance placed on the judgments of the Hon'ble Supreme Court in ***(i) Shamanur Sugars Ltd v Bescom (2014 SCC Online APTEL 6), N. Suresh Nathan & ors v UOI & ors (2010) 5 SCC 962, Mudunuri Subbaraju V State of AP (1988 SCC Online AP 23), and Thakuruddin Ramjash v S.N Mukherjee (1981 SCC Online Cal 200).***

(b) It is also MSEDCL's case that the said invoices are also illegal and bad in law as RGPPL failed to comply with the provisions of the terminated PPAs, which it seeks to illegally enforce. Any invoices raised under the terminated PPA ought to have been in line with Article 2.2.3, which categorically states that in case of default in payment of bills beyond 90 days from the presentation of bills, RGPPL may re-allocate power to other parties under the aegis of the Govt of India at the risk and cost of MSEDCL. However, the said clause also states that MSEDCL shall also be liable to pay the capacity charges to RGPPL only till the time power is re-allocated to the third party. Article 2.2.3 further provides that the surplus over the energy charges recovered from the sale of such power to other parties shall be adjusted against the capacity charge liability of MSEDCL."

Para 43 of the impugned order records that an amount of Rs.471 Crores had been paid by MSEDCL to RGPPL in terms of the interim order. The CERC rejected the submissions of MSEDCL as not maintainable, and held that the PPA dated 10.04.2007 was valid even after 01.04.2014; RGPPL was entitled to claim the amounts outstanding from MSEDCL by uploading the bills in the PRAAPTI portal; and, consequent thereupon, the interim order, directing RGPPL not to take any coercive/ precipitative action against MSEDCL for recovery of the balance amounts, stands discharged.

The prayers sought by the Appellant-MSEDCL in Petition No.276/MP/2024 are: (a) declare that the invoices raised by Respondent No. 1 (RGPPL) against the Petitioner, (MSEDCL) as more specifically set out in ANNEXURE P-28 to this Petition, as void, non-est and illegal; (b) restrain Respondent No. 1 (RGPPL) from issuing any further invoices under the terminated PPA dated 10.04.2007 and from uploading any further invoices on the PRAAPTI portal, seeking payment thereof; (c) direct Respondents No. 2 and 3 to restore Petitioner's short-term access and full GNA; and (d) restrain the Respondents from taking any coercive steps against the Petitioner in furtherance of such impermissible, inapplicable, void, non-est and arbitrary invoices, including by way of regulation of GNA and open access under the framework of the LPS Rules.

IA No. 99 of 2024 was filed by MSEDCL requesting the Commission, among others, to take the information and documents, filed along with the said IA, on record. A copy of the amended petition, incorporating the amendments referred to in the IA, was also included along with the said IA. After referring to Order VI Rule 17 CPC, the Appellant-MSEDCL had submitted that permitting them to file these documents would avoid multiplicity of proceedings, save time and effort and cost of all the parties involved, as also the precious time of this Tribunal.

The 2nd Respondent filed its reply to the said IA contending, among others, that the application was not maintainable. It also addressed the Appellant's claim that RGPPL had earned/gained Rs.309 Crores during FY 2015-16 to FY 2023-24 from sale of power to third parties. They also stated that the allegation, that they had failed to give effect to the order passed by the CERC on 08.03.2021 and 25.10.2021, was the subject matter of reconciliation; under the guise of seeking amendment of pleadings, the Appellant could not set up a new and muddled plea also drawing contrary facts in the very same litigation; and the application was an abuse of process.

Civil Appeal No. 4286 of 2025 was filed by the Appellant herein against the order passed by this Tribunal in EP No. 12 of 2023 dated 17.01.2025. In the interim order passed on 01.04.2025, in Civil Appeal No. 4286 of 2025, the Supreme Court noted the submission, urged on behalf of the Appellant by the Learned Attorney General of India, that computation of fixed charges must be based on actual figures, i.e. payment received by the respondents from third parties, for supply of electricity must be reduced. The Supreme Court directed the Respondent (RGPPL) to file calculation, along with an affidavit, stating the actual amount received by them on supply of electricity to third parties, and the amount which was payable by the Appellant-MSEDCL in terms of the Power Purchase Agreement; the figures should be certified as per audited accounts; and the aforesaid calculation, along with the affidavit, shall be filed within a period of five days. The Supreme Court further observed that the Appellant-MSEDCL would have the opportunity to respond to the aforesaid chart by filing a calculation sheet, duly supported by the affidavit of the authorized person, within five days thereafter. The matter was directed to be re-listed in the week commencing 28.04.2025.

Pursuance thereto, RGPPL filed its affidavit dated 10.04.2025 wherein it stated as under:

"***10.*** *I say that MSEDCL is trying to conflate the issue and mislead this Hon'ble Court with regard to the adjustment of the receipts from third party sales under Article 2.2.3. Article 2.2.3 reads as under:*

"2.2.3. In case of default in payment of bills beyond a period of Ninety (90) days from the presentation of bills, RGPPL shall have the right to re-allocate power to other parties under the aegis of GOI at the risk and cost of MSEDCL. However, MSEDCL shall continue to be liable to pay the Capacity Charges till the power is re-allocated. The surplus over Energy Charges recovered from sale of such power to other parties shall be adjusted against the Capacity Charge liability of MSEDCL. In case the surplus over Energy Charges is higher than the Capacity Charge liability of MSEDCL, such surplus shall be retained by RGPPL and no energy charge to the extent of energy sold shall be borne by MSEDCL and corresponding Take or Pay obligation would not be applicable on MSEDCL.

11. *I say that the above Clause gives an option to RGPPL to request the Government of India to reallocate the share of electricity of MSEDCL to other entities in case there is a default in making payment for a period of 90 days. It cannot be that MSEDCL does not perform the PPA with regard to payment of Capacity Charges but at the same time requires RGPPL to pass on the adjustments to the Capacity Charges to it under the very same PPA. All along MSEDCL's case has been that there is no PPA because of its alleged termination. Suddenly, without raising this issue in any prior proceeding, MSEDCL is directly asking this Hon'ble Court to direct RGPPL to pass on some adjustments to it.*

12. *I say that, in any event. Article 2.2.3 has no application since the Government of India never reallocated MSEDCL's power to any entity under the above provision, except to the Indian Railways under a scheme that was floated by the Government of India on 27.03.2015 to revive gas plants across*

the country. Certain funding under the Power System Development Fund('PSDF') was given by the Ministry of Power for the same. RGPPL was one of the bid winners and supplied electricity to the Indian Railways to the extent of 300-620MW for the period from 26.11.2015 to 31.03.2017. Further, Ministry of Power vide letter dated 17.03.2017 temporarily allocated 540 MW to Indian Railways from MSEDCL share for the period from 01.04.2017 to 31.03.2022. For this whole period, i.e. from 26.11.2015 to 31.03.2022, to the extent the quantum of power was allocated to Indian Railways, RGPPL did not claim any Capacity Charges from MSEDCL in Execution Petition No. 12 of 2023 corresponding to such allocation. This is on account of the fact that tariff charged by RGPPL to MSEDCL is in terms of Central Commission's Tariff Regulations, as applicable from time to time, as per which the liability of Capacity Charges is in proportion to respective quantum of power as allocated by Ministry of Power, GoI. This ensured a saving of about Rs 2792 crores to MSEDCL by way of avoiding Capacity Charges. Copy of the Note filed RGPPL in the Execution Petition making this specific statement is attached hereto and marked as Appendix - H.

15. *I also say that the claim of RGPPL before the Appellate Tribunal did not include Capacity Charges for such capacity that was re-allocated from MSEDCL to the Indian Railways for the period from 26.11.2015 to 31.03.2017, and from 01.04.2017 to 31.03.2022. An auditor certificate to this effect is attached hereto and marked as Appendix - 1.*

16. *I say that apart from the above, no other portion of MSEDCL's share was ever re-allocated to any other entity by the Government of India However, with regard to third party sales, over the years, RGPPL has sold certain electricity in the energy exchange on a short term basis to third parties for which MSEDCL's share as per Article 2.2.2 of the PPA would work out to be Rs 110.75 crores till March 2025. Further, RGPPL was scheduled by Western Regional*

Load Dispatch Centre ('WRLDC') under Reserve Regulation Ancillary Services ('RRAS) provisions, for which Capacity Charges received through RRAS till FY 23-24, an amount of Rs 44.75 crores would have to be passed on to MSEDCL. The aforesaid calculation has been attached as Appendix-J."

The Appellant-MSEDCL filed its affidavit in reply thereto on 16.04.2025 wherein it is stated as under:

"2. I am filing the present affidavit in response to the Affidavit dated 10.04.2025 filed by Respondent No. 1. Ratnagiri Gas and Power Private Limited, in compliance with this Hon'ble Court's Order dated 01.04.2025 passed in the captioned matter.

3. I state that this Hon'ble Court vide its Order dated 01.04.2025 directed the parties to comply as follows:

"...The respondents shall file calculation, along with an affidavit, stating the actual amount received by them on supply of electricity to third parties and the amount which was payable by the appellant, Maharashtra State Electricity Distribution Company Limited, in terms of the Power Purchase Agreement. The figures will be certified, as per audited accounts.

The aforesaid calculation, along with the affidavit, shall be filed within a period of five days from today.

The appellant will have the opportunity to respond to the aforesaid chart by filing a calculation sheet, duly supported by the affidavit of the authorized person, within five days thereafter..."

4. At the outset, I state that Respondent No. 1 has only selectively (at its own volitions) provided surplus gains from sale of power in Power Exchange Market and fixed charges received against power scheduled/sold under

provision of CERC (Ancillary service Operations) Regulation 2015 i.e., Reserve Regulation for Ancillary Service (RRAS).

5. Respondent No. 1 has not complied with the Order of this Hon'ble Court as the calculation sheet submitted by Respondent No. 1 does not contain actual surplus gains over the energy charges recovered from the sale of power to "all other/third parties", specifically and inter alia including surplus gain on account of sale of power to Indian Railways.

6. I further state that in response to the objections on merits raised by Respondent No. 1, even though the Interim Application bearing I.A. No. 1671 of 2024 was filed by the Appellant after the judgement was reserved, however, RGPPL, being a party to the PPA cannot ignore the provisions contained therein. Furthermore, the Ld. APTEL in the Impugned Order, takes categorical note of the said IA filed by MSEDCL and also the reply filed by the Respondent to the said IA. However, without prejudice to the above, I state that contention of Respondent No. 1 is incorrect because the Interim Application filed by MSEDCL before CERC, i.e. IA No. 99 of 2024 categorically records the submission of MSEDCL that, "..provisions of PPA and the LPS Rules make it clear that the generator is obligated to adjust the revenue derived by it from sale of power to third parties against the capacity charges liability of the contracted procurer"... and that Respondent No. I has failed to comply with the same by not adjusting the surplus gains made by it while selling power to the Indian Railways and others. Therefore, any contention raised by Respondent No. 1 that the arguments relating to adjustments under the PPA have not been taken before the Ld. CERC is misconceived and incorrect.

7. In this regard, I also state that it is rather Respondent No. 1, which stated before the Ld. CERC, in its Reply to IA 99 of 2024, that the issue of so-called surplus recovery over and above the expenditure incurred towards energy charges can be reconciled between the parties, provided MSEDCL

abides by its obligations to pay the capacity charges. However, for the first time before this Hon'ble Court, Respondent No. I is taking the plea of Article 2.2.3 of the PPA not being applicable to the power supplied to Indian Railways, which states as under:

2.2.3 In case of default in payment of bills beyond a period of Ninety (90) days from the presentation of bills, RGPPL shall have the right to re-allocate power to other parties wider the aegis of GOI at the risk and cost of MSEDCL. However, MSEDCL shall continue to be liable to pay the Capacity Charges till the power is re-allocated. The surplus over Energy Charges recovered from sale of such power to other parties shall be adjusted against the Capacity Charge liability of MSEDCL. In case the surplus over Energy Charges is higher than the Capacity Charge liability of MSEDCL, such surplus shall be retained by RGPPL and no energy charge to the extent of energy sold shall be borne by MSEDCL and corresponding take or Pay obligation would not be applicable on MSEDCL.

8. I say that contrary to its stand before the Ld. CERC, Respondent No. I is now taking the argument at Para 12 wherein it is mentioned that "in any event, Article 2.2.3 has no application since the GoI never reallocated MSEDCL's power to any entity under the said provision except to the Indian Railways under a scheme that was floated by the GoI on 27.03.2015 to revive gas plants across the country. Certain funding under the Power System Development Fund (PSDF) was given by the Ministry of Power for the same, RGPPL was one of the hid winners and supplied electricity to the Indian Railways to the extent of 300-620 MW for the period from 26.11.2015 to 31.03.2017. Further, Ministry of Power vide letter dated 17.03.2017 temporarily allocated 540 MW to Indian Railways from MSEDCL share fro the period from 01.04.2017 to 31.03.2022." Further at para 13, Respondent No. I has mentioned that "apart from the sale to Indian Railways, no other portion of

electricity allocated to MSEDCL was ever reallocated under the aegis of GoI as required under Article 2.2.3 of the PPA dated 10.04.2007. Therefore, the question of RGPPL giving any adjustments under Article 2.2.3 of the PPA does not arise". It is clear from the absolutely contrary statements made by the Respondent No.1 (basis a selective and baseless reading of Clause 2.2.3) that power was allotted to Indian Railways from the share of MSEDCL under the aegis of GoI. Rather, such a statement suggests that the provisions of Article 2.2.3 of the PPA are applicable and accordingly, as per PPA clause 2.2.3, the Respondent No.1 is liable to adjust surplus (gains) over energy charges recovered from sale of power to "other parties" (including and/or/but not limited to Indian Railway) from Capacity charges liability of MSEDCL.

10. I further say that Respondent No. 1 has categorically submitted the surplus (gain) from sale of power through Power Exchange (Rs. 110.75 Crs) and revenue received against capacity charges *under RRAS provision (Rs. 44.75 Crs) and accepted that this has to be passed on to MSEDCL. However, in complete contrast, the Respondent No.1 denied for adjusting this surplus gain against the decree passed by the APTEL i.e. capacity charges liability of MSEDCL citing reason of pending disputed claims not adjudicated by any forum (which is yet another new and baseless submission without any evidence before this Hon'ble Court).*

11. I state that there is a clear violation of Article 2.2.2 and 2.2.3 of the PPA wherein Respondent 1 is obligated to adjust surplus gain towards MSEDCL's Capacity charges liability. Other charges as mentioned by Respondent No.1 in its submission dated 11.04.2025 are not allowed by the Ld. APTEL, in the Impugned Order itself, and hence there is no basis for the Respondent No. 1 to not disclose and/or keep pending any adjustment of surplus gain towards Capacity Charges obligation of MSEDCL on context.

Calculation of Adjustments under Clause 2.2.3 of the PPA

12. 1 further state that, the earlier in the year 2024, specifically on 19.03.2024, the Appellant herein had sought certain data from Respondent No.1, which included the audited balance sheets from FY 2013-14 to FY 2022-23. Respondent No. 1 responded vide its Letter dated 28.03.2024, while also supplying the audited balance sheets as sought.

20. Respondent No. 1 in its written submission before CERC in 276/MP/2024 has accepted that it has not given the effect of CERC's True Up orders. However, RGPPL has further stated that this is a matter of reconciliation.

23. I say that if Appellant herein compelled to pay the Respondent No.1, capacity charges as per APTEL's order without adjusting surplus gains made by Respondent No. 1 by selling power to other parties, this will impact the Appellant and the consumers of the Appellant in Maharashtra adversely and financially with a direct consequence of such additional burden on end consumers in the State of Maharashtra."

Thereafter, by its order in Civil Appeal No. 4286 of 2025 dated 06.05.2025, the Supreme Court directed the Appellant-MSEDCL to pay half of the amount as computed, i.e. half of Rs.2477.20 Crores, to the Respondents by way of six equal monthly instalments, beginning from 15.07.2025; the instalments shall be paid as per the time fixed; upon failure to pay the instalments within time, the Appellant-MSEDCL shall be liable to pay interest, as fixed and payable by the DISCOMs to the generating companies in terms of the regulations or tariff orders etc. The Appeal was directed to be listed in the week commencing 18.08.2025. Thereafter, by its order dated 29.08.2025, the Supreme Court, while granting leave and expediting the hearing, directed the appeal to be listed for hearing in the month of November, 2025.

We have no quarrel with the submission, urged on behalf of the Appellant-MSEDCL, that the CERC ought to have decided whether or not to permit the amendment sought by way of IA No. 99 of 2024, and if it had permitted the amendment, to then examine the contentions urged in the said IA on its merits. Failure of CERC to do so, may well have justified a limited remand directing CERC to examine these aspects, and pass a fresh order thereupon in accordance with law. It does appear from the contents of the affidavit filed by the 2nd Respondent-RGPPL before the Supreme Court on 10.04.2025, the reply filed thereto by the Appellant-MSEDCL on 16.04.2025, and the orders of the Supreme Court referred to hereinabove, that the issue regarding the invoices raised by RGPPL, being contrary to Clauses 2.2.2 and 2.2.3 of the terminated PPA, is pending consideration before the Supreme Court in Civil Appeal No. 4286 of 2025.

We enquired from Shri C. S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, as to how this Tribunal could adjudicate the contentions urged under this head in the present appeal, when the very same issues are pending consideration before the Supreme Court in the Civil Appeal. We also informed the Learned Senior Counsel that such identical contentions could not be urged simultaneously and parallelly before the Supreme Court in the pending Civil Appeal and in the present Appeal before this Tribunal; and it is only if MSEDCL was willing to refrain from urging the very same contentions in Civil Appeal No. 4286 of 2025, which is still pending consideration before the Supreme Court, would it be permissible for us to examine these contentions in the present appeal.

Sri C. S. Vaidyanathan, Learned Senior Counsel appearing on behalf of the Appellant-MSEDCL, expresses his inability to give any such assurance. Since these aspects are being considered by the Supreme Court, in Civil Appeal No. 4286 of 2025, it would be wholly inappropriate for us, during the

pendency of Civil Appeal No. 4286 of 2025 before the Supreme Court, to parallelly undertake the exercise of examining the very same issues in the present Appellate Proceedings. We must, therefore, refrain from examining the contentions urged, on behalf of both the parties, under this head.

XXIV. CONCLUSION:

For the afore-mentioned reasons, we are of the view that the order impugned in this Appeal, ie the order of the CERC in Petition No. 276/MP/2024 dated 12.06.2025, does not necessitate interference. Appeal No 232 of 2025, filed by the Appellant-MSEDCL, fails and is, accordingly, dismissed. All the IAs therein also stand dismissed.

Pronounced in the open court on this the **28th day of November, 2025**.

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

REPORTABLE / ~~NON-REPORTABLE~~