APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 33 OF 2019 &
IA NO. 172 OF 2019

Dated : 20th October, 2020

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF :

JSW Energy Ltd
JSW Centre,
Bandra Kurla Complex
Bandra (E)
Mumbai – 400051. .... **APPELLANT**

Versus

1. The Secretary
   Maharashtra Electricity Regulatory Commission,
   World Trade Centre, Centre No. 1,
   13th Floor, Cuff Parade,
   Mumbai – 400005.

2. The Managing Director
   Maharashtra State Electricity Distribution-
   Company Ltd.,
   G-9, Prakashgadh, Anand Kanekar Marg,
   Bandra (E), Mumbai – 400005 .... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Basava Prabhu S. Patil, Sr. Adv.
Mr. Aman Dixit

Mr. Aman Anand
Mr. Abhimanyu Maheswari
Mr. Suraj Guru

Counsel for the Respondent(s) : Mr. S. K. Rungta, Sr. Adv.
Mr. Buddy A. Ranganadhan
Ms. Stuti Krishn
Mr. Shivankur Shukla
Mr. Raunak Jain
Mr. Vishvendra Tomar **for R-1**

Mr. G. Umapathy
Mr. Anup Jain
Mr. Udit Gupta
Ms. S. Rama
Ms. Vaishnavi
Ms. Pavithra **for R-2**

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. This Appeal is filed by the Appellant against the order dated 15.01.2019 (Impugned Order) passed by Maharashtra Electricity Regulatory Commission (in short **"MERC/State Commission")** in Case No. 289 of 2018. The Appellant is aggrieved by the Impugned Order passed by the State Commission, in a complaint filed against the 2nd Respondent-MSEDCL under section 142 of the Electricity Act, 2003 (in short **"the Act"**) for non-compliance of the directions contained in the final order dated 07.03.2018 passed by the Commission in Petition No. 123 of

2017, has *suo-moto* modified and reversed the findings and the directions in the final order dated 07.03.2018.

2. **The facts that led to filing of this Appeal, in brief, are as under:**

i) The Appellant is a generating company within the meaning of Section 2(28) of the Act which owns, operates and maintains amongst others a 1200 MW (4X300 MW) generating station at Jaigadh, Ratnagiri in the State of Maharashtra. 2nd Respondent-MSEDCL is a distribution licensee in the state of Maharashtra.

ii) Pursuant to a competitive bidding process initiated by the 2nd Respondent in the year 2007, the Appellant emerged as one of the successful bidders and a Power Purchase Agreement ("PPA") dated 23.02.2010, for supply of 300 MWs of power from Unit 1, was executed between the Appellant and the 2nd Respondent.

iii) The State Commission, vide its order dated 01.12.2011 in Case No. 67 of 2011, while approving certain events as being change in law events under the PPA, and noting that there might be further changes in law during the subsistence of the PPA, directed that the Appellant and the 2nd Respondent to mutually calculate and settle the financial impact on account of change in law payable to the Appellant. The Parties followed

this procedure for mutual settlement for payment of change in law compensation, including that of auxiliary consumption, up to August, 2016. 2nd Respondent accepted and paid the change in law compensation, including that on account of coal consumed for auxiliary consumption, for the period between December, 2011 and August, 2016.

iv) With effect from September 2016 until February 2017, the 2nd Respondent stopped making payments for the change in law compensation relatable to coal consumed for auxiliary consumption. Thereafter, vide letter dated 10.02.2017, 2nd Respondent informed the Appellant that change in law compensation would be paid only on the actual units supplied by the Appellant, excluding auxiliary consumption. On this ground, 2nd Respondent adjusted an amount of Rs. 6.28 Crore from the pending bills of the Appellant, the amount paid as change in law compensation on auxiliary consumption for the period up to August, 2016.

v) On 05.03.2018, the State Commission dismissed the Petition filed by the 2nd Respondent seeking amendment of the PPA related to contracted capacity and auxiliary consumption. The Commission held that if required, the Appellant is free to meet its auxiliary consumption from other units of the generating station.

vi) Aggrieved by the adjustment of Rs.6.28 Crores, Appellant approached the State Commission with Petition No. 123 of 2017. The State Commission, vide its order dated 07.03.2018, after categorically noting that the contracted capacity under the PPA is 300 MWs, gave a finding that change in law compensation is applicable on auxiliary consumption and directed the 2nd Respondent to refund the amount wrongly adjusted vide letter dated 10.02.2017 and also to release the future amounts withheld towards change in law for auxiliary consumption along with interest. The State Commission held that - (i) the normative auxiliary consumption for the purposes of compensation on account of change in law shall correspond to scheduled generation, and (ii) the change in law will be applicable on normative basis or actuals, whichever is less.

vii) The Appellant challenged the order dated 07.03.2018 before this Tribunal in Appeal No. 155 of 2018, on the limited issue of non-payment of applicable tariff for power supplied from alternative source in the month of February 2017.

viii) 2nd Respondent, vide its letters dated 03.08.2018 and 16.08.2018 refused to comply with the directions in the order dated 07.03.2018 passed

by the State Commission. This led to filing of a complaint on 10.10.2018 (Case No. 289 of 2018) by the Appellant under section 142 of the Act.

ix) On 15.01.2019, the State Commission passed the Impugned Order, modifying and reversing the findings and directions in the Order dated 07.03.2018 passed in Case No. 123 of 2017 relating to the entitlement of the Appellant for change in law compensation on auxiliary consumption.

x) Appellant contends that the State Commission has committed a grave jurisdictional error which deserves to be set aside by this Tribunal. The impugned order has caused grave financial prejudice to the Appellant for the past period and will continue to affect its financial position in future.

xi) According to the Appellant, the State Commission has committed a grave jurisdictional error in modifying and reversing the findings on merits and the direction in its final order dated 07.03.2018 passed in Case No. 123 of 2017 in a complaint filed by the Appellant under Section 142 of the Act for non-compliance of the directions contained in this very order, since the State Commission has no jurisdiction to re-adjudicate a case on merits in a proceeding under section 142 of the Act. The decision on the merits of the dispute in the order dated 07.03.2018 has attained finality.

xii) Appellant contends that in the proceedings under Section 142 of the Act in Case No. 289 of 2018, the 2nd Respondent did not dispute that the terms of the order dated 07.03.2018 have attained finality but again urged that change in law compensation cannot be given on auxiliary consumption, to the extent that the same is being met from other units. This contention of the 2nd Respondent-MSEDCL, was based on a complete misreading of the order dated 05.03.2018 and 07.03.2018 of the State Commission, had no bearing or relevance to the scope of the proceedings under section 142 of the Electricity Act, 2003.

xiii) Appellant further contends that the position taken by the Respondent No. 2 before the State Commission that under the PPA, it is not required to pay compensation for change in law on auxiliary consumption, if the same is met by sourcing power from units other than Unit No. 1 is contrary to the provisions of the PPA and thus is untenable. The reliance on Article 19 of the PPA by the 2nd Respondent in this context is wholly misplaced.

xiv) Appellant also contends that auxiliary consumption is not the supply being made to the 2nd Respondent from an alternative source(s) and thus reliance on Article 19 of the PPA is wholly misconceived. Further, for this very reason, the reliance on the finding of the State Commission in the

order dated 07.03.2018 that supply of power from an alternative source would not attract the change in law provisions is totally misplaced.

xv) According to Appellant, the State Commission has misread and misunderstood the order dated 05.03.2018 passed in Case No. 122 of 2015. The order dated 05.03.2018 upholds the position that under the PPA, the Appellant has the flexibility to meet its auxiliary consumption requirements either from Unit No. 1 itself or in case required from any other unit of the generating station.

xvi) Appellant further contends that the State Commission in the Impugned Order has wrongly placed reliance on paragraph 18.4 of the order dated 07.03.2018 in respect of power supplied to the 2nd Respondent from an alternative source and does not pertain to auxiliary consumption.

xvii) According to Appellant, the principle of restoring Appellant to the same economic position, as if the change in law event has not occurred, would necessarily include within its fold the coal consumption to meet the auxiliary consumption pertaining to the contracted capacity for 300 MW. This position has been correctly accepted by the State Commission in its order dated 07.03.2018 which was accepted by the parties to the dispute. The only discernible reason from the Impugned Order appears to be that

since the Appellant had chosen to meet its auxiliary consumption requirement from sources other than Unit No. 1, it cannot now start meeting its auxiliary requirement from the unit contracted under the PPA. This reasoning is wholly untenable and totally opposed to Article 4.4.4 of the PPA which in no unclear terms gives the option of meeting the auxiliary consumption from Unit No. 1 itself.

xviii) Further, according to Appellant, the State Commission has failed to appreciate that as a matter of fact, almost 93% of auxiliary consumption has been met by the Appellant from Unit No. 1 itself and therefore, there cannot be an issue regarding compensation for change in law on this portion of auxiliary consumption. Further, the position that the Appellant is entitled to compensation for change in law on auxiliary consumption met from Unit No. 1 itself has never been disputed by the 2nd Respondent. As such, there is absolutely no basis for the State Commission for concluding in the Impugned Order that no compensation on account of change in law is to be paid to the Appellant irrespective of the source from where such auxiliary power requirement is met.

xix) **Being aggrieved by the impugned Order dated 15.01.2019 passed by the State Commission in Case No. 289 of 2018, the Appellant has filed this appeal seeking the following reliefs:**

"A. Set aside the Impugned Order dated 15.01.2019 passed by the 1st Respondent-State Commission; and

B. Direct the 2nd Respondent to make payment of change in law compensation on auxiliary consumption as directed by the State Commission in its order dated 07.03.2018 passed in case no. 123 of 2017 against the past, present and future monthly bills of the Appellant, along with interest thereon; and/or

C. Direct the 1st Respondent to initiate appropriate proceeding against 2nd Respondent under Section 142 of the Act and pass an appropriate order for non-compliance of order dated 07.03.2018 passed in Petition No. 123 of 2017."

xx) Based on the above pleadings, the following questions of law arise according to Appellant:

"A. Whether the State Commission has the jurisdiction to re-adjudicate a case on merits in a proceeding under Section 142 of the Act?

B. Whether the findings and the directions in the order dated 07.03.2018 on the issue of entitlement of the Appellant to receive change in law compensation on auxiliary consumption operates as res judicata, thus barring the jurisdiction of the State Commission to re-hear and re-adjudicate the merits of the dispute?

C. Whether, without prejudice, the Appellant can be restored to the same economic position, as if the change in law has not occurred, without it being compensated for the change in law impact on coal being utilized for purposes of auxiliary consumption?

D. Whether, without prejudice, the Appellant has the flexibility to meet its auxiliary consumption requirements either from unit No. 1 or from any other unit of the generating stations?

E. Whether Article 19 of the PPA or the finding at paragraph 18.4 of the order dated 07.03.2018 is applicable to quantum of auxiliary consumption being met from a unit other than Unit No.1?

F. Whether, without prejudice, the Appellant is entitled to change in law compensation at least on the quantum of auxiliary consumption being met from Unit No. 1 itself?”

3. *Per contra,* the 2nd Respondent-MSEDCL filed reply, in brief, as under:

i) According to 2nd Respondent, as per the provisions of Case I bidding guidelines and PPA, the sole responsibility of arranging fuel is on the Appellant and in case non-availability of fuel from the identified unit, the same needs to be arranged from the alternative source. As per Article 19 of PPA, supply of fuel from alternative sources does not fall within the precincts of “Change in Law” as had been stated and agreed upon by the parties to the PPA i.e., Appellant and the 2nd Respondent that Change in Law events will not be applicable in case the supply of fuel is done from an alternative source or a source other than the identified unit under the Request for Proposal (in short **“RFP”**) .

ii) Further, MERC in its order dated 05.03.2018 in Case No. 122 of 2015 in the matter of *Adani* qua 1320 MW PPA and *JSW* qua 300 MW, on amendment in the Case I Stage I competitive bidding PPAs with regard to reduction in contracted capacity from its rated capacity to the Ex bus capacity (i.e. excluding auxiliary consumption) and related provisions, has

noticed that - *"8.17. Article 4.4 clearly establishes that there is no compulsion on the Seller to use Auxiliary Power from the same Unit and gives it flexibility to use power for Auxiliary Consumption from the same Unit, if so desired. The Seller is free to arrange Auxiliary Power requirement from other Units of the same TPS."* And *"13…. the Commission notes that it is not mandatory to meet the Auxiliary power requirements of a contracted Unit from that Unit alone if and when APML and JSWEL have other untied or unutilised capacity to meet it…"* Also, the MERC vide its order dated 07.03.2018 in Case No. 123 of 2017 in the matter of *JSW* qua 300 MW regarding change in law on energy supplied from alternative source has categorically stated that - *"18.4... the Change in Law would not be applicable in case power is supplied from the alternate source than the identified Unit in the RFP considering the provisions of Article 19 of the PPA."*

iii) According to 2nd Respondent, thus, the State Commission, in complete consonance of the earlier similar orders passed on the same issue, has rightly disallowed the compensation claimed by the Appellant under change in law qua the power supplied from the alternative source, which is not identified in RFP i.e., from other unit(s) of the plant.

iv) According to 2nd Respondent, it is clear from the provisions envisaged in Article 19 of the PPA and the State Commission's

adjudication that the provisions for change in law and force majeure shall be applicable to the unit identified in the RFP. Since, admittedly the Unit from which the Appellant has supplied electricity is not identified in the RFP, therefore, Appellant cannot claim Change in Law in respect of such unidentified Unit. Accordingly, MERC in impugned order has rightly held that the 2nd Respondent is not being liable to pay the amount claimed by the Appellant herein for auxiliary energy consumption, and the same is duly informed to the Appellant by letters dated 03.08.2018 and 16.08.2018 that the Invoices raised for auxiliary consumption is not liable to be paid, as MERC in Case No.122/2015 and in Case No.123/2017 had disallowed the change in law on an energy supplied from alternative source as per Article 19 of PPA.

v) 2nd Respondent further contends that MERC rightly opined that the auxiliary energy requirement of the Unit was planned and conceptualised in advance to be met through other sources and based on these calculations a tariff was quoted by the Appellant, knowing very well that sourcing of auxiliary energy requirement would be from other sources and not from the Unit under the PPA. Hence, to claim compensation under the change in law provisions for energy source from alternative source, is clearly in contrast with the terms of the PPA, more particularly is also contrary to Appellant's own conduct as at the stage of bidding, they had

made the bid for the entire rated capacity as the net contracted capacity, leaving aside the auxiliary energy consumption. Therefore, at a later stage a claim cannot be made by the Appellant seeking compensation.

4. The Appellant filed written submissions, in brief, as under:

i) According to Appellant, the order dated 07.03.2018 has admittedly attained finality and therefore, the State Commission under Section 142 of the Act was bound to carry out the terms and directions contained therein, as the same having not been set aside or declared void by a competent Authority. Reliance in support of the proposition is placed on the judgment in "***Patel Narshi Thakershi and Others v. Shri Pradyuman singhji Arjunsinghji"*** reported at *1971 (3) SCC 844.*

ii) Appellant further contends that it is settled principle that a Court executing a decree cannot travel behind it and pass orders jeopardizing the rights of the parties under the decree even if the decree is erroneous. An executing court can allow objections to the executability of a decree only on the grounds of jurisdictional infirmity and voidness and nothing else. Clearly in the present case there is no allegation/averment of the order dated 07.03.2018 suffering from a jurisdictional infirmity or being void/a nullity. Reliance in support of the proposition is placed on the

judgment in "***Brakewel Automotive Components (India) Pvt. Ltd. v. P.R. Selvam Alagappan"*** reported at *2017 (5) SCC 371*.

iii) Further, the State Commission's power of review, under Section 94(1)(f) of the Act, is co-extensive with that of a civil court under the Code of Civil Procedure, 1908.

iv) Appellant also contends that since it is settled proposition that a Civil Court has no *suo-moto* powers to review its concluding findings on an issue in a suit, such power certainly could not have been vested in the State Commission. Reliance in support of the proposition is placed on the judgment in "***Kumaran Vaidyar and Others vs. K.S. Venkiteswaran and others"*** reported at *1991 SCC Online Ker 99*. This Tribunal has also held in "***M/s Cauvery Hydro Energy Ltd. vs. Karnataka Power Transmission Corporation Ltd."*** *(2017 SCC Online APTEL 68)* that the State Commission does not have powers to re-adjudicate a case on merits under Section 142 and 146 of the Act.

v) According to Appellant, Regulation 15 of the MERC (Conduct of Business) Regulations, 2004 clearly restricts the power of *suo-moto* review only to the action taken by the Secretary or any officer of the Commission and does not and cannot apply to the orders passed by the Commission.

vi) Appellant further contends that the power of review of the Respondent-Commission under MERC (Conduct of Business) Regulations, 2004 is provided under Regulation 85, which is on the same lines as the powers of a Civil Court under Order XLVII of the Code for Civil Procedure. Therefore, Regulation 15 of the MERC (Conduct of Business) Regulations, 2004 has no application whatsoever in the present case, and does not confer the power/jurisdiction on the State Commission to reverse and re-adjudicate its decisions *suo-moto*, which have attained finality. Therefore, the issue of applicability of change in law provisions to coal used for auxiliary consumption is totally without jurisdiction and therefore, the impugned order deserves to be set aside. Even though, once it is found that the Impugned Order is without jurisdiction, there is no necessity of getting behind the rationale/reasoning of the order, is the stand of the Appellant.

vii) Appellant further contends that in the Impugned Order, despite noticing the reasons for allowing change in law compensation for auxiliary consumption stated in the order dated 07.03.2018 by the State Commission itself, the State Commission has, without saying as to why and on what basis is the earlier reasoning incorrect, made completely inconsistent and perverse findings.

viii) According to the Appellant, the Impugned Order proceeds on erroneous basis. The State Commission in the Impugned Order assumes that auxiliary energy requirement at the time of the bid was planned to be met through other sources and not from Unit No.I, and that the tariff bid was built on this assumption. Reliance is placed on the order dated 05.03.2018 to return a finding that the said order upholds such assumption of sourcing auxiliary power requirement from other sources. The State Commission consequently, in the impugned order not only declined the change in law compensation for auxiliary consumption sourced from other units but also declined change in law compensation on auxiliary consumption met from Unit-I itself, holding that the Appellant who had at the time of the bid planned to meet the auxiliary consumption through other sources cannot now change the said bidding assumption and meet auxiliary requirement from the contracted unit. The assumption by the State Commission has got no basis whatsoever.

ix) According to Appellant, Article 4.4.4 of the PPA has not been considered at all in the Impugned Order. In fact, the assumption is directly opposed to the terms of Article 4.4.4 of the PPA wherein the Appellant has the right to meet auxiliary consumption from Unit-I.

x) Further, reliance of the State Commission on the order dated 05.03.2018 is totally misplaced and the observation by the State Commission from the order dated 05.03.2018 only reflects that there is flexibility available to the Appellant to meet auxiliary consumption requirements either from Unit-I or from other units, if available. The observation in no way supports the conclusion/finding that the bid was premised on sourcing auxiliary consumption requirement from other units. The above findings of the State Commission are therefore, completely unsustainable.

xi) Appellant further contends that the State Commission relies on its finding at paragraph 18.4 of the order dated 07.03.2018 to hold that no change in law compensation can be claimed for energy sourced from alternative sources. This finding is perverse as paragraph 18.4 of the order dated 07.03.2018 relates to supply of power from an alternative source and not energy sourced for meeting auxiliary consumption from alternative units. The finding at paragraph 18.4 of the Order dated 07.03.2018 has been challenged by the Appellant in Appeal No. 155 of 2018 before this Tribunal.

xii) The provisions of Article 19 of the PPA suggest or imply nowhere that change in law compensation for coal utilized for meeting the auxiliary

consumption requirement will not be paid to the Appellant. Article 19 pertains to supply of power to MSEDCL and not to sourcing auxiliary power. The proviso to the said Article only affirms and reiterates that provisions for change in law and force majeure shall be applicable to the unit identified in the RPP and nowhere suggests or implies that provisions of change in law would not apply to auxiliary consumption sourced from other units. Thus, the above finding of the State Commission is wholly unsustainable.

xiii) Appellant further contends that the Respondent-Commission is participating actively in the present proceedings before this Tribunal and defending its own order passed in the capacity of an adjudicator; however, a quasi-judicial authority cannot take sides when its quasi-judicial order is assailed before an appellate court and it should leave it to the parties to workout legal remedies available to them. Reliance in this regard is placed on the judgment in "***Jindal Thermal Power Company Ltd. vs. Karnataka Power Transmission Corporation Ltd."*** *(MFA NO. 4795 of 2002 dated 08.04.2004)*.

5. *Per Contra,* 1st Respondent-Commission filed written submissions, in brief, as under:

i) According to 1st Respondent-Commission, one of the major contentions of the Appellant is that the Commission has no jurisdiction to re-adjudicate a case on merits in a proceeding under Section 142 of the Electricity Act, 2003. It is the submission of the Respondent-Commission that the petition filed before the Commission was not a petition limited to Section 142 alone but filed expressly, under Section 86(1)(f) read with Section 142 of the Act. Hence, the Appellant's argument that the Commission exceeded its jurisdiction under Section 142 is contrary to their own petition before the Commission which was not limited to the punitive provision alone but had also raised a dispute under Section 86(1)(f) of the Act. Further, the prayer raised in the petition before the Commission clearly sought a relief far above and beyond Section 142. Prayer (c) and (d) in the petition before the Commission were specifically "(c) …..*issue necessary directions to the Respondent (MSEDCL) to compensate the Petitioner towards compensation for the impact of change in law for auxiliary consumption by way of making payment of dues of Rs 12,27,34,994/- as on …"* and "(d) .... *Issue directions to make payment on account of Late Payment Surcharge as per the provisions of the PPA*…." Such prayer could, obviously, have been considered only when adjudicating a dispute under Section 86(1)(f) and could not have been considered under Section 142, which the section only provides for levy of

a penalty. The appellant having thus invited an Order on the merits of whether there ought to be a direction for recovery of monies or not, could not today turn around and suggest that the Commission had no power to consider the very prayer made by it before the Commission.

ii) According to 1st Respondent Commission, other major contentions of the Appellant are that the Respondent Commission has committed grave jurisdiction error in modifying and reversing the findings on merits and the direction in its Order dated 07.03.2018 passed in Case No.123 of 2017 and the Commission's decision on merits on the dispute in the Order dated 07.03.2018 has attained finality and principles of *res judicata* bar the jurisdiction of the Commission to re-adjudicate the merits of the dispute in any proceedings. It is the submission of the Commission that the above issues are interrelated; and in exercise of the powers conferred on the Commission by section 181 of the Electricity Act, 2003 and all powers enabling it in that behalf, the Commission has made the "Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004". Under the Electricity Act, 2003 (Para 94), the Commission has Power for reviewing its decisions, directions and Orders. The Commission accordingly with reasons has corrected its Order dated 07.03.2018 in its impugned Order dated 15.01.2019 in Case No. 289 of 2018 by giving its rationale at Para 19 of the Impugned Order. It is clear from the Impugned

Order that the Commission has merely reconciled, in the impugned Order, the effect of its two earlier Orders dated 07.03.2018 and 05.03.2018.

iii) Further, in its 07.03.2018 Order, at Para 18.4, the Commission had essentially held that *"the Change in law would not be applicable in case power is supplied from the alternate source other than the identified unit I the RFP considering the provisions of Article 19 of the PPA…"* In the 05.03.2018 Order, the Commission had essentially held that JSW had under the PPA agreed to supply the full capacity of the plant of 300 MW as its "contracted capacity" and the auxiliary consumption could not be excluded from the same (Para 11.7 and 11.9). Therefore the only reconciliation of the aforesaid two orders of 05.03.2018 and 07.03.2018 is that if the auxiliary consumption is not to be met from the identified unit and is being sourced from a non-identified unit (as was JSW's own case), then such auxiliary consumption that is sourced from a non-identified unit would not qualify for any change in law. That is all that the Commission has held in the Impugned Order.

iv) 1st Respondent-Commission further submits that the contentions made by the Appellant regarding the Commission having no jurisdiction to re-adjudicate a case on merits in a proceeding under section 142 of the Act are entirely incorrect. The Appellant had filed a Petition No.289 of

2018 before the Commission under the subject title of Petition under section 86 (1) (f) of the Act read with section 142 of the Act. Contrary to what is sought to be contended by the Appellant, the petition before the Commission was not a petition simply under Section 142. Accordingly, the Commission has adjudicated the instant matter under the Section quoted by the Appellant i.e., 86 (1) (f) and come to conclusion that there is no need to invoke any action under Section 142 of the Act. Thus, the Commission has correctly exercised its power and adjudicated the matter. Hence, question of *res judicata* do not arise at all.

v) Further, according to Respondent-Commission, another major contention raised by the Appellant is that "*the only reasoning in the impugned Order that since JSW had chosen to meet its auxiliary consumption requirement from sources other than Unit No.1, it cannot now start meeting its auxiliary consumption from the unit contracted under the PPA. This reasoning is untenable and against the Article 4.4.4 of the PPA which in no unclear terms gives the option of meeting the Auxiliary consumption from Unit 1 itself. Further the reasoning is also directly opposed to the findings of the Commission in Order dated 7 March, 2018*." 1st Respondent-Commission submits that in Para nos. 15 and 16 in the impugned Order dated 15.01.2019 in Case No. 289 of 2018 has provided reasoning relying on the definition of the Contracted Capacity as provided

in the PPA. It is in the above background the Respondent-Commission has reiterated and reconciled its earlier rulings, as given in Order dated 05.03.2018 in Case No. 122 of 2015, admittedly JSW was also a party in that Case. 1st Respondent-Commission further submits that in support of the above stand, the Commission has relied on its already clarified issue in the Order dated 07.03.2018 in Case No. 123 of 2017. The Commission at Para no. 18 in the impugned Order dated 15.01.2019 in Case No 289 of 2018 in fact, has given a well reasoned findings and consequent directions which are in line with the relevant Regulations and the PPA provisions.

vi) 1st Respondent-Commission further submits that as far as Appellant's contention that Article 4.4.4 of the PPA allowed use of auxiliary power from contracted capacity is concerned, even though Article 4.4.4 allows such use, the Appellant while bidding gross capacity of the Unit as net contracted capacity has itself assumed that auxiliary power requirement of contracted Capacity will be met from other sources. The Appellant's Thermal Power Station is having 4 Units of 300 MW capacity. Out of these 4 Units, first Unit is contracted through competitive bidding under Section 63 of the Act with MSEDCL. Under the PPA, net contracted capacity of first Unit is stipulated as 300 MW, which is also gross capacity of that Unit. Thus, while offering capacity and rate under competitive bidding, even though Article 4.4.4 of the PPA allows use of

contracted capacity for meeting auxiliary requirement, the Appellant has taken commercial decision to offer gross capacity of the Unit as net contracted capacity and met auxiliary power requirement of such contracted capacity from other Units of the Power Plant. Under such circumstances, it is not correct for the Appellant to now claim the benefit of Article 4.4.4 of the PPA. Nevertheless, Article 4.4.4 is only restricted to enable seller to use contracted capacity for its auxiliary power requirement; it does not stipulates commercial implications of the same. Hence, the contentions of the Appellant need to be rejected, is the submission of the Commission.

6. *Per Contra,* 2nd Respondent filed written submissions, in brief, as under:

i) According to 2nd Respondent-MSEDCL, the Appellant relied upon Clause 4.4.4 of the PPA to contend that the Appellant is entitled for auxiliary consumption. However, though Clause 4.4.4 of the PPA indicates that the Appellant can use the contracted capacity for meeting the unit's auxiliary load requirements, but the same does not read to mean that the supply of contracted capacity is permitted to be reduced for the same. Further, Clause 4.4.4 also does not deal with any payment obligation qua MSEDCL towards the said auxiliary consumption, rather it

merely deals with the mode and manner of usage of power by the Appellant but at no point of time refers to reduction in the supply of contracted capacity.

ii) According to 2nd Respondent, Appellant contends that MSEDCL was regularly paying for the auxiliary consumption to the Appellant pursuant to the PPA till the issuance of letter dated 10.02.2017. However, it is the contention of the 2nd Respondent that though MSEDCL in the past was paying for the auxiliary consumption, but the same by no stretch of imagination, would mean that if any wrongful action so made by a party in contradiction to the terms of the PPA would be allowed to be continued which contradicts PPA more particularly and clearly, cannot be so permitted to be continued by a judicial order.

iii) 2nd Respondent also contends that the order of MERC in Case No. 123/2017 had not appreciated the facts of this particular case which differs from other standard PPAs, as in the present case the Appellant had contracted its entire bid capacity without deducting auxiliary consumption capacity and therefore, at a later stage, the Appellants are barred to claim benefit for auxiliary consumption by reducing contracted capacity.

iv) 2nd Respondent further contends that MERC in Case No. 122 of 2015 vide its order dated 05.03.2018 had clearly declined the prayer of

reduction in the contracted capacity of Appellant for adjustment of auxiliary consumption through modification in the PPA. However, the subsequent order dated 07.03.2018 passed in Case No. 123 of 2017 being self-contrary to MERC's earlier order dated 05.03.2018 and therefore, owing to the disparity on the issue, MSEDCL in the larger interest of its ultimate consumers and for ensuring the supply of complete contracted capacity by the Appellant, upon co-joint reading of both the orders declined the payment sought towards auxiliary consumption by following the principle of interpretation benefiting and sub-serving the interest of general public at large vis-à-vis private party's commercial interest.

v) According to 2nd Respondent, reading of Order dated 05.03.2018 passed by MERC in Petition No. 122/2015 along with order dated 07.03.2018 in Case No.123/2017, unambiguously determines issues like mode and manner of consideration of auxiliary consumption of Appellant and therefore cannot be said to be distinct orders. By the first order, MERC rules the mandate upon Appellant to supply full contracted capacity, i.e., 300 MW and in its second order, though it permitted CIL applicable for auxiliary consumption, but had not ruled for supply of power less than the contracted capacity, contrary to which is presently so interpreted by the Appellant.

vi) Further, though MERC was adjudicating a petition filed by the Appellant under Section 142, however while exercising its adjudicatory powers, it can also discharge *suo-moto* powers under Regulation 32 read with Regulation 92 of the MERC (Conduct of Business Regulations), 2004 to make such orders, for meeting the ends of justice. The impugned order dated 15.01.2019 was passed in that direction when the MERC observed that the original order dated 07.03.2018 was erroneously passed, being in contradiction to its earlier order dated 05.03.2018 upon the same issue, and thus, the same was in the nature of an abuse of the process of the Commission. MERC has inherent power under Regulation 92 read with Regulation 32 to *suo-moto* correct an order, as soon as the incorrectness of the same came to its knowledge and thus in the impugned order dated 15.01.2019, while correcting the earlier order dated 07.03.2018 by exercising its inherent power, also stated the reasons for such correction which thereby is also a reasoned order, meeting the principle of natural justice as well.

vii) According to 2nd Respondent, the present case is not of that whether the power for auxiliary consumption being drawn from identified or non-identified unit so as to consider passing of the benefit of change in law. Rather, assuming even though that the power for auxiliary consumption

has been so drawn from the identified unit, but the issue in the present case, is that whether the Appellant is entitled for the claim of auxiliary power at the first place itself or not? While submitting its bid and signing the PPA, the Appellant had specifically agreed to supply entire bid capacity, without any reduction for auxiliary consumption and it is for the said reason alone, the Appellant's bid was considered over and above other bidders, considering more supply of power, than other generators. Since, the Appellant had entered into PPA for the entire bid capacity as contracted capacity, therefore at the time of signing the PPA, they knew very well that the requirement of auxiliary consumption for supplying the contracted capacity of power would be met by themselves and for the said reason as well the payment obligation was not envisaged under the PPA by both the parties. Therefore, now the Appellant cannot change its stand and demand payment for auxiliary consumption, which they themselves have waived off while signing the PPA and moreover, based on such waiver itself was able to get successfully awarded the bid in their favour.

viii) According to 2nd Respondent, the Appellant approached MERC in impugned Case No. 289 of 2018 under Section 86(1)(f) read with Section 142 of Electricity Act, 2003. MERC has wide powers under Section 86 of Act, 2003. The Hon'ble Supreme Court of India in "***Gujarat Urja Vikas Nigam Limited v. Essar Power Ltd.***" [reported in *(2008) 4 SCC 755*], has

upheld the wide powers of the State Commission to adjudicate upon all disputes under Section 86(1)(f) of Act, 2003. This Tribunal in "***Pune Power Development Pvt. Ltd. v. KERC & Ors.***" [reported in *2011 ELR (APTEL) 0303*] has also held that the adjudicatory powers of the State Commission are wide and extend to any dispute which may arise between a licensee and a generating company. The Appellant invoked the jurisdiction under Section 86(1)(f) read with Section 142 of Act, 2003. MERC has rightly exercised its jurisdiction in correcting the anomaly and reconciled the two orders dated 5.3.2018 and 7.3.2018 passed by it. The MERC (Conduct of Business) Regulations, 2004 also provides for exercise of powers at Para 92 to 95. Thus, there is no infirmity in the order passed by MERC which is in effect to set at rest the controversy between the parties vis-a-vis the liability of auxiliary consumption on account of change in law.

ix) 2nd Respondent further contends that the reliance placed by the Appellant on "***Brakewel Automotive Components (India) Pvt. Ltd. v. PR Selvam Alagappan***" [*2017 (5) SCC 371*], "***Kumaran Vaidyar & Ors. v. KS Venkiteswaran & Ors.***" [*1991 SCC OnLine Ker 99*], "***Patel Narshi Thakershi & Ors. v. Shri Pradyumansinghji Arjunsinghji***" *[1971* (3) SCC 844] and "***M/s Cauvery Hydro Energy Ltd. v. Karnataka Power Transmission Corporation Ltd.***" [*2017 SCC OnLine APTEL 68*], will

have no bearing on the present appeal. These are the cases regarding power of the Court, in executing the decree of the Court that it cannot go beyond the decree. In the present appeal, MERC's jurisdiction was invoked under Section 86(1)(f) read with 142 of Act, 2003. It is well settled law that MERC has wide powers under Section 86 of Act, 2003.

x) Further, in Petition No. 122/MP/2015 filed by Answering Respondent seeking amendment in PPA relating to reduction of the contracted capacity, the stand of the Appellant was that since inception, the understanding of both the Parties to the PPA as well as the Commission has always been that the Contracted Capacity under the PPA is 300 MW; and the Parties have all along acted upon the understanding that the Contracted Capacity under the PPA is 300 MW. On this basis, Appellant has even been penalised.

xi) Furthermore, MERC inter-alia held that Article 4.4.4 of the PPA, which is a provision relating to Unit operation, in fact prohibits Appellant from using any electricity generated by the Unit to the extent of its Contracted Capacity, clearly indicating the intention and the commitment to deliver a Contracted Capacity of 300 MW to answering respondent as paramount. The exception in Article 4.4.4 which permits the Unit's generation to be used for auxiliary consumption cannot be read so as to

curtail the contracted capacity or to limit the prohibition contained in the main part of Article 4.4.4, as the same has also not been framed in such a manner, whereby the definition of the contracted capacity is permitted to be reduced. If Article 4.4.4 is to be interpreted in a manner as Appellant is projecting, then undoubtedly the same would lead to two contradictory projection of the "contracted capacity", which clearly is not the intent of the parties at the time of signing the PPA. This exception is merely an enabling provision relevant for unit operation, and cannot be read to imply curtailment of contracted capacity. It accordingly held that in the absence of agreement of the parties, the revision proposed by the Answering Respondent cannot be granted in terms of Article 18.1 of PPA and it cannot agree to proposal to modify the relevant provisions of the PPAs which was entered under Section 63 of Act, 2003. The proposed revisions would amount to re-opening of the PPAs, which is not empowered to do so in terms of Section 63 of Act unless these revisions are also agreed to by other parties to the contracts. Further, the above order passed by MERC attained finality as none of the parties challenged the same. Thus the ratio of the above is that the Appellant is bound to supply the entire contracted capacity which is also the net rated capacity amounting to 300 MW to the Answering Respondent.

xii) According to 2nd Respondent, in the case filed by the Appellant being Case No. 123 of 2017, MERC held that financial impact of change in law on the auxiliary consumption to restore the generator to the same economic position as if such change in law has not occurred is allowed. The change in law shall be applicable on auxiliary consumption of the unit as per the norms laid down by the Commission or actual, whichever is less, since the tariff of the project is based on Competitive Bidding, the auxiliary power consumption considered is not known. However this auxiliary consumption should be at a normative value corresponding to scheduled generation only. MERC accordingly directed the Answering Respondent to release the amount already deducted and future amount withheld towards applicable change in law for auxiliary consumption, with applicable interest thereon within a period of one month from the date of this Order.

xiii) Further, the orders dated 07.03.2018 and 05.03.2018 passed by MERC was examined by the Answering Respondent. On a conjoint reading of the said two orders, it was clear that in the matter of Appellant for 300 MW PPA where auxiliary consumption is met from the alternative source, the change in law is not applicable to the auxiliary consumption as per provision of Article 19 of PPA and as envisaged in order dated

07.03.2018. Accordingly the Appellant was informed about the same vide its letter dated 16.08.2018.

xiv) According to 2nd Respondent, under PPA, net contracted capacity of the first unit is stipulated as 300 MW, which is also gross capacity of that unit. Thus while offering 100% of unit capacity i.e., gross capacity as net capacity and rate under competitive bidding, even though Article 4.4.4 of the PPA allows use of contracted capacity for meeting the unit's auxiliary requirements, Appellant has taken commercial decision to offer gross capacity of the unit as net contracted capacity and net auxiliary requirement of such contracted capacity from other units of the power plant.

ANALYSIS & CONCLUSION:

7. It is Appellant's case that in the light of order dated 07.03.2018 becoming final, the State Commission ought to have discharged its functions under Section 142 of the Act. Since one cannot travel beyond the decree, therefore even if decree/order was erroneous, under Section 142 of the Act, the State Commission ought not to have modified the fruits of the order dated 07.03.2018. They also contend that once the State Commission passed orders, it becomes *functus officio* therefore; the question of exercising *suo-moto* powers of review would not arise. For the

above prepositions, they place reliance on the judgments of "***Patel Narshi Thakershi and Others v. Shri Pradyuman singhji Arjunsinghji"; "Brakewel Automotive Components (India) Pvt. Ltd. v. P.R. Selvam Alagappan"; "Kumaran Vaidyar and Others v. K.S. Venkiteswaran and others"*** and "***M/s Cauvery Hydro Energy Ltd. vs. Karnataka Power Transmission Corporation Ltd."***. They also bring on record MERC (conduct of business) regulations 2004 to contend that there is no *suo-moto* review powers and so also to substantiate their argument that the powers of review of Respondent-Commission is like that of a Civil Court.

8. On the merits of the impugned order, Appellant contends that the Respondent-Commission ought not to have assumed that auxiliary energy requirement at the time of bid was planned, and accordingly, the Appellant seems to have planned to meet its auxiliary energy requirements through other sources and not from unit No.1. Appellant further contends that the Respondent-Commission also wrongly opined that the tariff bid was based on this assumption.

9. Placing reliance on the order dated 05.03.2018 to opine as stated above was erroneous is the contention of the Appellant. Therefore, Respondent-Commission was wrong in passing the impugned order

declining to allow compensation in respect of Change in Law event so far as auxiliary consumption sourced from other Units. It also erroneously declined change in law compensation on auxiliary consumption met from Unit No.1 itself, on the ground that the Appellant was not entitled to meet auxiliary consumption through Unit No.1 by changing the bid assumption of taking auxiliary energy from other Units. According to Appellant, this was directly in contravention of Article 4.4.4 of the PPA, which allows Appellant to use power for auxiliary consumption from Unit No.1.

10. Appellant also contends that the finding at Para 18.4 of the Order dated 07.03.2018 would not be relied upon since it relates to supply of power from alternative source and not energy sourced for meeting auxiliary consumption from alternative Units.

11. Appellant by placing reliance on Article 19 of the PPA and its proviso contends that it does not suggest that Change in Law compensation for coal utilised for meeting the auxiliary consumption requirement will not be paid to the Appellant. According to the Appellant, the proviso only affirms that the provisions for ‘Change in Law’ and ‘force majeure’ shall be applicable to the Unit identified in the RPP and nothing else. Therefore, according to the Appellant, Respondent-Commission was not justified to interpret Article 19 as interpreted in the impugned order.

12. Appellant also contends that Respondent-Commission ought not to have participated in this appeal since it cannot take sides to support its own order especially when its quasi judicial order is the subject matter before the Appellate Forum.

13. The Respondent-Commission opposing these contentions has reiterated its stand as stated in the reply by way of written submissions pertaining to Appellant's arguments in respect of Section 142 and on the opinion expressed in the order dated 05.03.2018 and so also order dated 07.03.2018. According to Respondents, in the present impugned order the Respondent-Commission has merely reconciled the effect of its earlier orders dated 05.03.2018 and 07.03.2018. At para 18.4 of the order dated 07.03.2018 the Commission has given reasons why there is need to reconcile the earlier orders.

14. The impugned order pertains to Petition No.89 of 2018 before the Respondent-Commission. It is noticed that this Petition was not merely filed for directions under Section 142 of the Act. As a matter of fact, the subject title of the Petition is Section 86(1)(f) of the Act read with Section 142 of the Act. Therefore, it is clear that the Appellant was not justified to contend that the impugned order would not have been passed by the Commission since it was a claim under Section 142 of the Act. This view

of us is further strengthened by the very fact that the Appellant had specifically sought for issuance of directions to Respondent-MSEDCL to compensate the Petitioner towards the impact of Change in Law event so far as auxiliary power consumption and for payment of dues of Rs.12,27,34,994/- Crores. In the said Petition they also sought for payment on account of late payment surcharge in terms of PPA. Therefore, it is very clear that the Appellant sought adjudication of dispute under Section 86(1)(f) since apparently Section 142 cannot give such relief to the Petitioner. Accordingly, we opine that the Appellant is not justified in contending that the Petition was filed only for directions under Section 142 of the Act. Therefore, none of the Judgments relied upon by the Appellant are of any assistance to the Appellant.

15. Appellant in a way has contended that the impugned order is hit by principles of *res judicata* since the impugned order has modified its earlier orders, which have attained finality. The order dated 05.03.2018 pertains to Case No. 122 of 2015. To these proceedings, the Appellant-JSW was also a party. In this order, the Respondent-Commission declined the prayer of the Petitioner to reduce the contracted capacity of the very same Appellant for adjustment of auxiliary power consumption by modification of terms of PPA. Petition No. 123 of 2017, which was disposed of on 07.03.2015, was self contradictory to the earlier order dated 05.03.2018.

Therefore, both the Respondents contend that to remove the disparity between the two orders, in order to benefit larger interest of the ultimate consumers, the necessity to reconcile earlier orders became imperative. Para Nos. 8, 9, 15, 16, 18 and 19 of the impugned order dated 15.01.2019 clearly depicts the entire scenario and then with reasoning this impugned order was passed. Those paragraphs of the impugned order read as under:

"Commission's Analysis and Ruling

8. JSW under the present Petition has approached the Commission against MSEDCL's non- compliance of the Commission' Order dated 7 March, 2018 issued in Case No 123 of 2017. In that Order the Commission has directed MSEDCL to release the amount already deducted and future amount withheld towards applicable Change in Law for auxiliary consumption, with applicable interest thereon within a period of one month from the date of that Order. JSW contended that despite the aforesaid specific direction by the Commission, MSEDCL has resorted not to comply with that Order.

9. The Commission's Rulings on the issue of Auxiliary Consumption in its Order dated 7 March, 2018 in Case No 123 of 2017 are as follows; (In this Case Adani Power Maharashtra Ltd. (APML) and Rattan India Power Ltd.(RPL) has also filed their MAs viz MA No 22/2017 and 24/2017 respectively)

"19. D: ***Whether Change in Law is applicable for the Auxiliary consumption in monthly bills***

19.2 Definition of Contract Capacity as per PPA of JSWEL (300MW) or …..

"Contracted Capacity"

"Means for the first unit 300 MW rated capacity at the Interconnection point offered to and accepted by the Procurer, and in relation to the power station as a whole means 300 MW rated net capacity at the Interconnection Point offered and accepted by the Procurer or such rated capacities as may be determined in accordance with Article 6.3.4 and Article 8.2 of this Agreement, where the rated capacity of a unit or a portion thereof" …..

19.3……

19.4 It is an admitted proposition that auxiliary power consumption is must to run auxiliaries of any Power Plant. The bidder would have quoted certain tariff for the Contracted Capacity after having taken due care of all factors including auxiliary consumption and with applicable Taxes and Duties on the 7th day prior to Bid deadline. Even quantity of coal supply under Fuel Supply Agreement is computed considering the Gross Station Heat Rate. ***The coal required for auxiliary consumption forms part of total coal supply to the generating station. Naturally Change in Law which impacts the coal supply in turn affects the coal which is required for auxiliary consumption. …………… Thus any financial impact on account of Change in Law on coal consumption required for auxiliary power consumption needs to be allowed being inseparable part of any generating unit/station. MSEDCL has argued that the auxiliary consumption is like an O&M expenses, however Commission is not convinced on this account for the simple reason that O&M expenses by any stretch of imagination does not include fuel expenses*****…..**

19.5 The Commission also notes the Orders passed by CERC in Case No 118/MP/2015 dated 30.12.2015 and Case No. 112/MP/2015 dated 07.04.2017, where ***the issue of applicability of Change in Law on component of auxiliary consumption has been explicitly addressed and the impact on account of the same has been allowed****………..*

19.6 …….

19.7 MSEDCL in its submission has cited CERC Order in Case No 189/MP/2016 13.12.2017, where it has mentioned the

Change in Law shall be payable on the Actual coal consumed on the Scheduled generation or actual generation, whichever is lower. The Commission has gone through this Order of CERC and also observed the ruling related to auxiliary consumption, in the same Order at Para 55, which is relevant to the present matter……….

19.8 It is therefore crystal clear that Change in Law is applicable on auxiliary consumption also. ……

19.9……

*19.10 The Commission through the submission and pleadings has observed that **MSEDCL has been making payments on account of Change in Law to the Generators including auxiliary consumption and has never disputed the monthly Energy Bills of the Sellers before being paid.** It has all of a sudden recovered the amount on account of Change in Law to the extent of impact on component of auxiliary consumption. The Commission is of the view that MSEDCL could have approached it for better clarity on the subject.*

*19.11. In view of the above, **financial impact of Change in Law on the auxiliary consumption to restore the generator to the same economic position as if such Change in Law has not occurred is allowed. The Change in Law shall be applicable on auxiliary consumption of the Unit as per the Norms laid down by the Commission or actual, whichever is less since the tariff of the project is based on Competitive Bidding the auxiliary power consumption considered is not known**. However, this auxiliary consumption should be at a normative value corresponding to Scheduled generation only. Moreover, this Change in Law with respect to auxiliary consumption shall not include power consumption for staff colonies of the generating station."*

19.12 This dispensation with respect to Change in Law for Auxiliary Consumption shall also be applicable to APML and RPL
…..

*20.8 <u>In view of the above</u>, **<u>the Commission directs MSEDCL to release the amount already deducted and future amount withheld towards applicable Change in Law for auxiliary consumption, with applicable interest thereon within a period of one month from the date of this Order.”</u>***

Further, regarding Change in Law on energy supplied from alternate source the Commission in the above said Order has also ruled that:

“18.4… the Change in Law would not be applicable in case power is supplied from the alternate source than the identified Unit in the RFP considering the Provisions of Article 19 of PPA.”

………

15. The Commission notes that Gross Generation capacity of JSW is 1200 MW (4 Units x 300 MW) and it has entered into a PPA of 300 MW with MSEDCL on 23 February, 2010, following competitive bidding process in terms of Section 63 of the EA, 2003. JSW has commenced supply of power to MSEDCL as per terms of that PPA in the month of September 2010. That PPA, inter alia, provides the definition of Contacted Capacity as reproduced below;

“Contracted Capacity”

Provided that for the purpose of payment, the tariff will be the Quoted Tariff for the applicable Contract Year as per Schedule 10; Means (i) <u>for the first Unit 300 MW rated net capacity at the Interconnection Point offered to and accepted by the procurer</u>, and in relation to the Power Station as a whole means <u>300 MW rated net capacity at the Interconnection Point offered to and accepted by the</u>

procurer, or such rated capacities as may be determined in accordance with Article 6.3.4 or Article 8.2 of this Agreement, where the rated capacity offered to and accepted by the Procurer could be the entire rated net capacity of the unit or a portion thereof;

16. Thus, it is evident that JSW's first Unit of 300 MW has been clearly identified under the PPA dated 23 February, 2010 entered with MSEDCL. The Commission notes that at the time of bidding, JSW had made a bid for entire rated capacity of the Unit (300 MW) as a net Contracted Capacity (300 MW), which means that auxiliary energy requirement of the Unit was planned to be meet through other sources. Hence, it can be concluded that JSW's quoted Tariff under the PPA has been built on sourcing Auxiliary energy requirement from other sources and not from the Unit under the PPA. The Commission by its Order dated 5 March, 2018 in Case No. 122 of 2015 (wherein JSW was also Respondent) has upheld such assumption / practice of sourcing Auxiliary power requirement from other sources as follows:

> *"13…. The Commission notes that it is not mandatory to meet the Auxiliary Power requirements of a contracted Unit from that Unit alone if and when APML and JSWEL have other united or un utilised capacity to meet it…"*

Hence, in the opinion of the Commission, offering net Contracted Capacity equal to Gross Generating Capacity of the Unit was conscious commercial decision of the JSW.

18. Thus, even though it is ruled under impugned Order dated 7 March, 2018, that compensation for Change in Law event is

applicable for Auxiliary energy consumption, it cannot be made applicable to the auxiliary consumption if it is met from the source other than Unit identified under the PPA/RFP. As regards proportionately allowing the change in law to the extent of auxiliary power consumed from energy generated from contracted unit, Commission doesn't think it to be prudent on the part of petitioner to make that claim if it has chosen to source the auxiliary power requirement from other non contracted units as the entire rated capacity of the unit has been contracted for supply and for which change in law event has been allowed.

19. In view of above, as at the time of competitive bidding, JSW has taken conscious commercial decision to source Auxiliary power requirement of 300 MW Unit from other source, now it cannot claim compensation for Change in Law for such other source or change its bidding assumption and meet Auxiliary requirement from the contracted Unit under the PPA for claiming Change in Law. The impugned Order dated 7 March, 2018 stands corrected to that effect."

16. Reading of the above paragraphs substantiate the contention of the Respondents that the Respondent-Commission followed the principle of interpretation for the benefit and sub-serving the interest of general public at large *vis-a-vis* private parties commercial interest. Even otherwise, it was the duty of the Respondent-Commission to clarify why such orders were passed by reconciling earlier orders in the interest of consumers at large.

17. In Case No. 122 of 2015, amendment of terms of PPA in relation to contracted capacity and auxiliary consumption was sought. In that case, Respondent-Commission opined that it is not mandatory to meet auxiliary power consumption from contracted units. Apparently, auxiliary power consumption is a must to run auxiliaries of any power plant. But, the question is whether in the back drop of offer of the Appellant in the bid i.e., 300 MWs as contracted capacity, was it permissible to deduct such auxiliary consumption from the contracted capacity of Unit No.1? It is noticed that a general observation seems to have been made that auxiliary power consumption need not be mandatorily met from that Unit alone. Therefore, Respondent-Commission did opine in that order of 05.03.2018 that, if required, Appellant is free to meet its auxiliary consumption from other units of the generating station.

18. Subsequently, in Petition No. 123 of 2017, by order dated 07.03.2018 the Respondent-Commission did notice that the contracted capacity in terms of PPA is 300 MWs. It also opined that the normative auxiliary consumption for the purpose of compensation on account of Change in Law shall correspond to scheduled generation and further the Change in Law will be applicable on normative basis or actual, whichever is less. It is also not in dispute that the Respondent-Commission did direct

Respondent No.2-Discom to refund the amount which was adjusted by MSEDCL in terms of letter dated 10.02.2017 and further directed Respondent-Discom to release the amounts, which were withheld, towards Change in Law compensation for auxiliary consumption. Aggrieved by the said order dated 07.03.2018, the Appellant approached this Tribunal in Appeal No. 155 of 2018 on a limited issue i.e., non-payment of applicable tariff for power supplied from alternative source.

19. Appellant contends that by virtue of order dated 07.03.2018 whatever benefit that was granted to the Appellant was reversed by the impugned order so far as entitlement of the Appellant for Change in Law compensation so far as auxiliary consumption was concerned. Therefore, Appellant contends that the principle of restoring Appellant to the same economic position as if no Change in Law has occurred, has to take into its fold the coal consumption towards auxiliary consumption pertaining to the contracted capacity for 300 MWs.

20. Apparently, the sole responsibility of arranging the fuel is on the Appellant since it is case–1 bidding in terms of guidelines. Therefore, in the case of non-availability of fuel from the identified unit, the same needs to be arranged from the alternative source. The Article 19 of the PPA reads as under:

" ARTICLE 19 : SUPPLY FROM ALTERNATE SOURCES

Supply from alternate sources of fuel and from sources other than the unit identified by the Seller in the RFP for competitive bidding process initiated by the Procurer through issue of RFQ and RFP for process for procurement of generation capacity and purchase and supply of electricity is allowed. However, in such cases no tariff adjustment or change in quoted transmission charge/ transmission loss is allowed. Provisions for change in law and force majeure shall be applicable to the unit identified in the RFP, notwithstanding anything contained in this document."

The reading of the above Article makes it crystal clear that if fuel is supplied from alternate source, it does not fall within the ambit of Change in Law. This was the agreed terms between the parties, who signed the PPA i.e., the Appellant and the DISCOM. There is clear understanding that if supply of fuel is done from an alternative source or a source other than the identified Unit under Request for Proposal (RFP), the consequences of Change in Law event will not be of any assistance or will not be applicable to such case. Pertaining to Case-1 Stage-1 competitive bidding PPAs, Petition No. 122 of 2015 came up before the MERC. By referring to Article 4.4 of the PPA, the Commission did opine that there was no compulsion on the seller to use auxiliary power from the same Unit and said Article gives flexibility to use power for auxiliary consumption from the same Unit, if so desired. Therefore, in such case, the seller was

free to arrange auxiliary power requirement from other units of the same thermal power station. It is further noticed that at Para 18.4 of the order dated 07.03.2018 in Case No. 123 of 2017, the Commission categorically opined that the Change in Law would not be applicable to cases where power is supplied from the alternative source i.e., other than the identified unit in the RFP. This was opined in the light of Article 19 of the PPA. This order is challenged in another Appeal No. 155 of 2018, which is pending.

21. By reading the impugned order and the admitted facts, we note that there are two situations pertaining to claim of Change in Law event compensation pertaining to auxiliary power consumption. The seller, if he desires, can always use auxiliary power from the identified unit or it can also use such auxiliary power from other sources other than the identified units. But, by virtue of terms of PPA - Article 19, where parties have specifically agreed that no Change in Law event compensation applies to auxiliary power consumption, if such requirement is met from sources other than the identified unit, generator/seller cannot claim such compensation for Change in Law event in respect of auxiliary consumption.

22. So far as Unit No.1 is concerned, the Appellant offered entire 300 MWs as contracted capacity, therefore, the net capacity and contracted

capacity offered by the bidder was one and the same. The bid of the Appellant was accepted since more power is supplied and the tariff was competitive when compared to other bidders. Now it is not open to the Appellant to claim Change in Law event compensation in respect of auxiliary consumption, if it is met from other than the identified Unit, which was categorically agreed in the light of PPA.

23. Next question would be "whether the Appellant is entitled to Change in Law event compensation in respect of power consumed for auxiliaries of the same unit"? In our view, the seller can claim such compensation in respect of Change in Law event, but the Appellant-Seller may have to face other consequences of not supplying power out of contracted capacity at normative level of 80%. In such event, the generator will be eligible for change in law event compensation for supplying auxiliary power from Unit No.1, but at the same time, he may have to lose the opportunity of recovering quoted tariff and incentive for making higher capacity available. Apparently, the Appellant is seeking Change in Law event compensation in respect of auxiliary consumption from sources other than the identified Unit, therefore, Appellant is prohibited to claim such compensation, since the Appellant has signed the PPA with its eyes open agreeing for such terms. The Appellant seller is not entitled to claim change in law event compensation in respect of auxiliary power consumption being utilized

from units other than the identified Unit. This is what Part – II of Article 19 provides. The rationale/reason behind such provision seems to be that the Appellant has not entered into any PPA with MSEDCL to supply power from its other units. Apparently, the other units of the Appellant are operating as merchant units. Therefore, the other units cannot be given the same treatment and benefit on par with Unit No.1. Accordingly, we opine that the Appellant would be entitled to claim change in law compensation to the extent of auxiliary power being utilized from Unit No.1 only. However, the Appellant may have to face other consequences for not supplying power out of contracted capacity at normative level. This observation is consistent with Article 19 and so also Article 4.4.4 of the PPA, which specifically provides for utilization of power from Unit No.1 to meet auxiliary power requirement and housing colony consumption. Any other interpretation is nothing but revision of PPA terms, which is not permitted in law without mutual consent of the parties.

24. In the light of the above situation and the nature of contract between the parties, especially agreed terms of PPA in respect of Change in Law event compensation regarding the offer of entire 300 capacity of Unit No.1 <u>of contracted capacity by the bidder</u>, the Appellant is not entitled for the relief sought so far as Change in Law event. In this appeal, the claim of the Appellant for change in law event compensation for the auxiliary power

supplied from other units would have been justified had the Appellant tied up the entire capacity of the power station with MSEDCL. In such event, entire capacity from all the units would have been dedicated to MSEDCL whereby the consumers of MSEDCL would have consumed such power. In such situation, the total power generated from all the units would have been utilized for the benefit of MSEDCL and the Appellant would not have any scope for selling the power to third parties. However, the case on hand is different, since the Appellant has PPA with MSEDCL for Unit No. 1 only. The Appellant has flexibility of using the power generated from other units either for merchant sale whenever market rates are high or use it for Unit No.1's auxiliary power requirement. Therefore, in the absence of any obligation or commitment on the part of the Appellant to serve the consumers of the State in question from other units, there is no justification or rationale to ask the consumers of the State to pay for such power.

25. The reading of orders of the Respondent-Commission dated 05.03.2018 and 07.03.2018 when compared with the impugned order, there is no modification or reversal of their earlier opinions. In the impugned order the Commission has clarified under what circumstances in the light of terms of contract (PPA) a seller is entitled to Change in Law event compensation.

26. Apparently, the Appellant's thermal power station is having four Units of 300 MWs capacity. We are concerned with Unit No.1 only. Power from Unit No.1 was contracted by following the due process and guidelines for competitive bidding in terms of Section 63 of the Act. In terms of PPA, net contracted capacity of Unit No.1 is stipulated as 300 MWs, which is also gross capacity of that Unit. Therefore, in terms of RFP, while offering capacity and rate under competitive bidding, the Appellant has taken commercial decision to offer entire gross capacity of 300 MWs of the Unit as net contracted capacity. This offer of the Appellant rather implies that the Appellant would meet the auxiliary power requirement of such contracted capacity i.e., Unit No.1 from other Units of the power plant. Therefore, the Respondents were justified to contend that the Appellant while submitting its bid and signing the PPA, had specifically agreed to supply entire capacity without reducing any capacity for auxiliary consumption. It is specific stand of MSEDCL that because of this reason of offering entire capacity of Unit No.1, the bid of the Appellant was considered over and above the other bidders i.e., supply of more power than other generators. Therefore, both Respondents are justified in stating that Article 4.4.4 of the PPA cannot endure to the benefit of the Appellant, since it only refers to liberty of seller to use power from contracted capacity for auxiliary consumption requirement and it does not stipulate any

commercial implications arising out of it. As stated above, in such case, the Appellant has to forego commercial benefit of recovery of quoted tariff to that extent and also lose the opportunity of claiming incentive.

27. In the instant Appeal, we are not concerned with the dispute whether auxiliary power consumption could be drawn from identified or non-identified Unit for the purpose of compensating the Appellant in respect of Change in Law event claim. What we are concerned is whether the Appellant is entitled for the claim of auxiliary power in the first place, since the Appellant agreed to supply entire bid capacity of 300 MWs, which is both net and gross capacity of Unit No.1, and since the Appellant had not sought for reduction for auxiliary consumption, which became the basis for accepting the bid of the Appellant, we are of the opinion that the Appellant knew very well that it has to meet requirement of auxiliary power consumption for supply of power from Unit No.1 by making its own arrangement. Therefore, there is no such indication i.e., payment obligation under PPA. Now, the Appellant cannot demand payment for auxiliary consumption since the Appellant itself waived such claim at the time of offering bid, which became the foundation or reason for the Appellant to become successful bidder. It is also noticed that in Petition No. 122 of 2015, the claim of the present Appellant for reduction of contracted capacity was rejected and the Appellant was also penalised for

not meeting the obligation of supply of contracted capacity. Therefore, Article 4.4.4 is like an exception or enabling provision. Therefore, the Respondent-Commission was justified in rejecting the claim of the Appellant for revision of terms of PPA, since it would amount to reopening of PPA, which cannot be entertained in view of competitive bidding process contract under Section 63 of the Act. This order dated 05.03.2018 was never challenged by the parties. Therefore, we conclude that in so far as the auxiliary power consumption from the same Unit is concerned, the claim of the Appellant cannot be rejected in the light of Article 4.4.4 of the PPA. The Appellant/seller shall be eligible to claim change in law compensation on auxiliary power supplied from other units, only when the capacity of entire power station is tied up with MSEDCL through long terms PPAs.

28. In the light of above discussion, reasoning and so also conjoint reading of Articles 4.4.4 and 19 of the PPA, we are of the opinion that none of the contentions raised by the Appellant are sustainable to claim change in law event compensation for the auxiliary power consumption met from other Units except to the extent of auxiliary power being utilised from Unit No.1. Accordingly, the appeal is disposed of in the above terms. Needless to say that all the pending IAs, if any, shall stand disposed of.

29**.** There shall be no order as to costs.

30. Pronounced in the Virtual Court on this **day of 20th October, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

√

REPORTABLE / ~~NON-REPORTABLE~~

Tpd/ts