IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL No. 446 OF 2019 &
IA Nos. 494, 493 OF 2020 &
IA Nos. 2240, 2239 & 2263 OF 2019

Dated: **15th September, 2020**

Present: **HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER**

HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

IN THE MATTER OF

VIDARBHA INDUSTRIES POWER LIMITED
Through its Authorized Representative
H-Block, 1st Floor, Dhirubhai Ambani Knowledge City,
Navi Mumbai 400 710
Maharashtra ..... **Appellant**

VERSUS

1. **MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**
Through its Secretary,
World Trade Centre No. 1, 13th Floor,
Cuffe Parade,
Mumbai 400 005, Maharashtra ..... **Respondent No.1**

2. **ADANI ELECTRICITY MUMBAI LIMITED**
Through its Authorized Representative
Devidas Lane, Off SVP Road,
Near Devidas Telephone Exchange, ... **Respondent No.2**
Borivali (W), Mumbai 400013, Maharashtra

3. **AXIS BANK LIMITED**
Through its Authorized Representative
'Axis House'
C-2, Wadia International Centre,
Pandurang Budhkar Marg, ... **Respondent No.3**
Worli, Mumbai 400 025, Maharashtra

Counsel for the Appellant : Mr. Basava Prabhu S. Patil, Sr. Adv.

Mr. S Venkatesh
Mr. Vikas Maini
Mr. Suhael Buttan

Counsel for the Respondent(s): Mr. Ramji Srinivasan, Sr. Adv.
Mr. Ramanuj Kumar
Mr. Manpreet Lamba
Ms. Priyal Modi for R-2

Mr. Sitesh Mukerjee
Mr. Vishal Binod
Mr. Arjun Agarwal for R-3

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. This matter was heard, with consent of all sides, by Video-Conferencing, physical presence in Court being not possible on account of restrictions imposed and advisories issued by governmental authorities for containing spread of coronavirus (Covid-19).

2. The appellant Vidarbha Industries Power Limited (hereinafter referred to variously as "VIPL" or "appellant" or "the Genco" or "the Seller" or "the borrower"), is a Generating Company within the meaning of Section 2 (28) of the Electricity Act 2003 ("the Act"). It (VIPL) developed a 600 MW (2x300 MW) Coal-fired Thermal Power Plant ("TPP") at the Maharashtra Industrial Development Corporation ("MIDC") Butibori Industrial Area, District Nagpur, Maharashtra ("the project"). During the period around and immediately anterior to the happening of the subject events, the power from the project was being

supplied (to the extent of half of the required baseload demand of 1200 MW) to second respondent Adani Electricity Mumbai Limited (hereinafter referred to variously as “AEML” or “the second respondent” or “the Procurer”), which is a Distribution Licensee for specified area of Mumbai, under a Long-Term Power Purchase Agreement styled and labelled as the “Consolidation Agreement” (“PPA”) dated 14.08.2013 which statedly came into effect from 01.04.2014, covering two units of the appellant it having entered into such arrangement originally with Reliance Infrastructure Ltd (“RInfra”), a company (procurer) from which the second respondent would later take over. The third respondent i.e. Axis Bank Limited is the lead bank of the consortium of lenders (“Lenders”) vis-à-vis RInfra (the original procurer) certain discretion and rights vested in it having been taken care of by the said PPA dated 14.08.2013.

3. The present appeal has been filed under sub–section (1) and (2) of Section 111 of the Electricity Act 2003 against the Final Order and Judgment dated 16.12.2019 passed by the first respondent Maharashtra Electricity Regulatory Commission (hereinafter referred to variously as “MERC” or “the Commission” or “the first respondent”) in Case No. 247 of 2019 (“the impugned order”). The second respondent (procurer) had invoked certain clauses of the PPA to issue and serve on the appellant (Genco) a Procurer’s Preliminary Default Notice dated 18.01.2019 (“PPDN”), it being followed by a

Letter/Notice dated 20.04.2019 ("Termination Notice") thereby bringing an end to the contractual relationship. The above-said case (no. 247 of 2019) had been filed by VIPL before MERC challenging the legality of the said PPDN and Termination Notice. By the impugned order dated 16.12.2019, the Commission found, *inter alia*, that procedure as per PPA of serving copy of PPDN on the Lenders had not been followed but rejected the plea of the appellant that the impugned action of the procurer bringing an end to contractual relationship was illegal. It held the Termination Notice to be valid though deeming it to have been issued to the Lenders on the date of the Order (i.e. 16.12.2019) clarifying that the Lenders might take further necessary action as per provisions of PPA to exercise their right of substituting VIPL with another entity for operating the thermal station for recovery of their dues and further that in case of default on the part of lenders in availing such rights, the procurer (AEML) to be at liberty to arrange alternate source for its requirement of power and approach the Commission with appropriate petition within six months of the order.

4. By the appeal at hand, the appellant contends that in taking the above view, the MERC has *ex facie* demonstrated lack of probity or propriety, exhibiting institutional bias, it having condoned critical omission and sustaining such termination on a completely egregious premise, virtually foreclosing the existing rights of VIPL and its

shareholders, in spite of holding that the mandatory procedure prescribed for the Termination of PPA dated 14.08.2013 has not been followed by AEML in issuing the PPDN as well as Termination Notice.

5. The background facts on which the parties rely, or as are necessary for adjudication on the present appeal, have been set out at length in the pleadings. The facts which are admitted or indisputable may be taken note of at this stage.

PAST HISTORY INVOLVING R-INFRA – NARRATIVE BY APPELLANT

6. The appellant has taken us through the history from the very beginning of the project.

7. The Ministry of Coal ("MoC"), Government of India ("GoI") had issued the New Coal Distribution Policy, 2007 ("NCDP, 2007") on 18.10.2007. Through NCDP, 2007, the GoI had given an unequivocal commitment to meet the existing as well as future coal requirement of all Generators through linkage/ Letter of Assurance ("LOA") / Fuel Supply Agreement ("FSA"), by domestic coal, up to 100% of the normative requirement. Some of the key provisions of NCDP, 2007 included (i) Clause 2.2 that held out assurance that 100% of quantity of coal shall be given to power plants; (ii) Clause 5 whereunder policy for new consumers was envisaged in terms of which LoA would be issued followed by signing of FSA; and (iii) Clause 7 whereby process

of signing FSA with new consumers was provided subject to fulfilment of certain milestones. However, recognizing the shortfall in availability of domestic coal, the Cabinet Committee on Economic Affairs ("CCEA") by its decision dated 21.06.2013 approved the mechanism for supply of coal to power producers. This was done primarily owing to shortage of coal materialization in India, permitting Coal India Limited (CIL) to import and supply coal to willing TPPs on cost-plus basis, also allowing the TPPs to import coal to meet the shortfall in supply of indigenous coal by CIL. The NCDP was amended ("Amended NCDP, 2013") by MoC on 26.07.2013, pursuant to the decision of CCEA, the existing Coal supply under the FSAs having been reduced thereunder.

8. On 06.11.2007, VIPL was awarded the implementation of a Group Captive Power Project ("GCPP") by Maharashtra Industrial Development Corporation (MIDC) through Competitive Bidding Process, initially a generating station of 130 MW capacity later enhanced to 300MW, it (VIPL) being permitted to so expand the capacity by adding Phase II (300 MW capacity) as Independent Power Project ("IPP"). On 25.06.2008, LOA for Supply of Coal was issued by Western Coalfields Ltd. ("WCL") to VIPL in consideration of request made by VIPL for 12,34,000 tons per annum of indigenous coal in respect of VIPL's Unit-I, as per NCDP 2007, the LOA for second unit being issued by WCL on 13.07.2010.

9. It is own case of the appellant that since adequate industrial consumers had not shown interest in procuring power from first phase of its generating station under GCPP route, it had offered on 18.01.2013 the entire 600 MW gross capacity to Reliance Infrastructure Limited ("RInfra"), a distribution licensee ("Discom") then operating in Mumbai with the approval of the Commission. It is admitted case of the appellant that both the appellant (VIPL) and the said Discom (RInfra) are sister concerns they being subsidiary companies of the conglomerate named Reliance India Limited (RIL). On 15.03.2013, the appellant and RInfra entered into a PPA for supply of power from second unit of the former (VIPL).

10. On 31.02.2013, both the above said parties, i.e. the appellant and RInfra, approached the State Commission by a joint petition (case no. 2 of 2013) under Section 86 (1) (a), Section 86 (1) (b), Section 62 of the Electricity Act (i.e. on Cost Plus basis) read with MERC (Multi Year Tariff) Regulations, 2011 ("MYT Regulations 2011"), praying for approval of the PPA and determination of Provisional Tariff thereof. The petition was allowed by MERC by its order dated 20.02.2013, it being *inter alia* held that the PPA for Unit-1 would be considered after the approval of MIDC had been granted, the PPA in respect of Unit-II having been approved in terms of the MYT Regulations 2011, the energy charges being based on the projections made by VIPL. Thus, the appellant and RInfra executed

the PPA for supply of power from Unit II on 15.03.2013. In the wake of developments wherein MIDC accorded approval on 28.05.2013 for conversion of Unit I from GCPP to an IPP (the LOA being later permitted to be converted from GCPP to IPP on 21.02.2014 followed by MoC forwarding to CIL the said decision on 04.03.2014 and execution of FSA in respect of VIPL's Unit II for 300MW being signed on 10.03.2014 and coal supply starting from October 2014), another PPA was executed on 04.06.2013 for Supply of Power from Unit I. Then followed the execution of the "Consolidated Agreement" (the PPA) for supply of power from the entire capacity of VIPL (Unit-I & Unit-II), the parties approaching MERC by a joint petition (Case no 76 of 2013) for approval of the said Consolidated Agreement (PPA). The MERC by its order dated 19.07.2013 (in Case No. 76 of 2013) approved the PPA between VIPL and RInfra for supply of power generated from VIPL's Unit I under Section 62 of the Act and also the Consolidated Agreement executed between the parties for supply under the two PPAs for Unit I and II to be treated as supply from Power Station as a whole. Thus, the Consolidated PPA was executed on 14.08.2013 by VIPL with RInfra for Supply of Power from both Unit I and Unit II.

11. On 24.07.2013, the appellant (VIPL) filed petition (Case No. 91 of 2013) before MERC praying for determination of provisional tariff for the Consolidated PPA for FY 2014-15 and 2015-16 on cost plus

basis i.e. under Section 62 of the Act. The Unit I of VIPL was concededly not on the list of such IPPs as had a LoA and would be granted an FSA as per NCDP, 2013. The VIPL statedly was constrained to obtain coal from alternative sources, including procurement of imported coal to commence power supply to RInfra w.e.f 01.04.2014.

12. It is pointed out that in the wake of Amended NCDP, 2013 issued on 26.07.2013, the MoP of GoI had earlier on 31.07.2013 issued letter advising the Electricity Regulatory Commissions to allow additional cost of coal as a "*pass through*" in terms of the decision taken by the CCEA treating it as consequent to the occurrence of a Change in Law event. On 30.05.2014, VIPL filed a petition (Case No. 115 of 2014) before MERC praying for determination of final tariff for FY 2014-15 and 2015-16 under MYT Regulations 2011.

13. It is the case of the appellant that while facing constraints of lack of domestic coal supply, on account of pending FSA for Unit I, it was obliged to continue procuring coal from alternative sources and supplied power to the procurer (RInfra), the latter (RInfra) being in default in timely or adequate payments for supply of power drawn. On 24,03.2015, it (the appellant) called upon the then procurer (R-infra) to clear the Supplementary Invoices raised to the tune of Rs. 250 Crores for delayed payment for the period April 2014 to February 2015 wherein inadequate payments were made by the latter

(Procurer/ R-Infra). This situation, it has been stated, continued to prevail and the appellant was constrained to issue another Letter on 08.03.2017, *inter alia*, pointing out the breaches owing to constant default in making payments causing deep financial stress requesting R-Infra to make immediate payment.

14. The appellant had filed a petition (Case No. 91 of 2015) before MERC on 10.07.2015 in terms of Section 62 of the Electricity Act read with applicable MYT Regulations praying for determination of final true up of FY 2014-15 and revised Annual Revenue Requirement ("ARR") for FY 2015-16 claiming cost of coal as entirely pass through. The said petition was disposed of by MERC by its Order dated 20.06.2016, *inter alia*, disallowing the actual fuel costs for FY 2014-15 and FY 2015-16 and directing VIPL to refund Rs. 841 crores to R-Infra (later corrected as Rs.740 crore) mainly on account of procurement of alternate coal for Unit I and Cost-Plus coal for Unit II. It is the contention of the appellant that the order of MERC was patently erroneous as the Regulations framed by MERC categorically permitted VIPL to claim actual cost of coal for its Section 62 (Cost-Plus) Project.

15. The above-mentioned Order of MERC was challenged by the appellant before this tribunal by appeal (No. 192 of 2016) which was decided by judgment dated 03.11.2016 holding that for Section 62 projects (i.e. Cost-Plus projects), no ceiling on cost of coal could be

prescribed. Reliance is placed by the appellant on some parts of the said decision which, therefore, may be extracted verbatim as under:

"7. QUESTIONS OF LAW

As per Appellant, following questions of law arise in the present Appeal:

a) Whether the Appellant, is entitled to claim the fuel costs incurred by it due to delay in execution of Fuel Supply Agreement (FSA) with Coal India Limited ("CIL") and its subsidiaries for reasons not attributable to the Appellant in its tariff to Respondent No.2, with whom there is a valid, duly approved Power Purchase Agreement, in accordance with the applicable Tariff Regulations of the State Commission?

b) Whether Respondent No.1 has ignored the inordinate delay on part of various Government Authorities and Public Sector Companies which are not within the control of the Appellant and /or are force majeure events which in turn has delayed execution of the FSA between the Appellant and WCL despite all efforts on part of the Appellant?

c) Whether the 1st Respondent could have disallowed such cost of fuel incurred by reason of there being no FSA in favour of the Appellant?

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g) The State Commission while giving in-principle approvals for the Power Purchase Agreements for Unit–II vide order dated 20.02.2013 as well as for Unit-I vide order dated 19.07.2013 has not put any specific conditions as far as Energy Charges are concerned. The State Commission has put its observations in Annexure-1 of the order on the PPA which also does not include any specific reference to the limitation/ capping/ outer limit of Energy Charges. Further, the State Commission also approved the Consolidation Agreement executed between RInfra-D and VIPL for supply under the two PPAs for Unit 1 and Unit 2 to be treated as supply from the Power Station as a whole.

h) As per the provisions of Electricity Act 2003, there are two specific modes of power procurement and tariff

determination by the Appropriate Commission. The State Commission after going through its prudence check for analysing the options of power procurement by Respondent No 2 and ensuring competitiveness of the power proposed to be supplied by the Appellant had taken a conscious decision to grant in-principle approval of the Power Purchase Agreements between the Appellant and Respondent No 2. The said approval was to determine the Tariff under Section 62 of the Electricity Act, 2003 on cost plus basis.

i) The State Commission in the Impugned Order observed that "the PPA through Section 62 route was approved by the Commission considering also the projections of VIPL-G showing that, even in a pessimistic scenario (CIL supplying, out of the committed coal, 65% in FY 2014-15 and 70% in FY 2015-16, the rest being procured from the domestic open market and/or imports), the Energy Charge would still be competitive, at Rs 1.74 in FY 2014-15 and Rs. 1.79 in FY 2015-16. Had a higher tariff been envisaged, the Commission might well not have approved the PPA under Section 62 and asked RInfra-D to explore other options and modalities." We do not find any support to the observations of the State Commission in its earlier orders granting approval of the Power Purchase Agreement for Unit-I as well as Unit-II. The State Commission while examining the various fuel scenario may have identified any ceiling/ ratio of coal use as specified under various scenario, which is not the case under present consideration. Once the State Commission has approved the PPA under Section 62, the basic principles of Tariff determination as per Section 62 have to be followed by the State Commission.

j) Even as per the provisions of the Tariff Policy 2016, in case of Competitively Bid projects under Section 63 of the Electricity Act, the cost of imported/ market based e-auction coal procured for making up the shortfall due to reduced quantity of domestic coal supplied by CIL, vis-a-vis the assured quantity or quantity indicated in Letter of Assurance/ FSA, has been made a pass through by the Appropriate Commission on a case to case basis.

k) The basic philosophy of allowing such additional coal cost as pass through in the Tariff is to deal with the situations where the shortfall in coal supply is beyond the control of the Developer/Generator. Here in the present case the

Appellant, in absence of supply of Domestic coal at notified prices, was forced to use Cost Plus coal as well as use coal from other sources (e-Auction/ Imported) .To safeguard the interest of the consumers, the prudence check of the Appropriate Commission has also been well recognised. In the present case while deciding on the True Up petition filed by the Appellant, the State Commission ought to have considered the factors for arranging coal from other sources despite putting up best efforts to get coal from CIL/ WCL/ SECL sources by the Appellant. The State Commission while applying its prudence check must allow the actual fuel mix used by the Appellant while determining the Energy charges for FY 14-15 and FY 15-16. While giving this observation, we would like to underline the fact that it is the prime responsibility of the Appellant to ensure supply of domestic linkage coal from CIL to have most competitive energy charges for the supply of its power to Respondent No 2. Further as the domestic coal availability position in the country has eased out, the Appellant as well as the State Commission has to ensure the supply and use of Domestic coal to the extent possible for supply of power under the current agreements.

l) It is abundantly clear that the prime responsibility of arranging coal is that of the Appellant. Inspite of all efforts put in by the Appellant, it could not get the FSA for Unit-I executed. As such the Appellant arranged/is arranging the coal through alternate sources for Unit-I. The Appellant should put in all possible efforts to get the FSA executed for Unit-I at the earliest. It is not at all a fair practice as adopted by the State Commission in the Impugned Order to restrict the actual fuel cost incurred/to be incurred by the Appellant based on the various considerations as detailed out in the Impugned Order for generation from Unit-I for the given period. In the meantime, the State Commission is directed to allow the Appellant the cost of coal supplied/being supplied in the intervening period till the FSA is executed by the Appellant for Unit-I limiting to the extent of the cost of coal what has been allowed/being allowed by the State Commission to the Appellant for Unit-II during the period from COD till the FSA for Unit-I is executed.

m) Having observed as above, we will decide the first issue i.e. Whether the Appellant is entitled to claim the fuel costs incurred by it due to delay in execution of Fuel Supply Agreement (FSA) with Coal India Limited ("CIL") and its

subsidiaries for reasons not attributable to the Appellant in its tariff to Respondent No.2, with whom there is a valid, duly approved Power Purchase Agreement, in accordance with the applicable Tariff Regulations of State Commission, in favour of the Appellant for allowing cost of coal for Unit-I limiting to the extent of what has been allowed/is being allowed by the State Commission for the corresponding period for the supply under FSA arrangement for the generation from Unit-II of the Appellant to Respondent No.2.

n) On the related issue at para 7 (b) above i.e. Whether Respondent No.1 has ignored the inordinate delay on part of various Government Authorities and Public Sector Companies which are not within the control of the Appellant and /or are force majeure events which in turn has delayed execution of the FSA between the Appellant and WCL despite all efforts on part of the Appellant, this issue gets covered as per our decision as above."

(Emphasis laid by appellant)

16. In the wake of the above judgment dated 03.11.2016 of this tribunal (in Appeal no. 192 of 2016), the appellant (VIPL) filed application (in Case No. 91 of 2015) for implementation before MERC while MERC preferred Civil Appeal No. 372 of 2017 before the Hon'ble Supreme Court which is pending.

17. Meanwhile, on 17.05.2017 CCEA approved new more transparent Coal Allocation Policy for Power Sector, 2017 named "*Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India*" ("*SHAKTI*") for signing of FSA with existing LOA holders of Thermal Power Plants. As per this policy (*SHAKTI*), FSAs for the existing LOA holders are to be signed after ensuring that the units are commissioned or would be commissioned before 31.03.2022, respective milestones met, all specified conditions of the LOA fulfilled

within specified timeframe and where nothing adverse is detected against the LOA holders. It is the case of appellant that it has been eligible for immediate execution of FSA under para (A) (i) of *SHAKTI* since it had LOA and was party to an existing PPA. Its request to CIL and MoC, however, did not evoke any reply and it claims to have submitted its response to notice inviting Expression of Interest ("EoI") issued by CIL to participate in linkage e-auction to secure the FSA for Unit I under Para B(ii) of *SHAKTI* Policy which was applicable for plants that hold valid PPA but not LoA, this without prejudice to its claim of entitlement under Para A(i).

18. But, on 06.09.2017, Central Electricity Authority ("CEA") disallowed the participation of the appellant in e-auction of linkages in line with Clause B (ii) of the *SHAKTI* Policy on the ground that the VIPL already has a valid LOA for its Unit I and FSA for its Unit II in which view "*the eligible quantity has been shown as zero*".

19. The appellant filed Writ Petition (C) No. 10614 of 2017 on 20.11.2017 before Delhi High Court, seeking execution of FSA for Unit I and interim relief in the nature of immediate commencement of coal supply through the MoU route. On 31.01.2018, by an interim order, a single bench of the High Court observed that the appellant (VIPL) appears to have fulfilled the pre-requisite of Clause A (i) of SHAKTI Policy and consequently directed CIL to supply coal as per the quantity and grade mentioned in the LOA. A Review Application

No.102 of 2018 filed by MoC was rejected on 07.03.2018. The MoC of GoI and CIL challenged the said orders by LPA (No. 169/2018) which was allowed by order dated 21.08.2019 of a division bench of Delhi High Court and the Orders dated 31.01.2018 and 07.03.2018 of single bench were set aside primarily because the appellant did not fall in the IPP category the conversion whereto from status of GCPP had been applied for only subsequently and also for the reason that at interim stage relief in the nature of mandatory injunction ought not have been granted. The main Writ Petition, however, has remained pending before the High Court.

20. It is pertinent to also note (as highlighted by the second respondent) in above context that the Appellant was found ineligible by the SLC(LT) of the MoC to get the FSA on the basis of LoA issued for Unit 1 as a GCPP. In its meeting held on 19.01.2018, the Committee concluded that VIPL's Unit 1 as IPP had sought to bypass the procedure and thus was not eligible to transfer its LOA from GCPP to IPP, its minutes reading, *inter alia*, as under:

> *"17. MoC also informed that a complaint vide letter dated 3rd February 2014 also addressed to CBI and CVC, has been received which raises similar issues. It was indicated therein that due to non-availability of sufficient power grade coal in WCL, the sanction of new Power Plants under IPP in the Vidarbha Region of Maharashtra was not possible and hence, VIPL entered through the route of GCPP initially, and now camouflaging the situation to convert it into IPP to take advantage of the fuel cost difference between GCPP and IPP, which is about 90-100 Crores per annum considering the present price structure of coal. It was also stated in the*

complaint that the recommendations of WCL to MoC for conversion from GCPP to IPP is already under scanner of agencies like CBI, CVC etc."

(Emphasis laid by second respondent)

21. The conclusions of the Committee may be quoted thus:

"a. the PP (i.e., VIPL) bypassed the queue of IPPs which were awaiting recommendations for issuance of LOA at that point of time. This denied level playing field for the IPPs who were waiting in the queue and awaiting LoA.

b. the tangible and intangible benefits of a LoA had accrued to PP while it never functioned as a CPP.

c. The intentions of PP/VIPL were never to operate as CPP but only to gain benefits by switching from one category to another, i.e., from CPP to IPP.

d. the comparison with preceding case of AMNEPL, as quoted by PP, does not hold as the nature of PPAs was different in these two cases. In AMNEPL, PPA was to be based on tariff-based bidding where the rates are market-discovered.

e. In the cases of conversion of category after the case of PP, the entities had been denied transfer of linkage upon change in the category from IPP to CPP or vice-versa."

POWER PURCHASE AGREEMENT (PPA)

22. A copy of the PPA dated 14.08.2013 has been submitted with the pleadings. It may be noted that the appellant is described in the said document as the "Seller" while the other party (RInfra, the original signatory) is described as the "Procurer". The interest represented by the third respondent (not a party to the PPA) is covered under the expression "Lender(s)" defined by Article 1 (Definitions and Interpretation) to mean "*mean the banks, other financial institutions, multilateral agencies, RBI registered non-banking financial*

companies, mutual funds and agents or trustees of debenture/ bond holders, including their successors and assignees, who have agreed as on or before commencement of supply of power from the Power Station to provide the Seller with the debt financing, and any successor banks or financial institutions to whom their interests under the Financing Agreements may be transferred or assigned", this subject to proviso "*that, such assignment or transfer shall not relieve the Seller of its obligations to the Procurer under this Agreement in any manner and does not lead to an increase in the liability of the Procurer at any given point of time*".

23. The PPA conceived of possibility of its termination and, thus, defined "*Termination Notice*" as a communication by one party to the other party of the Contract to bring about "*termination of this Agreement in accordance with Articles 3.4.2, 3.4.3, 3.4.4, 3.4.5, 4.1.1, 11.3.4, 11.4.5, 11.5.1 and Clause 7.2.3 of Schedule 7 of this Agreement*". It may be added that we are concerned here with Article 11.3 since that relates to the event of default attributable to the Seller which is the premise on which the impugned PPDN and Termination Notice were issued by the procurer leading to the dispute at hand, the ground thereof pertaining to "*Availability Factor" or "Availability"* which under the contract definitions mean "*the average of the daily average declared capacities as certified by Maharashtra State Load Despatch Centre (MSLDC) for all the days during that period expressed as a*

percentage of the installed capacity of the Unit 1 of the Power Station minus Auxiliary Consumption in MW" the formula for its computation having been specified.

24. By express terms of the PPA, the Seller (the appellant) took upon itself certain obligations. Article 3.1 reads thus:

3.1 Satisfaction of conditions subsequent by the Seller

3.1.1 The Seller has Power Station of 600 MW at the location described in this PPA

3.1.2 The Seller agrees and undertakes to duly perform and complete the following activities at the Seller's own cost and risk within ten (10) months from the Effective Date, unless such completion is affected by any Force Majeure event or due to the Procurers' failure to comply with their obligations under Article 3.2.1 of this Agreement, or if any of the activities is specifically waived in writing by the Procurer:

a) The Seller shall have executed the Fuel Supply Agreement and have provided the copy of the same to the Procurer;

b) The Seller shall submit evidence of commissioning of the Unit 1 of the Power Station, including details of its Installed Capacity;

c) The Seller shall have obtained all Consents, Clearances and Permits required for supply of power to the Procurer as per the terms of this Agreement;

d) The Seller shall have sent a written notice to all the Procurer indicating the Aggregate Contracted Capacity and total Installed Capacity for each unit and for the Power Station as a whole expressed in MW;

e) The Seller shall have provided an irrevocable letter to the Lenders duly accepting and acknowledging the rights provided to the Lenders under the terms of this Agreement;

(Emphasis supplied)

25. It is clear from the above that it is the obligation of the Seller to execute Fuel Supply Agreement and take all necessary consents, clearances or permits and to perform its part of the bargain within the specified timelines at its own cost and risk. The obligations, noticeably, include accepting and acknowledging by communication that cannot be revoked to the Lenders as to the rights created in their favour by the PPA. It may be assumed, since contrary has not been pleaded or argued, that the appellant would have sent such communication to the lenders after the execution of the PPA.

26. The appellant seeks to highlight that the payment terms were set out in (Article 8 : Billing and Payment) the PPA as under:

Payment of monthly bills

8.3.3 All payments required to be made under this Agreement shall only include any deduction or set-off for:

i) deductions required by the Law; and

ii) amounts claimed by the Procurer from the Seller, through an invoice duly acknowledged by the Seller, to be payable by the Seller, and not disputed by the Seller within thirty (30) days of receipt of the said Invoice and such deduction or set-off shall be made to the extent of the amounts not disputed. It is clarified that the Procurer shall be entitled to claim any set-off or deduction under this Article, after expiry of the said thirty (30) Days period.

Provided further, the maximum amounts that can be deducted or set-off by the Procurer under this Article in a Contract Year shall not exceed an amount equal to Rupees Two Lakhs Fifty Thousand only (Rs 2,50,000) per MW of Contracted Capacity, except under sub Article (i) above.

8.5 Third Party Sales on Default

8.5.1 Upon the occurrence of an event where the Procurer has/ have not made payment by the Due Date of an Invoice, the Seller shall follow the steps as enumerated in Articles 8.5.2 and 8.5.5.

8.5.2 On the occurrence of the event mentioned in Article 8.5.1 and after giving a notice of at least seven (7) days to the defaulting Procurer, the Seller shall have the right to offer twenty five (25) per cent of the Contracted Capacity pertaining to defaulting Procurer ("Default Electricity") for sale to third-parties.

8.5.3 Deleted

8.5.4 Deleted

8.5.5 If the payment of the due amount in full is not made by the Procurer within thirty (30) days of the Due Date on the respective Invoice, the provisions of Article 8.5.2 shall apply with respect to one hundred per cent (100%) of the Contracted Capacity.

8.5.6 In the case of Article 8.5.5, the Seller shall ensure that sale of power to the shareholder(s) of the Seller or to any direct or indirect affiliate of the Seller/ the shareholder(s) of the Seller is not at a price less than the Energy Charges.

8.5.7 In case of third party sales as permitted by this Article 8.5, the adjustment of the surplus revenue over Energy Charge (applicable to the defaulting Procurer) attributable to such Default Electricity sold, shall be adjusted as under:

a) the surplus up to the Tariff shall be used towards the extinguishment of the subsisting payment liability of the defaulting Procurer towards the Seller; and

b) the surplus if any above the Tariff shall be retained by the Seller.

8.5.8 The liability of the defaulting Procurer towards making Capacity Charge payments to the Seller even for Default Electricity sold to third parties or other non- defaulting Procurers or remaining unsold during such periods will remain unaffected.

Provided such Capacity Charge payment liability shall cease on the date which occurs on the expiry of a period of three (3) years from the date of occurrence of a Procurer Event of Default under Article 11.2.1 (i), provided if prior to such date, such Procurer Event of Default has not ceased and regular supply of power for a period of at least ninety (90) continuous Days has not occurred.

8.5.9 Sales to any person or Party, other than the defaulting Procurer under Article 8.5, shall cease and regular supply of power to the defaulting Procurer in accordance with the provisions of this Agreement shall commence and be restored on the later of the two following dates or any date before this date at the option of Seller:

a) the day on which the defaulting Procurer pays the amount due to the Seller; or

b) *the date being "x" days from the date on which the defaulting Procurer pays the amount due to the Seller, where "x" days shall be calculated in accordance with Schedule 2.*

(Emphasis supplied)

27. It is quite apparent that the procurer is bound to pay the requisite charges as per the financial terms of the PPA against the invoices that are periodically raised by the Seller, defaults on the part of the former leading to certain rights in the hand of the Seller to sell the electricity to third parties. Dealing with the subject of "*Termination for Procurer Event of Default*", Article 11.4.1 provides that "(u)*pon the occurrence and continuation of any Procurer Event of Default pursuant to Article 11.2.1(ii), the Seller shall follow the remedies provided under Article 8.5.2 or Article 8.5.5, as the case may be*". It was pointed out at the hearing that the PPA, as originally signed by

the appellant and RInfra, both sister concerns, consciously omitted inclusion of any provision in the nature of payment security mechanism.

28. At the heart of the controversy is the clause dealing with Seller Event of Default. Article 11.1 providing thus:

11.1 Seller Event of Default

11.1.1 The occurrence and continuation of any of the following events, unless any such event occurs as a result of a Force Majeure Event or a breach by Procurer of its obligations under this Agreement or a Procurer Event of Default, shall constitute a Seller Event of Default:

(i) the failure to commence supply of power to the Procurer up to the Contracted Capacity, relevant to the Revised Scheduled Delivery Date(s) or the Scheduled Delivery Date, as the case may be, by the end of twelve (12) months, or

(ii) after the Delivery Date, the interruption of power supply by the Seller for a continuous period of two (2) Months and such default is not rectified within thirty (30) Days from the receipt of first notice from the Procurer in this regard, or

(iii) After the Delivery Date, the Seller fails to achieve Normative Availability for a period of twelve (12 consecutive or non-consecutive Months within any continuous period of thirty six (36) Months or

(iv) the Seller fails to make any payment (a) of an amount exceeding Rupees One (1) Crore in aggregate required to be made to Procurer under this Agreement, within three (3) Months after the Due Date of undisputed invoice(s) /demand raised by the said Procurer on the Seller or (b) of an amount up to Rupees Five (5) Crore required to be made to Procurer under this Agreement within six (6) Months after the Due Date of undisputed invoice(s)/ demand; or

(v) any of the representations and warranties made by the Seller in Schedule 7 of this Agreement; being found to be untrue or inaccurate, including but not limited to undertakings from its Parent Company related to the minimum equity obligation;

Provided however, prior to considering any event specified under this sub-article to be an Event of Default, the Procurer shall give a notice to the Seller in writing of at least thirty (30) days, or

(vi) if

a) the Seller assigns, mortgages or charges or purports to assign, mortgage or charge any of its assets or rights related to the Unit 1 of the Power Station in contravention of the provisions of this Agreement; or

b) the Seller transfers or novates any of its rights and/ or obligations under this agreement, in a manner contrary to the provisions of this Agreement; except where such transfer

(i). is in pursuance of a Law; and does not affect the ability of the transferee to perform, and such transferee has the financial capability to perform, its obligations under this Agreement or

(ii). is to a transferee who assumes such obligations under this Agreement and the Agreement remains effective with respect to the transferee;

(vii) if (a) the Seller becomes voluntarily or involuntarily the subject of any bankruptcy or insolvency or winding up proceedings and such proceedings remain uncontested for a period of thirty (30) days, or (b) any winding up or bankruptcy or insolvency order is passed against the Seller, or (c) the Seller goes into liquidation or dissolution or has a receiver or any similar officer appointed over all or substantially all of its assets or official liquidator is appointed to manage its affairs, pursuant to Law,

Provided that a dissolution or liquidation of the Seller will not be a Seller Event of Default if such dissolution or liquidation is for the purpose of a merger, consolidation

or reorganization and where the resulting company continues to retain creditworthiness similar to the Seller and expressly assumes all obligations of the Seller under this Agreement and is in a position to perform them; or

(viii) the Seller repudiates this Agreement and does not rectify such breach within a period of thirty (30) days from a notice from the Procurer in this regard; or

(ix) except where due to any Procurer's failure to comply with its material obligations, the Seller is in breach of any of its material obligations pursuant to this Agreement where the Procurer and Seller are parties, and such material breach is not rectified by the Seller within thirty (30) days of receipt of first notice in this regard given by the Procurer; or

(x) any direct or indirect change in the shareholding of the Seller in contravention of the terms of this Agreement; or

(xi) Not Used

(xii) *occurrence of any other event which is specified in this Agreement to be a material breach/ default of the Seller.*

(Emphasis supplied)

29. Achieving and maintaining normative availability on the part of the Seller is crucial from the perspective of the interests of the procurer since the latter depends on the former for discharging its obligations as the distribution licensee for the area towards the consumers. There can be no denial of the fact that the discipline expected to be maintained in this regard is of utmost importance and forms the core. Some room for play is given for the reason the normative availability may fall below par for reasons that may be beyond the control of the generator. Nonetheless, a threshold is

specified. After the commencement of the supply there cannot ordinarily be interruption for a continuous period of two months and this is to be treated as a default on the part of the Seller leading to the consequences that are agreed upon should there be no resumption within 30 days of notice about such disruption from the procurer. The focus, however, is on the clause (iii) of Article 11.1.1 wherein failure on the part of the Seller "*to achieve Normative Availability*" for a period of twelve (12) months – consecutive or nonconsecutive – within a continuous period of thirty-six (36) months is treated as a serious default giving rise to a right in the hand of the procurer to initiate action in the nature impugned here. But, as is clear from bare reading of above, such default on the part of seller should not be a consequence of default of the procurer or *force majeure*.

30. The contract (PPA) contains *force majeure* clause (Article 9.3) which means "*any event or circumstance or combination of events and circumstances (including those stated below) that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices*".

31. The parties, however, focus their arguments on the following part of *force majeure* clause:

9.3 Force Majeure

9.3.1 (ii)Non-Natural Force Majeure Events

1. Direct Non-Natural Force Majeure Events attributable to the Procurer

a) Nationalization or compulsory acquisition by any Indian Governmental Instrumentality (under the State Government(s) of the Procurer or the Central Government of India) of any material assets or rights of the Seller; or

b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by the Seller to perform its obligations under the Agreement or any unlawful, unreasonable or discriminatory refusal to grant any Consents, Clearances and Permits required for the development/ operation of the Power Station, provided that a Competent Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

9.4 Force Majeure Exclusions

9.4.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Mejeure:

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Power Station;
b. Delay in the performance of any contractor, sub-contractor or their agents excluding the conditions as mentioned in Article 9.2;
c. No-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;

d. *Strikes or labour distrurbance at the facilities of the Affected Party;*
e. *Insufficiency of finances or funds or the agreement becoming onerous to perform; and*
f. *Non-perfomance caused by, or connected with, the Affected Party's:*
   i. *Negligent or intentional acts, errors or omissions;*
   ii. *Failure to comply with an Indian Law; or*
   iii. *Breach of, or default under this Agreement*

(Emphasis supplied)

32. Pertinent to note that the defense of *force majeure* is not available in the event of non-performance owing *inter alia* to unavailability of fuel (or escalation of its cost) or absence of sufficient funds making it onerous for the seller.

33. The PPA also conceives of termination due to *force majeure*, the relevant clause reading thus:

> *"11.5 Termination due to Force Majeure*
>
> *11.5.1 If the Force Majeure Event or its effects continue to be present beyond the period as specified in Article 4.7.3, either Party shall have the right to cause termination of the Agreement. In such an event, subject to the terms and conditions of the Financing Agreements, this Agreement shall terminate on the date of such Termination Notice."*

34. The maximum period to trigger such consequence of *force majeure* per clause 4.7.3 is twelve months.

35. The defense of *force majeure* is available both to the procurer and the seller. The appellant focuses on the above part of the exclusion clause to explain away failure on its part to achieve normative availability so as to question the impugned action on the

part of the procurer issuing PPDN and Termination Notice. In this context, however, the following clause (9.5) also needs to be borne in mind:

> *a. Notification of Force Majeure Event*
>
> *i. The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communication, but not later than one (1) day after such reinstatement.*
>
> *Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.*
>
> *The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.*
>
> (Emphasis supplied)

36. The above clause leaves no doubt as to the fact that the rights flowing from *force majeure* cannot inure to the benefit of the affected

party unless a notice of such event setting out its full particulars (its effect and remedies proposed) is given within the prescribed period.

37. The procedure to be followed in the event of Seller Default is set out in Article 11.3 as under:

> *11.3 Procedure for cases of Seller Event of Default*
>
> *11.3.1 Upon the occurrence and continuation of any Seller Event of Default under Article 11.1, the Procurer shall have the right to deliver to the Seller a notice with a copy to the Commission and the Lenders' Representative, of their intention to terminate this Agreement (Procurer Preliminary Default Notice), which shall specify in reasonable detail, the circumstances giving rise to the issue of such notice.*
>
> *11.3.2 Following the issue of Procurer Preliminary Default Notice, the Consultation Period of ninety (90) days or such longer period as the Parties may agree, shall apply and it shall be the responsibility of the Parties to discuss as to what steps shall have to be taken with a view to mitigate the consequences of the relevant Event of Default having regard to all the circumstances.*
>
> *11.3.3 During the Consultation Period, the Parties shall, save as otherwise provided in this Agreement, continue to perform their respective obligations under this Agreement.*
>
> *11.3.4 Within a period of seven (7) days following the expiry of the Consultation Period unless the Parties shall have otherwise agreed to the contrary or the Seller Event of Default giving rise to the Consultation Period shall have ceased to exist or shall have been remedied, the Procurer may terminate this Agreement by giving a written Termination Notice of thirty (30) days to the Seller with a copy to the Commission. A copy of the Termination Notice shall be given to the Lenders' Representative. The Lenders may exercise or the Procurer may require the Lenders to exercise their substitution rights and other rights provided to them, if any, under Financing Agreements and the Procurer*

would have no objection to the Lenders exercising their rights if it is in consonance with provisions of Schedule 12. Alternatively, in case the Lenders do not exercise their rights as mentioned herein above, the Capacity Charge of the Seller shall be reduced by twenty percent (20%) for the period of Seller Event of Default.

11.3.5 Further, in addition to the reduction in Capacity Charges as per the provision in Article 11.2.4, the Seller shall be liable to pay to the Procurer, charges equivalent to twelve (12) months Capacity Charges calculated at Normative Availability. Such payment shall be made by the Seller to the Procurer within thirty (30) days of the termination of the Agreement. Any amount remaining unpaid on the part of the Seller shall be considered as a material breach and the Procurer shall have the right to enforce such claim as per the provisions of the Law.

(Emphasis supplied)

38. The issuance of PPDN by the procurer does not bring to a halt the contractual obligations to perform on the part of the parties. It is only the starting point of a process that may (or may not) lead to termination of the contract (PPA) with the Seller. In fact, such termination, if it follows, would also not bring an end to the PPA. The PPA survives *albeit* with possibly a different player being brought in as the Seller. The intent, as we would see from later clauses (Schedule 12), is to have the PPA run its full term. If the Seller – presently operating the power station – is unable to perform, it is administered caution by PPDN. Then follows a period of consultation (for minimum 90 days – extendable by mutual consent of both sides). The idea is to give opportunity to the defaulting procurer to make amends which is why the parties know PPDN as the "*cure notice*".

Both parties cooperate and collaborate so as to "*mitigate the consequences*". The termination cannot occur unless the period of consultation has failed or elapsed. The Procurer has a window of seven days (after consultation period) during which it may choose to terminate.

39. To deliver a PPDN is a "*right*" given to the Procurer which is aggrieved due to default. Though copy of the PPDN is also made over to the Lenders, the consultation in its wake is only between the parties to the PPA. As observed earlier, the idea is to provide a platform for them to confer with each other, and cooperate, so that corrective steps could be taken by the defaulting party even if such efforts lead only to mitigation. In such consultation, there cannot be any role for third parties. None is so conceived by the PPA for the Lenders even though their stake is considered important and despite the fact that a role of import is expected to be played by them in the context of - should endeavor made during the consultation period not bear fruit to the satisfaction of the procurer who consequently opts to proceed to terminate the PPA with the Seller - initiation of the process for substituting the existing Seller by another entity. The right of the lender (third party to the PPA) to substitute the Seller (for which one has to go to the loan contract) is brought to life only upon the issuance of the Termination Notice by the procurer and not at any time antecedent thereto, not the least after issuance of PPDN. It may be

added here that the PPA also makes it clear that process for exercise of such right (of substitution) of the Lender in terms of the Financial Agreement is to be in accord with the PPA. The loan document, given the contractual relationship between the Seller and the Lenders, is the prime contract to regulate their *inter-se* relationship and obligations.

40. As is clear from the bare reading of the above Article, the consequences flowing from termination of the PPA by the Procurer on account of default on the part of the Seller include the "*Substitution*" of the latter at the instance of the Lender(s). The detailed procedure for substitution is set out in Schedule 12 which may be extracted as under:

> *SCHEDULE 12: SUBSTITUTION RIGHTS OF THE LENDERS*
>
> **12.1** *Substitution of the Seller*
>
> 12.1.1 *Subject to the terms of the PPA, upon occurrence of a Seller Event of Default under the PPA, the Lenders shall, have the right to seek substitution of the Seller by a Selectee for the residual period of the PPA, for the purposes of securing the payments of the Total Debt Amount from the Seller and performing the obligations of the Seller, in accordance with the provisions of this Schedule.*
>
> 12.1.2 *The Lenders may seek to exercise right of substitution by an amendment or novation of the PPA executed between Procurer and the Seller in favour of the Selectee, the Procurer and the Seller shall cooperate with the Lenders to carry out such substitution.*

12.2 *Procurers Notice of Default*

12.2.1 *The Procurer, who serves the Preliminary Default Notice on the Seller as per this Agreement, shall simultaneously also issue a copy of the same to the Lenders.*

12.3 *Substitution Notice*

12.3.1 *In the event of failure of the Seller to rectify the Seller Event of Default giving rise to Preliminary Default Notice and on receipt of a copy of the Termination Notice by the Procurer, the Lenders, either on their own or through its representative (the "Lenders' Representative") shall be entitled to notify the Procurer and the Seller of the intention of the Lenders to substitute the Seller by the Selectee for the residual period of the PPA (the "Substitution Notice").*

12.4 *Interim operation of Power Station*

12.4.1 *On receipt of a Substitution Notice, no further action shall be taken by any Party to terminate the PPA, except under and in accordance with the terms of this Schedule* **Error! Reference source not found.** *of this Agreement.*

12.4.2 *On issue of a Substitution Notice, the Lenders shall have the right to request the Procurer to enter upon and takeover the Power Station for the interim and till the substitution of the Selectee is complete and to otherwise take all such steps as are necessary for the continued operation and maintenance of the Power Station, including levy, collection and appropriation of payments there under, subject to, the servicing of monies owed in respect of the Total Debt Amount as per the Financing Agreements and the Seller shall completely cooperate in any such takeover of the Power Station by the Procurer. If the Procurer, at their sole and exclusive discretion agree to enter upon and takeover the Power Station, till substitution of the Selectee in accordance with this Agreement, such Procurer shall be compensated for rendering such services in accordance with Clause 12.9.4 of this Schedule.*

12.4.3 *If the Procurer refuse to take over the Power Station on request by the Lenders in accordance with Clause 12.4.2 above, the Seller shall have the duty and obligation to continue to operate the Power Station in accordance with the PPA till such time as the Selectee is finally substituted.*

12.4.4 *The Lenders and the Procurer shall, simultaneously have the right to commence the process of substitution of the Seller by the Selectee in accordance with these terms and the Seller hereby irrevocably consents to the same.*

12.5 *Process of Substitution of Seller*

12.5.1 *The Lenders' Representative may, on delivery of a Substitution Notice notify the Procurer and the Seller on behalf of all the Lenders about the Lenders' decision to invite and negotiate, at the cost of the Lenders, offers from third parties to act as Selectee, either through private negotiations or public auction and / or a tender process, for the residual period of the PPA. Subject to and upon approval of the Procurer, such Selectee shall be entitled to receive all the rights of the Seller and shall undertake all the obligations of the Seller under the PPA between the Seller and the Procurer, in accordance with these terms of substitution.*

12.5.2 *The Lenders and the Seller shall ensure that, upon the Procurer approving the Selectee, the Seller shall transfer absolutely and irrevocably, the ownership of the Power Station to such Selectee simultaneously with the amendment or novation of the PPA between the Seller and the Procurer in favour of the Selectee as mentioned in Clause 12.1.2 of this Schedule.*

12.6 *Modality for Substitution*

Criteria for selection of the Selectee

12.6.1 *The Lenders and / or the Lenders' Representative shall in addition to any other criteria that they may deem fit and necessary, apply the following criteria in the selection of the Selectee:*

(a) if the Seller is proposed to be substituted prior to the Scheduled Delivery Date or Revised Scheduled

Delivery Date, as the case may be, the Selectee shall possess the financial capability to perform and discharge all the residual duties, obligations and liabilities of the Seller under the PPA. If the Seller is proposed to be substituted during the Operation Period, this criteria shall not be applicable.

(b) the Selectee shall have the capability and shall unconditionally consent to assume the liability for the payment and discharge of dues, if any, of the Seller to the Procurer under and in accordance with the PPA and also payment of the Total Debt Amount to the Lenders upon terms and conditions as agreed to between the Selectee and the Lenders;

(c) the Selectee shall have not been in breach of any agreement between the Selectee and any Bank or any Lender or between the Selectee and the Procurer, involving sum greater than Rupees…….. (Rs……../-) at any time in the last two (2) years as on the date of the substitution notice to the Seller.

(d) any other appropriate criteria, whereby continuity in the performance of the Selectee's obligations under the PPA is maintained and the security in favour of the Lenders under the Financing Agreements is preserved.

12.7 *Modalities*

12.7.1 *The following modalities shall be applicable to any substitution of the Seller by the Selectee pursuant to this Agreement:*

12.7.2 *The Lenders' Representative shall on behalf of the Lenders propose to the Procurer (the "Proposal") pursuant to Clause 12.7.3 below, the name of the Selectee for acceptance, seeking:*

(a) grant of all the rights and obligations under the PPA between the Procurer and the Seller, to the Selectee (as substitute for the Seller);

(b) amendment of the PPA between the Procurer and the Seller, to the effect that the aforementioned grant to the Selectee, shall be such that the rights and obligations assumed by the Selectee are on the same

terms and conditions for the residual period of the PPA as existed in respect of the Seller under the original PPA between the Procurer and the Seller; and

(c) the execution of new agreements as necessary, by the proposed Selectee for the residual period of the PPA on the same terms and conditions as are included in this Agreement.

12.7.3 *The Proposal shall contain the particulars and information in respect of the Selectee and the data and information as Procurer may reasonably require. The Procurer may intimate any additional requirement within thirty (30) days of the date of receipt of the Proposal.*

12.7.4 *The Proposal shall be accompanied by an unconditional undertaking by the Selectee that it shall, upon approval by the Procurer of the Proposal:*

(a) observe, comply, perform and fulfill the terms, conditions and covenants of the PPA between Seller and the Procurer or a new PPA (in the case of the novation thereof), which according to the terms therein are required to be observed, complied with, performed and fulfilled by the Seller, as if such Selectee was the Seller originally named under the PPA; and

(b) be liable for and shall assume, discharge and pay the Total Debt Amount or then outstanding dues to the Lenders under and in accordance with the Financing Agreements or in any other manner agreed to by the Lenders and the Procurer as if such Selectee was the Seller originally named under such Financing Agreements.

12.7.5 *At any time prior to taking a decision in respect of the Proposal received under Clause 12.7.2, the Procurer may require the Lender/ Lenders' Representative to satisfy it as to the eligibility of the Selectee. The decision of the Procurer as to acceptance or rejection of the Selectee, shall be made reasonably and when made shall be final, conclusive and binding on the Parties.*

12.7.6 *The Procurer shall convey its approval or disapproval of such Proposal, to the Selectee. Such decision shall be made by the Procurers at their*

reasonably exercised discretion within twenty one (21) days of:

(a) the date of receipt of the Proposal by the Procurer; or

(b) the date when the last of further and other information and clarifications in respect of any data, particulars or information included in the Proposal requested by any of the Procurers under Clause 12.7.3 above is received;

whichever is later.

Notwithstanding anything to the contrary mentioned in this Agreement, the approval of the Procurer for the Selectee shall not be withheld in case the Selectee meets the criteria mentioned in Clause 12.6.1.

12.7.7 *Upon approval of the Proposal and the Selectee by the Procurer, the Selectee mentioned in the Proposal shall become the Selectee hereunder.*

12.7.8 *Following the rejection of a Proposal, the Lenders and/ or the Lenders' Representative shall have the right to submit a fresh Proposal, proposing another Selectee (if the rejection was on the grounds of an inappropriate third party proposed as Selectee) within sixty (60) days of receipt of communication regarding rejection of the Selectee previously proposed. The provisions of this article shall apply mutatis mutandis to such fresh Proposal.*

12.7.9 *The substitution of the Seller by the Selectee shall be deemed to be complete upon the Selectee executing all necessary documents and writings with or in favour of the Seller, Procurer and the Lenders so as to give full effect to the terms and conditions of the substitution, subject to which the Selectee has been accepted by the Lenders and the Procurer and upon transfer of ownership and complete possession of the Power Station by the Procurer or the Seller, as the case may be, to the Selectee. The Procurer shall novate the Agreement which they had entered in to with the Seller in order to make the substitution of the Seller by the Selectee effective. The quantum and manner of payment of the consideration payable by the Selectee to the Seller towards purchase of the Power*

Station and assumption of all the rights and obligations of the Seller under the PPA shall be entirely between the Seller, Selectee and the Lenders and the Procurer shall in no way be responsible to bear the same.

12.7.10 *Upon the substitution becoming effective pursuant to Clause 12.7.9 above, all the rights of the Seller under the PPA shall cease to exist:*

Provided that, nothing contained in this sub-article shall prejudice any pending/ subsisting claims of the Seller against a Procurer or any claim of the Procurer against the erstwhile Seller or the Selectee.

12.7.11 *The Selectee shall, subject to the terms and conditions of the substitution, have a period of ninety (90) Days to rectify any breach and/ or default of the Seller subsisting on the date of substitution and required to be rectified and shall incur the liability or consequence on account of any previous breach and/ or default of the Seller.*

12.7.12 *The decision of the Lenders and the Procurer in the selection of the Selectee shall be final and binding on the Seller and shall be deemed to have been made with the concurrence of the Seller. The Seller expressly waives all rights to object or to challenge such selection and appointment of the Selectee on any ground whatsoever.*

12.7.13 *The Lenders shall be solely and exclusively responsible for obtaining any and all consents/ approvals or cooperation, which may be required to be obtained from the Seller under this Agreement and the Procurer shall not be liable for the same.*

12.7.14 *All actions of the Lenders' Representative hereunder shall be deemed to be on behalf of the Lenders and shall be binding upon them. The Lenders' Representative shall be authorised to receive payment of compensation and any other payments, including the consideration for transfer, if any, in accordance with the Proposal and the Financing Agreements and shall be bound to give valid discharge on behalf of all the Lenders.*

12.8 *Seller's Waiver*

12.8.1 *The Seller irrevocably agrees and consents (to the extent to which applicable law may require such consent) to any actions of the Lenders, the Lender's Representative and the Procurer or exercise of their rights under and in accordance with these terms.*

12.8.2 *The Seller irrevocably agrees and consents (to the extent to which applicable law may require such consents) that from the date specified in Clause 12.7.10, it shall cease to have any rights under the PPA or the Financing Agreements other than those expressly stated therein.*

12.8.3 *The Seller warrants and covenants that any agreement entered into by the Seller, in relation to the Power Station, shall include a legally enforceable clause providing for automatic novation of such agreement in favour of the Selectee, at the option of the Lenders or the Procurer. The Seller further warrants and covenants that, in respect of any agreements which have already been executed in relation to the Power Station and which lack a legally enforceable clause providing for automatic novation of such agreement, the Seller shall procure an amendment in the concluded agreement to incorporate such clause.*

12.9 *Interim Protection Of Service And Preservation Of Security*

Appointment of a Receiver

12.9.1 *In every case of the Lenders issuing a Substitution Notice and the Procurer refusing to take over the Power Station and the Seller failing to operate the Power Station in accordance with Clause 12.4.3 and the Procurer not electing to act as Receiver as per Clause 12.9.2 hereof, the Lenders may institute protective legal proceedings for appointment of a receiver (the "Receiver") to maintain, preserve and protect the assets held as security by the Lenders if such right is granted under the terms of the Financing Agreements.*

12.9.2 *If the assets of the Power Station are, in the opinion of the Procurer, necessary and required for the operation and maintenance of the Power Station, the Procurer shall be entitled to elect to act as the Receiver for the purposes of this Article and be entitled to maintain, preserve and protect the said assets by engaging an operator/service provider to act on their behalf and the Lenders and Seller hereby consent and agree to the same. Upon the Procurer so intimating the Seller and the Lender's representative their desire to act as Receiver, the Seller and the Lender's representative shall co-operate with the Procurers to facilitate the same.*

12.9.3 *Upon appointment of the Court appointed Receiver or the Procurer acting as Receiver, all the Receivables received by such Receiver shall be deposited by the Receiver in the bank account jointly designated by the Procurer and the Lenders. The Receiver shall be responsible for protecting the assets in receivership and shall render a true and proper account of the receivership to the Lenders in accordance with the terms of its appointment.*

12.9.4 *When acting as a Receiver or operator in accordance with Clauses 12.9 or 12.4.2, Procurer shall be entitled to be remunerated for such services as may be determined by the Commission. Furthermore, when acting as a Receiver, the Procurer shall not be liable to the Lenders, the Lenders' Representative, Seller or any third party for any default under the PPA, damage or loss to the Power Station or for any other reason whatsoever, except for willful default of the Procurer.*

12.10 *Substitution Consideration*

12.10.1 *The Lenders and Procurer shall be entitled to appropriate any consideration received for the substitution of` the Seller as hereinabove provided, from the Selectee towards the payment of Lenders' and the Procurers' respective dues, to the exclusion of the Seller.*

12.10.2 *The Seller shall be deemed to have nominated, constitutes and appoints the Lenders' Representative as its constituted attorney for doing all acts, deeds and*

things as may be required to be done for the substitution of the Seller by the Selectee pursuant to these terms.

Change in the Procurers or Lenders

12.11 *The Parties hereto acknowledge that during the subsistence of the PPA, it is possible that any Procurer may cease to be a party to this Agreement by reason of termination of PPA vis-à-vis such Procurer and any Lender may cease to remain as a Lender by reason of repayment of the debt or otherwise. Further it may possible that any Lender may be substituted or a new Lender may be added. In the event of any Procurer or Lender ceasing to be a party to the PPA or Financing Agreement respectively, the term and conditions as prescribed in this Schedule shall cease to automatically apply to such Procurer or Lender as the case may be. Further, upon any entity being added as a Lender and in the event such entity is given the right to substitute the Seller under the Financing Agreement and then the contents of this Schedule shall be applicable to the exercise of such right by the said new entity.***"**

(Emphasis supplied)

41. The process leading to substitution of the Seller at the instance of the Lender on account of termination of the PPA by the Procurer due to event of default on the part of the former, there being no resolution to the satisfaction of the Procurer in spite of consultation during the interregnum as specified, involves *consensus ad idem* on part of both i.e. Lender(s) who select the entity to replace (by substitution) the Seller on one hand and the procurer on the other, the Seller being obliged to "*cooperate*" and abide. The Lender's action begins only after Termination Notice. The Lender may or may not exercise the right of substitution. After all, they have their own contract

(Financial Agreement) which would protect their rights and provide remedies. The Lender may call upon the Procurer to take over the power station. But then, this is not binding on either side. What stands out from the above is the fact that Procurer has a role and discretion in selecting the substitute for the seller. There cannot be a substitution without its clear consent. The Seller, on the other hand, remains outside this part of the process, it being obliged to hand over reins of the power station to the selectee.

42. It has also been pointed out that the PPA provides, by Article 15.12.3, on the subject of "Notices" that "(*a)ll notices or communications given by facsimile shall be confirmed by sending a copy of the same via post office in an envelope properly addressed to the appropriate Party for delivery by registered mail. All notices shall be deemed validly delivered upon receipt evidenced by an acknowledgement of the recipient, unless the Party delivering the notice can prove in case of delivery through the registered post that the recipient refused to acknowledge the receipt of the notice despite efforts of the postal authorities*".

APPELLANT'S DISPUTE WITH R-INFRA

43. RInfra is not impleaded as a party to this appeal. It is, however, admitted fact that RInfra and VIPL (the appellant) are sister

companies. Some very serious allegations of misconduct on financial terms have been levelled by the appellant against RInfra. The summary of such averments is noted by us hereinbelow.

44. On 04.10.2017, the appellant invoked the clause (Article 8.5) of the PPA dated 14.08.2013 relating to *Procurer Event of Default* and issued a letter to RInfra calling it upon to remedy the defect immediately, *inter alia*, stating that the latter (RInfra) had committed Payment Default due date for payment of monthly invoices for the month of July 2017 for an amount of Rs.86.90 Crores being 01.09.2017, no payment having been made even after elapse of 30 days; in spite of efforts for reconciliation the amount of Rs. 28 Crores admitted by RInfra as outstanding as on 31.03.2017 having remained unpaid; R-Infra having not made any payment qua LPSC in more than 3 years of VIPL's operation such non-payment constituting violation of Article 8.3.5 of the PPA; an amount of Rs. 526 Crores being outstanding, due and payable to VIPL by R-Infra, the erratic payments having severely impaired the ability of VIPL to sustain its operations. It may be mentioned here itself that the defaults by RInfra in payments statedly persisted and letters continued to be exchanged between the two sides till at least March 2018, the appellant repeatedly communicating that on this account it would not be able to sustain its operations, the letter dated 28.04.2018 particularly cautioning that in case the outstanding dues were not cleared at the earliest, VIPL might

be constrained to enter into a total shutdown of generation w.e.f. 02.05.2018.

45. As is clear from the submissions of the appellant noted in later part of this judgment, the above defaults by its sister company RInfra (then the Procurer) is sought to be projected by the Seller (appellant) as such default of the Procurer as for which the substituted Procurer (second respondent) is also liable to be held accountable.

SUBSTITUTION OF R-INFRA BY AEML (SECOND RESPONDENT)

46. Against the backdrop of history noted earlier, RInfra created a new company named as Reliance Energy Generation & Supply Limited ("*REGSL*"), it being 100% subsidiary of RInfra until 28.08.2018. RInfra entered into a Share Purchase Agreement ("*SPA*") with the second respondent (then known as "Adani Transmission Limited" or "*ATL*") on 21.12.2017 pursuant to which ATL (later AEML) acquired the Mumbai Generation, Transmission and Distribution business ("*the Mumbai GTD Business*") of RInfra, in accordance with the *Scheme of Arrangement* framed under the Companies Act, 1956/2013, as approved by the High Court of Bombay by its order dated 19.01.2017 read with order dated 20.11.2017.

47. As is necessary to deal with some of the submissions, the following provisions of the Scheme of Arrangement approved by the High Court of Bombay need to be specifically noted:

> *1.1.9. "Mumbai Power Division" means Mumbai Power Generation, Transmission and Distribution business of the Transferor Company on a going concern basis along with all related assets, liabilities, employees as follows:*
>
> *(a) all assets wherever situated, whether movable or immovable, whether leasehold or freehold (including the right to various parcels of land on which activities relating to Mumbai Power Generation, Transmission and Distribution business are located and carried out), tangible or intangible, including all land, capital work in progress, building, plant & machinery, equipment, vehicles, furniture, fixtures, office equipments, computer installations, electrical appliances, accessories, investments including all rights, title, interest, claims, covenants, undertakings of the transferor Company pertaining to the Mumbai Power Generation, Transmission and Distribution business;*
>
> *(b) without prejudice to the generality of the Clause (a) above, the assets shall also include the following which relate to the Mumbai Power Generation Transmission and Distribution business of the Transferor Company:*
>
> *9.5 all the rights and licenses, all assignments and grants thereof, all permits, licenses, registrations, regulatory approvals, all municipal approvals, permission for establishing towers or receiving stations, quota rights (including rights under any agreement, contracts, applications, letters of intent, or any other contracts), or grants, entitlements, allotments, recommendations, clearances, tenancies, offices, taxes, goodwill, tax credits (including but not limited to, credits in respect of income tax and service tax, tax deducted at source, sales tax, advance tax, value added tax, excise duty, custom duty, service tax, works contract tax), privileges and benefits of all contracts, agreements, tenders, bids, performance statements and all*

other rights including lease rights, licenses, powers and facilities of every kind and description whatsoever;…"

3.1 TRANSFER AND VESTING OF MUMBAI POWER DIVISION OF THE TRANSFEROR COMPANY INTO THE TRANSFEREE COMPANY

3.1.1 Upon the Scheme becoming effective and with effect from the Appointed Date, the Mumbai Power Division of the Transferor Company shall stand transferred to and vested in or deemed to be transferred to and vested in the Transferee Company, as a going concern, in the following manner:

> *a) With effect from the Appointed Date, the whole of the undertaking and properties of the Mumbai Power Division shall pursuant to the provisions contained in Sections 391 to 394 and all other applicable provisions, if any, of the Act and without any further act, deed, matter or thing, stand transferred to and vested in and / or be deemed to be transferred to and vested in the Transferee Company on going concern basis so as to vest in the Transferee Company all rights, title and interest pertaining to the Mumbai Power Division. …*

6.1.4 The Transferee Company will be the successor of the Transferor Company vis-àvis the Transferred Divisions. …

6.4 LEGAL PROCCEDINGS

6.4.1 All legal proceedings of whatsoever nature by or against the Transferor Company pending and/or arising before the Effective Date and relating to the Transferred Divisions, shall not abate or be discontinued or be in any way prejudicially affected by reason of the Scheme or by anything contained in this Scheme but shall be continued and enforced by or against the Transferee Company, as the case may be in the same manner and to the same extent as would or might have been continued and enforced by or against the Transferor Company.

6.5 CONTRACTS, DEEDS, ETC.

6.5.1 Notwithstanding anything to the contrary contained in the contract, deed, bond, agreement or any other instrument, but subject to the other provisions of this Scheme, all contracts, deeds, bonds, agreements, memorandum of understandings and other instruments, if any, of whatsoever nature and subsisting or having effect on the Effective Date and relating to the Transferred Divisions of the Transferor Company, shall continue in full force and effect against or in favour of the Transferee Company and may be enforced effectively by or against the Transferee Company as fully and effectually as if, instead of the Transferor Company, the Transferee Company had been a party thereto."

[Emphasis supplied]

48. The Appointed Date under the Scheme of Arrangement was changed from 01.04.2016 to 01.04.2018 by order dated 20.11.2017 passed by the High Court of Bombay. Following the said order, the transfer of electricity distribution business from RInfra to AEML was approved by the Commission by its order dated 28.06.2018 (in Case Nos. 139-140 of 2017). The Order of MERC upheld the arrangement in SPA and, *inter alia*, held thus:

"8……

d. Scheme of Arrangement between RInfra and REGSL

i. Under the Scheme, RInfra is the Transferor Company and REGSL is the Transferee Company. RInfra proposes to transfer the Mumbai Power Division comprising Generation, Transmission and Distribution, the Samalkot Power Division, the Goa Power Station Division and the Windmill Division, to REGSL on a going concern basis under the provisions of the Companies Act, 2013, as applicable.

ii. The Scheme gives the rationale for such transfer and vesting. The Scheme is to take effect from the Appointed Date or such other date as may be decided by the Court and

would be operative from the Effective Date as defined therein.

iii. With effect from the Appointed Date, the whole of the undertaking and properties of the power generation, transmission and distribution divisions of RInfra, shall pursuant to the applicable provisions of the Companies Act, 1956 or the Companies Act, 2013 and without any further act, deed, matter or thing, stand transferred to and vested in and / or be deemed to be transferred to and vested in REGSL so as to vest all rights, title and interest pertaining to the power generation, transmission and distribution divisions.

9. ….

h. Under the Scheme of Arrangement approved by the Bombay High Court, the utility including assets and Licence of RInfra in respect of Mumbai Power Division, as on the Appointed Date (as referred in High Court Order), shall stand transferred to and be operated by REGSL. RInfra's shareholding in REGSL would then be transferred to ATL. The Petitioners submitted that all matters (including claims and liabilities) relating to the aforesaid licensed business upto the Appointed Date, which are under process, initiated or to be initiated in relation to any legal proceedings or regulatory proceedings, or pending with any Government Entity, pertaining to various expenses and/or disallowances and/or liabilities and/or demands and/or receivables all of which are in relation to the period prior to assignment of Licence to REGSL, are to be deemed to have been retained by and belong and accrue to RInfra by an overriding title in favour of RInfra at all points of time as a matter of fact, even before its accrual. All such amounts receivable from consumers or payable to consumers, if and when materialized in relation to the period prior to assignment of Licence to REGSL shall be to the account of RInfra. All such amounts receivable and recoverable by REGSL from the consumers and after adjusting the amount payable by RESGL to the consumers, shall be held by REGSL in trust for RInfra (to whom such amounts belong) and shall be paid/transferred accordingly….

12 (e) Upon the Scheme coming into effect and in consideration of the transfer and vesting of the Mumbai Power Division in REGSL on a going concern basis pursuant to provisions of this Scheme and applicable law, REGSL shall pay a lump sum cash consideration of Rs 5,575 crore (Rupees Five Thousand Five Hundred and Seventy-Five Crore) to RInfra.

16 (b) RInfra submitted that REGSL is a 100% subsidiary of RInfra with no activity at present, and provided the copy of the Statutory Auditor Certificate certifying the same. RInfra submitted that Mumbai Generation, Transmission and Distribution Business of RInfra, along with entire regulated asset base, shall be transferred to REGSL on going concern basis as on Appointed Date. REGSL will carry out Mumbai Power Business post the transfer of Licence and approval by the Commission. As the existing licensed business (along with all employees) is being transferred to REGSL on a going concern basis, REGSL will have all the technical expertise as is currently available in RInfra for carrying out the licensed business

46. RInfra proposes to transfer the Mumbai Power Division comprising Generation, Transmission and Distribution business, but excluding 4 plots of Santacruz land of the Distribution division, to REGSL on a going concern basis under the provisions of the Companies Act, 2013, as applicable. As per the Scheme of Arrangement, with effect from the Appointed Date and upon the Scheme becoming effective:

…….

> *a. the whole of the undertaking and properties of the power generation, transmission and distribution divisions of RInfra shall stand transferred to and vested in and / or be deemed to be transferred to and vested in REGSL so as to vest all rights, title and interest pertaining to the power generation, transmission and distribution divisions …*

c. all the past period liabilities and gains, incurred prior to the Appointed Date, shall continue to be to RInfra's account.

……

53. Further, the Parties have agreed that with the exception of certain mutually agreed claims and liabilities relating to the Mumbai Power Division, all claims and liabilities for the period prior to completion of the transaction would be retained by RInfra. The SPA is subject to customary Conditions Precedents, including approvals from the Commission, the Competition Commission of India, lenders of RInfra and Income Tax department, and payment of outstanding ED and TOSE to GoM, to proceed to completion of the transaction.

……

59. The Scheme of Arrangement, duly approved by Hon'ble [the] Bombay High Court, provides that the whole of the undertaking and properties of the distribution division of RInfra shall stand transferred to REGSL so as to vest all rights, title and interest pertaining to the distribution division, along with all reserves, debts, liabilities, contingent liabilities, duties and obligations of every kind, nature and description of RInfra pertaining to distribution division, any statutory licenses, permissions or approvals or consents held by RInfra to carry on operations of electricity distribution, any tax credits whether Central, State or local, availed vis-à-vis the distribution division, and all employees of RInfra engaged in or in relation to the distribution Division of RInfra and who are in such employment as on the Effective Date. Thus, the entire Distribution Licence and all associated assets and liabilities are being transferred to REGSL.

128. The Petitioners submitted that all matters (including claims and liabilities) relating to the aforesaid licensed business upto the Appointed Date, which are under process, initiated or to be initiated in relation to any legal proceedings or regulatory proceedings, or pending with any Government Entity, pertaining to various expenses and/or disallowances

*and/or liabilities and/or demands and/or receivables all of which are in relation to the period prior to assignment of Licence to REGSL, are to be deemed to have been retained by and belong and accrue to RInfra**.** All such amounts receivable from consumers or payable to consumers, if and when materialized in relation to the period prior to assignment of Licence to REGSL shall be to the account of RInfra. All such amounts receivable and recoverable by REGSL from the consumers and after adjusting the amount payable by RESGL to the consumers, shall be held by REGSL in trust for RInfra and shall be paid/transferred accordingly.*

……

*130. The Commission is of the view that the above proposed arrangement in respect of claims and liabilities of the licensed business upto the Appointed Date, and the approved/under-approval Regulatory Assets and past Revenue Gap, is appropriate and reflects the agreement between the Parties, and has no adverse impact on REGSL/ATL**.** Hence, the Commission approves the proposed arrangement in this regard. It is clarified that after assignment of the Distribution Licence to REGSL, the consumer shall interface only with REGSL even for prior period claims, and REGSL and RInfra shall mutually settle such claims in accordance with the Scheme of Arrangement**.***

……

143. As regards the suggestion that ATL should file a fresh MTR Petition after the transaction is completed, the Commission is of the view that the Distribution Business is being transferred as a going concern, and the service to the consumers as well as the tariff approved by the Commission shall continue seamlessly after the transaction is completed. The regulated books for tariff determination will remain unchanged on transfer of licensed businesses from RInfra to REGSL. The Commission has also ruled that no additional impact shall be sought to be passed through to the consumers on account of the transaction. Hence, there is no requirement for filing of a fresh MTR Petition by REGSL after the transaction is completed on the Appointed Date.

148. In accordance with the above analysis and rulings, the Commission approves the assignment of the Distribution Licence of RInfra to REGSL and transfer of distribution utility including distribution assets from RInfra to REGSL excluding the Plots at Santacruz, in accordance with the Scheme of Arrangement under Section 17(3) of the Act, subject to the following conditions:-

……

d. RInfra shall ensure that the transfer of all rights, title, ownership, possession and economic interest in the Distribution Licence vest in REGSL in terms of the Scheme of Arrangement;

f. It shall be the responsibility of RInfra to ensure that all legal and contractual requirement for and pursuant to the transfer of Distribution Licence to REGSL are complied with and any instance of non-compliance shall be construed as contravention of the directions of the Commission and shall be dealt with in accordance with law;

h. The amount of Rs. 271.56 crore against 4 plots of Santacruz land shall be payable by RInfra to REGSL or shall be adjusted against amount payable by REGSL/ATL to RInfra;

i. Any dues payable by the Licensee on account of Final Balancing and Settlement Mechanism (FBSM), which have already been collected from the consumers before the Appointed Date, shall be payable by RInfra to REGSL, and shall not be again recovered from the consumers by REGSL;

n. The claims and liabilities of the licensed business upto the Appointed Date, and the approved/under-approval Regulatory Assets and past Revenue Gap, shall vest with RInfra, as proposed by the Petitioners;"

[Emphasis supplied]

49. Accordingly, the second respondent (as the successor-in-interest of RInfra in relation to the Mumbai GTD Business) became the "Procurer" under the PPA in place of RInfra with effect from the "closing date" (i.e. 29.08.2018).

EVENTS LEADING TO DISPUTES BETWEEN VIPL & AEML

50. Referring to the above-mentioned SPA (dated 21.12.2017), RInfra (then the procurer / Discom) requested the appellant (VIPL) to issue a No-Dues certificate to ATL/ AEML (which was to substitute it as the procurer / Discom) in response to which the appellant, by communication dated 21.08.2018, drew attention of the former (RInfra), *inter alia*, to (a) non-payment of Monthly Bills from May 2018; (b) non-payment of Fuel Adjustment Charges ("FAC") bills forming part of Monthly Bills from July 2016; and (c) non-payment of any of the Supplementary Bills, which had statedly impaired the ability of VIPL to procure coal, achieve Normative Availability, and continuously operate the plant. At the same time, it (the appellant) expressed inclination to issue No-Dues Certificate subject, however, to RInfra (a) continuing to remain liable to make the payment towards entire outstanding accumulated till Closing Date and (b) granting waiver of Clause 11.1.1 (iii) under the PPA till the Closing Date. RInfra, in response, by letter dated 22.08.2018 granted consent for waiver of Clause 11.1.1 (iii) i.e. default for non-availability of the PPA and confirmed that RInfra shall remain liable to make the payment towards entire outstanding accumulated till Closing Date.

51. It is the case of the appellant that in view of waiver by RInfra, by the above-mentioned letter dated 22.08.2018, it (VIPL) issued Letter dated 22.08.2018 to REGSL endorsing a copy to RInfra confirming and declaring that (a) all outstanding amounts as on the Closing Date, i.e. 23.08.2018, whether receivable or payable from and to REGSL and/or RInfra with respect to the PPA dated 14.08.2013, shall be paid/received exclusively by it (RInfra), any claims arising from the PPA pertaining to the period up to the Closing Date to solely be to the account of RInfra, without recourse to REGSL; and (b) REGSL will be liable for all the obligations to VIPL, for the period commencing on and from 24.08.2018, without any recourse to RInfra.

52. On 23.08.2018, the appellant issued a letter to REGSL confirming and stating that (i) all outstanding amounts as on the Closing Date, whether receivable or payable from and to REGSL and RInfra with respect to the PPA dated 14.08.2013, shall be paid/received exclusively by RInfra; (ii) for the period commencing on and from the date post the Closing Date, REGSL will be liable for all the obligations; and (iii) that REGSL shall intimate the Closing Date on completion of the transaction. The above-mentioned exchange was followed up by signing of a Memorandum of Understanding (MoU) on 29.08.2018 by the appellant (Genco) and REGSL (the substituted procurer) whereby it was agreed that REGSL and its

subsidiaries, affiliates, associates and group companies would provide all possible assistance to VIPL in the issues pending before various fora viz. claim of VIPL for relief under Change of Law clause for increase in fuel cost in absence of FSA for Unit-I pending with MERC; Civil Appeal no. 372 of 2017 before Supreme Court challenging judgment of this tribunal allowing additional fuel cost of Unit-I; and, Writ Petition of VIPL pending before High Court of Delhi respecting FSA for Unit-I. On 03.09.2018, R-Infra issued letter to its sister company VIPL, it being signed by representatives of R-Infra, VIPl and AEML (successor-in-interest of REGSL), *inter alia*, mentioning the vesting of Mumbai GTD Business of R-Infra and of PPA dated 14.08.2013 with AEML w.e.f. 29.08.2018 and further that all references to R-Infra in the said PPA would thenceforth be construed as AEML owing to the acquisition of R-Infra by AEML.

53. It is pertinent to note here that all the above-mentioned correspondence emanating from VIPL or R-Infra carry the logo of the flagship company (Reliance) of which each of them has been a subsidiary. Further, and this is most crucial, the letters exchanged by these sister companies wherein VIPL insisted on waiver in lieu of No-Dues certification favoring R-Infra and grant of waiver (of possible action owing to non-performance) by R-Infra favoring VIPL were not shared with or endorsed to REGSL. The internal arrangement vis-à-vis waiver was kept away from even a remote mention in the letter

dated 22.08.2018 addressed by VIPL to REGSL. Though reference was made to letter dated 22.08.2018 of R-Infra, its copy was not passed on even at that stage.

54. On 03.10.2018, the appellant (VIPL) issued invoice for the month of September 2018 to AEML. This was disputed by AEML. Various e-mails were exchanged between VIPL and AEML with respect to demand of Rs. 42 Crores claimed as outstanding against AEML. Invoices for the months of October 2018 and November 2018 were issued by the appellant (Genco) on 01.11.2018 and 01.12.2018 respectively. These were also disputed by AEML.

55. On 15.12.2018, a Supplemental Agreement to the SPA dated 21.12.2017 was entered into between RInfra, ATL and AEML to record the understandings reached between the said parties regarding outstanding dues, adjustments, set-off etc, *inter alia*, towards demands of State Load Despatch Centre ("SLDC"). Simultaneously, an Undertaking was issued by VIPL which was made part of the said Supplemental Agreement, it concerning claim of REGSL for set-off towards payments made by it on account of outstanding past liability of VIPL to SLDC and against enforcement of letter of credit etc. The relevant part of the Undertaking dated 15.12.2018 reads thus:

> *"We are aware of the terms set out in the Supplemental Agreement and hereby confirm, accept and acknowledge the right of the Company to set-off any amounts remaining*

unpaid by the Seller towards SLDC Demand Amounts and/or SLDC interest against any and all payments made or required to be made by the Company to us under the Power Purchase Agreement dated 14 August, 2013. The amount being set-off by the Company shall be deemed to have been paid by the Company to the Vidarbha Industries Power Ltd. (VIPL) against the payments required to be made by the Company under the above said PPA."

56. Meanwhile, the Seller (Genco) / Appellant admittedly continued to be in default in maintaining plant availability of the power station, it being below prescribed norms almost consistently since January 2017. On 03.01.2019, the Procurer / second respondent expressed concerns by email communication that, *inter alia*, stated:

"5. Also, in reference to your letter dated 30th November 2018 in regards to month wise availability of power wherein VIPL had stated that availability of power for January 2019 will be 100%. However, VIPL have reduced availability to 50% from 1st day onwards without any advance prior intimation citing reason of coal shortage. It is becoming increasingly difficult for planning power purchase and AEML has to increasingly rely upon purchase from power exchange…"

[Emphasis supplied]

57. It is not disputed that the plant availability fell to the level of 22.94% in January 2019 and the generation came to a complete halt with effect from 17.01.2019, the appellant itself declaring zero availability.

58. On 05.01.2019, a letter was sent by VIPL to AEML with reference to the outstanding amount of Rs. 107.90 Crores against the Energy Invoice for November 2018 requesting it to release the

payment without adjusting any amounts towards Final Balancing & Settlement Mechanism (FBSM) liability considering the criticality of the situation, also stating that due to non-payment of Invoice by AEML, VIPL had not been able to procure coal and therefore would not be able to sustain operations of the plant. This was followed by another letter dated 16.01.2019 again mentioning that non-payment of the monthly bill had impaired VIPL's ability to procure coal and also that VIPL had also lost its opportunity to procure coal through e-auction and that, in such circumstances, VIPL would not be able to continue operations for Unit II also and shall be shutting down the plant from 16.01.2019. Energy Invoice for Rs. 119 Crores and Supplementary Invoice for Rs. 18.1 Crores towards Fuel Surcharge Adjustment Charges for the month of December 2018 and Energy Invoice for Rs. 35.7 Crores and Supplementary Invoice for Rs. 11.26 Crores towards Fuel Surcharge Adjustment Charges for January 2019 were issued in January/February 2019 by the appellant to AEML which raised disputes there against.

59. On 18.01.2019, AEML issued the impugned PPDN to VIPL invoking Article 11.1.1 (iii) read with Article 11.3.1 of the PPA dated 14.08.2013 on the ground that the appellant (Genco) was in default due to non-achievement of Normative Availability in the last 36-month period, also taking exception to stand of VIPL vis-à-vis monthly bills raised by it against AEML and the difficulties faced on account of fuel

stocks. Particularly, it was stated that there had been failure on part of VIPL to maintain plant availability since January 2016, the details of monthly availability sent along with the communication demonstrating default in achieving normative availability for twenty months during the last thirty-six months, it having been consistently below par, barring five sporadic months, over the period since January 2017. It is admitted that a copy of this communication was not made over to the Lenders.

60. It is pointed out by the appellant that on 21.02.2019, CIL announced linkage auction under para B(ii) of *SHAKTI* Policy for power producers/IPPs having already concluded long term PPAs. On 08.03.2019, MoP of GoI issued an Office Memorandum pursuant to an approval of the Government of India on recommendations of Group of Ministers ("GoM") that had been formed to examine the specific recommendations of a High Level Empowered Committee ("HLEC") constituted to address the issues of Stressed Thermal Power Projects. It is stated that the Government of India has mandated that no coercive action can be taken by Distribution Company (AEML) to press alleged defaults and seek to terminate the PPA. On 28.03.2019, AEML sent a communication to VIPL issuing the Verification Certificate to enable it (VIPL) to participate in linkage auction under Para B(ii) of the *SHAKTI* Policy, *inter alia*, also stating that VIPL is under an obligation to execute the FSA for

domestic/linkage coal under the PPA which it had failed to do till the date of the letter and further that AEML had not waived its rights in relation to the continued failure of VIPL on this issue. On 09.04.2019, CEA approved VIPL's eligibility for participation in the second round of the linkage auction under para B(ii) of *SHAKTI* policy.

61. On 03.04.2019, AEML sent another communication to VIPL, in continuation of its earlier PPDN dated 18.01.2019, *inter alia*, stating that (a) consultation Period of 90 days had started from 18.01.2019 as per Article 11.3.2 of the PPA but nothing had been heard from VIPL; (b) VIPL had been declaring Zero (0) power availability since 17.01.2019 and there was no communication whatsoever in respect of likely availability of generation; and that (c) resultantly AEML was constrained to make alternative arrangement and shall not be obliged to either purchase/offtake power from VIPL or be liable to pay capacity charges in case of any availability declared thereafter by VIPL.

62. The appellant responded to the PPDN dated 18.01.2019 on 90th day by reply dated 17.04.2019 urging it to be withdrawn, *inter alia*, stating that (a) the provisions of Article 11.3.1 of the PPA do not get attracted if the breach has been committed by the Procurer itself; (b) as per MoU dated 29.08.2018, AEML was required to provide all possible assistance in the various litigation pending before various fora; (c) non-availability of the Station was also due to non-signing of

the FSA by MoC which is a *Force Majeure* Event; (d) that erratic payment of energy bills by AEML/ RInfra over the years had aggravated the situation; and (e) that the appellant was facing financial hardship since it was unable to recover its entire cost of fuel because the first respondent (MERC) had not disposed its petition for implementation of this tribunal's order dated 03.11.2016. Indisputably, there was no move made by VIPL to avail of the provision for consultation during 90 days' period (post-PPDN) for any efforts towards mitigating the default.

63. On 20.04.2019, AEML issued the impugned Letter of Termination (of the PPA dated 14.08.2013), concededly after elapse of stipulated period of ninety days post PPDN, it taking effect after expiry of stipulated thirty days' period of its issue. A copy of the Termination Letter was sent to the Lenders by speed post. Then followed some efforts by VIPL to persuade AEML against severance of ties by exchanges that are noted hereinafter.

64. Some issues between RInfra and VIPL had remained outstanding and this included payment of FBSM liability of RInfra. This was subject matter of Civil Appeal No. 415 of 2007 pending at the time before Hon'ble Supreme Court. Upon its request, AEML was substituted as the appellant in place of RInfra in the said matter, RInfra and VIPL not objecting to this.

65. It is stated that on 24.04.2019, the parties (appellant / Genco and second respondent / Procurer) entered into some correspondence by email based on some discussions. The appellant refers to them as one beginning with email sent by it at 10:22 a.m. requesting AEML to unconditionally withdraw the PPDN dated 18.01.2019 and the Termination Letter dated 20.04.2019 sending therewith a note as per which (a) "*upon such withdrawal, there would be no default under the PPA till date*" and that (b) "*set-off of FBSM liability of RInfra from VIPL Invoices would be limited to Rs.15 Crore/ Month effective from payment from August 2019, up to maximum of Rs. 500 Crores net off Stand by receipts up to Rs.400 Crores*". At 5:03 p.m., in response, AEML by email, *inter alia*, suggested that (a) it (AEML) would "*withdraw the termination letter upon a formal request from VIPL"*; (b) AEML was agreeable on subject of set-off to "*adjust Rs.15 Crores each month from VIPL bill against FBSM and other receivables from RInfra*"; and that (c) the "*current limit of Rs.15 Crores is agreed basis known RInfra dues of Rs. 550 Crores and receiving upfront amount of Rs. 400 Crores*". Both sides remained stuck to these positions despite further exchange of emails on same day.

66. On 25.04.2019, VIPL sent two communications to AEML each referring to "*mutual agreement*" between the parties arrived at on 25.04.2019. By the first of them, AEML was requested to formally withdraw unconditionally and unequivocally its Letters dated

18.01.2019, 03.04.2019 and 20.04.2019, there being also mutual agreement that such withdrawal would also mean that any and all alleged Defaults (if any) of the Seller stand automatically waived by AEML as on 25.04.2019 in entirety and that AEML would not issue any further Default / Termination Notice at least up to 31.12.2019. By the second letter of same date on the subject of set-off rights of AEML against liability of RInfra from amounts payable by AEML to VIPL it was suggested that AEML shall set-off the total outstanding amount to be paid by RInfra to AEML in the range of Rs.500 – 520 Crores, after adjusting receipt of an amount up to Rs.400 Crores by AEML against standby claim, pursuant to judgment of Supreme Court in Civil Appeal Nos. 415 of 2007 and 3229 of 2007, only to the extent of Rs. 15 Crores per month, against all payments required to be made by AEML to VIPL and further that this set-off would be effective from the month when any amount becomes due and payable by AEML towards VIPL's latest monthly invoice based on full month's operations of Butibori TPP.

67. The Civil Appeal (no. 415 of 2007) was dismissed on 02.05.2019 by Supreme Court upholding the order of this tribunal and, *inter alia*, directing that *"the amount which is payable to Reliance Energy Limited, deposited or secured by way of bank guarantee by TPC as per order dated 07.02.2007 along with interest" … be paid to Adani Electricity Mumbai Limited*".

68. On 02.05.2019, another email was sent by AEML to VIPL/RInfra, *inter alia*, insisting that (a) RInfra (VIPL) send a formal request upon which AEML would withdraw all three letters dated 18.01.2019, 03.04.2019 and 20.04.2019 which would have the effect of withdrawal of all disputed defaults under the PPA as on 25.04.2019; (b) on setting off, parties had agreed that Rs. 500-520 crores (excluding interest) are known and agreed amounts payable by RInfra to AEML and additional amounts as and when crystallized shall become payable by RInfra to AEML; (c) the set-off shall be applicable from VIPL's earliest bill; and (d) that the current monthly set-off limit of Rs. 15 crores from VIPL's Invoices was agreed basis current agreed dues being of Rs. 500-520 crores (excluding interest) and AEML receiving upfront amount of Rs. 400 crores against the same immediately, upon receipt from any source. But, by email dated 07.05.2019, VIPL proceeded to take the position that issue of termination of the PPA as well as set-off limit were no longer pending issues as the resolution had attained finality to be acted upon by AEML by issuing appropriate letter. AEML responded on same date by email insisting upon '*Tangible Security*' to be created by VIPL in favour of AEML as a precondition for AEML to pay any amount so ordered by MERC in Case 199/2017. The appellant would term this response as an effort by AEML to renege from the understanding arrived at between the parties. Be that as it may, AEML, by its email

dated 13.05.2019, stated that "*(o)nly Event of default notice on account of lower availability has been agreed to be withdrawn … (t)ermination was in context of same and that would be withdrawn as agreed"* and that *"(w)e have agreed and conveyed that we will not press default notice for lower availability prior to Apr 2019 from our side and hope that the event shall now be cured and plant commenced to perform."*

69. There was an impasse as both sides in their subsequent communications would not budge from above-indicated positions. Meanwhile, on 11.07.2019, the appellant claims to have been able to obtain issuance of LoI for securing an FSA for its Unit-I under the *SHAKTI* B (ii) Policy, it being the appellant's case that under the scheme it (VIPL) was obliged to enter into a Supplemental PPA with the Procurer, i.e. AEML, and pass on the benefit of bid by VIPL and further that the PPA had to be approved by the concerned regulator within sixty days. On 15.07.2019, VIPL issued a letter to AEML urging the latter, *inter alia*, to sign the Supplemental PPA for the purpose of *SHAKTI* Policy. This was followed by reminder requests for amendment to PPA sent by appellant in July 2019, AEML statedly not responding. During this period, other issues continued to come up and simmer. These included liability of RInfra on account of SLDC Demand Amounts and SLDC Interest; issues raised in revised Mid

Term Review Petition (No. 199 of 2017) filed by VIPL on 20.09.2018 before MERC etc.

70. The second respondent (AEML) took the position, *inter* alia, by its letter dated 29.07.2019 that (a) in view of the Termination Notice dated 20.04.2019 issued by AEML to VIPL, there was no question of AEML resuming any regular payment to VIPL; (b) AEML instead was entitled to exercise its right to set-off against any and all amounts that may become due and payable to VIPL against VIPL's obligation to make termination payments to AEML under the PPA. By its subsequent letter dated 01.08.2019, AEML reiterated that the PPA between VIPL and AEML stood terminated by Termination Letter dated 20.04.2019, though adding that it might consider a fresh proposal from VIPL for supply of power on mutually acceptable terms that protect interest of AEML's consumers. By another letter dated 19.08.2019, AEML again asserted that since RInfra's liabilities towards SLDC/FSBM charges were yet to be discharged in full, the Undertaking dated 15.12.2018 furnished by VIPL continued to be valid and binding on VIPL it being impermissible for it to unilaterally terminate or cancel the same.

71. The appellant responded to the letter dated 01.08.2019 and Termination Notice dated 20.04.2019 of AEML, by letter dated 28.08.2019, *inter alia*, stating that defaults by AEML disentitled it (AEML) from terminating the PPA.

VIPL'S PETITION(S) BEFORE MERC

72. On 01.08.2019, VIPL filed a petition (Case No. 225 of 2019) before MERC for approval of the proposed Supplemental PPA to be signed between AEML and VIPL so as to pass on the discount offered in the *SHAKTI* B (ii) scheme. AEML filed its reply affidavit in said case on 29.08.2019 stating that the Petition was not maintainable as the PPA for which approval was being sought stood terminated on account of defaults committed by VIPL.

73. On 30.08.2019, the appellant filed the petition (Case No. 247 of 2019) which has resulted in the order of MERC that is impugned before us by the appeal at hand. The prayers made in the said petition included, *inter alia*, declaration that PPDN and the Termination Letter are bad in law and contrary to the PPA and thus be set aside; the PPA held to be "*valid and subsisting*"; and that pending hearing on the main petition, stay be granted, by interim orders, against the operation and effect of the PPDN and Termination letter thereby obliging the parties to continue discharging their obligations under the PPA, allow recoveries of charges and dues, and restrain AEML from entering into such other PPA.

74. On 03.09.2019, the afore-mentioned petition (Case No. 225 of 2019) of the appellant respecting the proposed Supplemental PPA was allowed by MERC, *inter alia*, ruling that (a) the Amendment Agreement / Supplementary Agreement as proposed by VIPL for giving effect to the tariff discount of four paise per kWh offered by VIPL under the *SHAKTI* Policy was approved; (b) the parties stood directed to enter and sign the Supplementary Agreement under the PPA, on or before 05.09.2019; (c) the Supplementary Agreement would be subject to the rights and remedies of both parties, in relation to termination of PPA for which separate Petition had already been filed by VIPL, registered as Case No. 247 of 2019; (d) VIPL shall provide year-on-year discount of four paise per kWh for the remaining term of PPA in the tariff in the monthly bills as per the condition prescribed in the SHAKTI Policy; and that (e) VIPL and AEML must mutually develop a mechanism for accounting of source-wise coal to avail proper discount offered in the tariff vis-à-vis the tied capacity. It is clear that this approval was subject to determination and adjudication of the dispute arising between the parties on account of PPDN and the Termination Letter and cannot have any bearing thereupon.

75. It appears that MERC, by an interlocutory order dated 17.10.2019, directed the parties to case no. 247 of 2019 to maintain *status quo* till the main petition was decided. The main petition of the

appellant, however, was decided by the MERC by the impugned order dated 16.12.2019, *inter alia*, holding the Termination Notice to be "*valid*", directing that it shall be "*deemed to have been issued to the Lenders on the Date of the Order* (i.e. 16.12.2019)", giving liberty to the Lenders to "*take further necessary action as per the provisions of the PPA to exercise their right of substituting VIPL-G (the appellant) with an entity for operating the thermal station for recovery of their dues*" and in the event of the lenders failing to avail of such rights, AEML to be "*at liberty to arrange alternative source for its requirement of power and approach the Commission with appropriate petition*" within the period specified.

POST-IMPUGNED DECISION EVENTS

76. It may be mentioned here that subsequent to the filing of the appeal at hand and during its pendency, the third respondent (lead banker of consortium of lenders of the appellant) issued Substitution Notice on 31.12.2019 as per Schedule 12 of the PPA in exercise of the liberty granted by the Impugned Order dated 16.12.2019. On 09.01.2020, the third respondent (representing the lenders of the appellant) filed an application before MERC seeking its permission for substituting VIPL through the Resolution Professional procedure under Insolvency and Bankruptcy Code 2016 ("*IBC*"). On 15.01.2020,

the lenders also moved National Company Law Tribunal ("NCLT") initiating proceedings under Section 7 of IBC against VIPL. Both the said matters (before MERC and NCLT) and Civil Appeal No.372 of 2017 before Supreme Court (challenging judgment of this tribunal allowing additional fuel cost of Unit-I) are pending. The second respondent (AEML), it is stated, was allowed on its application to be impleaded as party respondent in said civil appeal (no. 372 of 2019) by order dated 05.02.2020.

VIPL'S CONTENTIONS

77. The factual matrix as brought out by the appellant through pleadings, documents and submissions falls, generally speaking, in five parts: (i) events leading to PPA; (ii) circumstances emanating from changes in coal policy and consequent inability of the appellant (Genco / Seller) to procure coal in assured quantity, difficulties faced in tapping alternative sources, and additional costs resultantly incurred; (iii) disputes with the original Procurer (distribution licensee named Reliance Infra - predecessor to AEML); (iv) disputes with the second respondent (AEML); and (v) grievances against MERC. Whilst the first part is more of introductory, the second is referred in support of plea of *force majeure* or to pin blame on the procurer for failure to achieve optimum productivity by the generator. The third part is to explain financial distress into which the generator fell owing

allegedly to reasons of the erstwhile procurer. The fourth part is meant to demonstrate non-cooperation by the new procurer (second respondent) statedly indulging in prevarication and defaults in timely payments adding to the woes of the generator (appellant) on the financial front making it impossible for it to sustain its operations vis-à-vis the power station as also to show breaches of the procedure stipulated in PPA for termination. The last part is to buttress the plea of impugned judgment being result of a process that has been polluted.

78. The arguments of the appellant, broadly put, are that the impugned order is bad in law and vitiated because the MERC has not appreciated the fact that reduction in normative availability was due to *Force Majeure*, AEML having incorrectly included past period of default prior to the Appointed Date, it being incompetent to invoke Seller Event of Default since it itself has been in breach of the PPA, the PPDN and Termination Letter being void on account of non-compliance of the procedure under the PPA, the result of proceedings suffering from vice of Institutional bias on the part of MERC.

RESPONDENTS' STAND

79. The first respondent (MERC) has taken a position of neutrality in the proceedings before us, and rightly so, because as an adjudicatory body it has rendered opinion on the issue by the

impugned decision and bearing in mind the general discipline of hierarchy it simply awaits appellate scrutiny, its judgment expected to speak for itself without the need for any part thereof being explained unless so required by the appellate forum.

80. The third respondent (Lenders) supports the appellant by arguing that the non-endorsement of a copy of the PPDN to it was a fatal error that would render termination of PPA by the procurer (AEML) invalid, this having inhibited effective or timely response on the part of Lenders at a stage (consultation period) when it was possible to bail the beleaguered appellant (borrower/generator) out of financial distress and also later course of scouting for entity that could be selected in terms of the PPA for substitution.

81. The second respondent (AEML) defends the impugned order of MERC seeking to refute all above-mentioned contentions of the appellant and the third respondent (Lenders). It rather attributes certain acts to plead unjust, unfair, collusive, *malafide* and unconscionable conduct on their part to the detriment of the interests of the procurer/Discom (AEML) which have had the adverse effect on the capability of the latter to discharge its larger statutory duty towards the consumers at large. It points out that there is no explanation offered for the failure to achieve normative availability for such prolonged period since January 2017 and consistent (continuous) disruption of operations since January 2019. It also seeks to highlight

that the Lenders (third respondent) had declared the loan account of appellant (borrower) "*non-performing asset* (NPA)" in June 2019 on basis of records showing defaults on its part in servicing the loan since January 2019. It is further submitted that the Lenders have failed in their responsibility under the financial agreements by not overseeing the lack of productivity and consequent disruption of revenue since 2016, the liberty given by PPA for substitution not having been availed, the lenders instead having elected to pursue the alternative remedy under IBC.

TRIBUNAL'S OPINION

Institutional Bias?

82. We would rather take up the issue of Institutional bias on part of MERC first. The submissions of the appellant on this issue are noted hereinafter.

83. It is argued that MERC, while prosecuting its case in Civil Appeal No. 372 of 2017 before the Hon'ble Supreme Court, is discharging its regulatory function whereas in the present case, it was called upon to discharge its adjudicatory function. The appellant contends that the perusal of the impugned order reflects that MERC has been guided by its "*own vested interest as a regulator*" which renders it a case of Institutional bias. It is pointed out that the Tariff Order 20.06.2016 was passed by MERC in Case No. 91 of 2015 in

exercise of its regulatory power whereby it (MERC) had incorrectly disallowed the actual cost of coal incurred by VIPL under cost plus regime despite it being shown that FSA with CIL for Unit -I could not be secured for no fault on the part of VIPL which Tariff Order dated 20.06.2016 was partly set aside by this Tribunal in Appeal No. 192 of 2016. It is submitted that most of the findings in the impugned order are based on the averments and submissions made by MERC before Supreme Court in Civil Appeal No.372 of 2017, filed by MERC itself, challenging this Tribunal's Judgment dated 03.11.2016 in Appeal No.192 of 2016 treating the matter in a manner as if the said Civil Appeal had already been allowed.

84. Referring to the MTR Petition (Case No. 199 of 2017) submitted by it before MERC for truing up and fixation of tariff for the remaining years of the control period under MYT Regulations 2015, though amended on 20.09.2018, the appellant points out inordinate delay in decision thereupon. It is submitted that public hearing was held on 08.01.2019 after notices dated 29.09.2018 were published inviting objections and that order was reserved by MERC. It is the argument of the appellant that MERC is using the present proceedings as a "*ruse to delay the determination of tariff*", even though as per its own regulations (Regulation 15 of MYT Regulation 2015), it is required to pass the Tariff Order within 120 days from the date of filing of the tariff petition. It is submitted that continued delay in deciding Case No. 199

of 2017 (MTR Petition), is gravely prejudicing the interest of VIPL as till date VIPL has been unable to recover actual cost of its coal consumption due to lack of FSA for Unit I.

85. It is further argued that VIPL has in the past generated power by sourcing coal from alternate sources incurring substantial additional expenditure and yet its MTR Petition has remained pending adjudication before MERC, no order having been pronounced even after elapse of eighteen months this resulting in the appellant being deprived of the right to recover its additional expenditure.

86. In support of this plea, the appellant relies upon the rulings of the Supreme Court reported as *Ranjit Thakur v. Union of India*, (1987) 4 SCC 611 and *A.V. Bellarmin v. V. Santhakumaran Nair*, 2015 SCC OnLine Mad 10358.

87. In *Ranjit Thakur* (supra), the Supreme Court observed:

> *"**16.** It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal requirements of natural justice; is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "coram non-judice". (See Vassiliades v. Vassiliades [AIR 1945 PC 38 : 221 IC 603] .)"*
>
> (Emphasis supplied)

88. The appellant refers to following observations in *A.V. Bellarmin* (supra)**:**

*"**9.** Pre-determination and pre-disposition are two facets of bias. An alleged predetermination or predisposition has to be highlighted from an apparent bias. An apparent bias has to be found out from the point of view of either a reasonable mind or a fair minded informed observer as discussed above. Thus, the Court has to sit in the armed chair as a fair minded man who otherwise could be called a reasonable man and determine whether there exists a real bias. Therefore, a Court is required to transform itself to such a man and then decide. This is the common law principle, which has been evolved by the Courts. There is very little difference between a real likelihood and a reasonable suspicion of bias in practice. It is ultimately for the Courts to decide that there exists a bias or not. After all, the test of likelihood or reasonable suspicion is a mere instrument in identifying an element of bias.*

***10.** Coming to an official bias, it can transform into legal malice at times but not in every case. To decide as to whether there exists a likelihood or reasonable suspicion of bias, the test shall not be unacceptably high considering the concept and proof of bias.*

***11.** An apparent bias can be identified with the relative ease in pecuniary and personal as against official. Deciphering an official bias is an arduous job for a Court. That is the reason why the tests of likelihood or reasonable suspicion of bias is required to be used.*

***12.** In P.D. Dinakaran v. Hon'ble Judges Inquiry Committee ((2011) 8 MLJ 331 (SC)), the Apex Court after considering the judgments of the foreign Courts as well as our High Courts summed up the principles of bias by applying the test of real likelihood from the point of fair minded informed observer. The following paragraph would be apposite:*

> *"71. The principles which emerge from the aforesaid decisions are that no man can be a judge in his own cause and justice should not only be done, but manifestly be seen to be done. Scales should not only be held even but they must not be seen to be inclined. A person having interest in the subject-matter of cause is precluded from acting as a Judge. To disqualify a person from adjudicating on the ground of interest in the subject-matter of lis, the test of real likelihood of the bias is to be applied. In other words, one has to enquire as*

to whether there is real danger of bias on the part of the person against whom such apprehension is expressed in the sense that he might favour or disfavour a party. In each case, the court has to consider whether a fair-minded and informed person, having considered all the facts would reasonably apprehend that the Judge would not act impartially. To put it differently, the test would be whether a reasonably intelligent man fully apprised of all the facts would have a serious apprehension of bias. In cases of non-pecuniary bias, the "real likelihood" test has been preferred over the "reasonable suspicion" test and the courts have consistently held that in deciding the question of bias one has to take into consideration human probabilities and ordinary course of human conduct. We may add that real likelihood of bias should appear not only from the materials ascertained by the complaining party, but also from such other facts which it could have readily ascertained and easily verified by making reasonable inquiries."

Regarding the test of real likelihood of bias, it was none the less held what is important is real danger of bias on the part of the person against whom such apprehension is expressed. It was also held that human probabilities and ordinary course of human conduct are the parameters to be taken in mind while indulging in such test.

***13.** In State of Gujarat v. R.A. Mehta, (2013) 1 MLJ 362 (SC), while dealing with the doctrine of bias, the Apex Court held that reasonable suspicion that there is likelihood of bias affecting decision would be sufficient to invoke the doctrine of bias. Therefore, in effect the test of likelihood of bias or reasonable apprehension of bias are interchangeable in nature and consequently, the parameters required for such a test will also be construed to be the same."*

[Emphasis Supplied]

89. In our view, the argument of Institutional bias on the part of MERC is frivolous, wholly unfounded and in bad taste. The Commission has been entrusted by the statute (Electricity Act) with multifarious responsibilities, the adjudicatory function being only one of them. It discharges, *inter alia*, legislative function by framing

regulations that have the force of law and also oversees, as the regulator, the conduct of players in power sector engaged in the work of generation, transmission, trading, distribution *et al* granting approvals and securing compliances. As a statutory authority, it exercises its jurisdiction in accordance with law and its dispensation is subject to judicial scrutiny – before this tribunal under section 111 - in so far as it pertains to adjudication of disputes and before High Court under Article 226-7 of the Constitution of India in other matters. Ordinarily, the Commission is to act as a dispassionate authority while engaged in the duty of adjudication over disputes brought before it and should its order be challenged by appeal it would not seek to defend it in the manner a contesting respondent (disputant) would do. But there may be occasions where the Commission is expected not merely to defend its action but also to prosecute the matter with a view to enforce the law by approaching the superior forums as an appellant. The authorization by the statute (section 124) in favor of the regulatory commissions to arrange for legal representation on their part at the appellate stage is just one illustration of the several such acknowledgements by law as to why the participation by the Commission cannot be begrudged. It is not fair to attribute "*own vested interest"* to the regulator only because in a certain situation there may be an overlap between the regulatory function and adjudicatory function.

90. In the present matter, we are not called upon to sit in judgment as to the merits or demerits of the contentions urged before the Supreme Court in pending Civil Appeal No. 372 of 2017. Concededly, there is no stay granted by the Supreme Court in the said appeal vis-à-vis the order that is impugned therein. The dispute forming the subject matter of that case is still at large. In this scenario, if the Commission has taken a certain view that falls foul of the dispensation by this tribunal in the earlier round of appeal, suitable correction would have to be made at the stage of appellate scrutiny of such other matter. Incorrect decisions (assuming the view taken by the MERC in the matter referred to was erroneous) do not necessarily mean predisposition or *malafide* action. Deductions on that account cannot travel to the present case - the cause of action wherein has nothing to do with the previous litigation - so as to permit the argument of institutional bias being raised.

91. The grievance relating to "*inordinate delay*" in decision by MERC on a matter reserved for order long back is misconceived. Assuming there has been such undue delay, there is no information shared as to what remedy was pursued by the appellant in such regard. This cannot be used as a defense against termination of the PPA, not the least so as to justify non-performance or in the face of total absence of remedial steps.

92. But what has pained us is the effort on the part of the appellant to come with such misleading and intemperate line of submissions based on half-truths.

93. A lot of energy was focused on the grievance that MERC has caused inordinate delay in rendering its decision on the petition (case no. 199/2017) of the appellant. That this is a patently wrong picture painted on incomplete facts is revealed by copy of letter dated 02.04.2018 of MERC addressed to the appellant acknowledging its letter dated 10.01.2018 requesting the matter in said case (Mid Term Review Petition) to be kept "*in abeyance*" pending decision of the Supreme Court in Civil Appeal no. 372 of 2017, the appellant having submitted before Supreme Court on 06.02.2017 that it would not press the judgment dated 03.11.2016 of this tribunal, liberty as prayed for having been granted by the Commission for the MYT petition to be revised/amended in light of decision in aforesaid civil appeal. If there was delay in the matter being taken up for hearing, the appellant itself must take responsibility.

94. It has been demonstrated before us that the MERC had approved procurement of 600 MW power from VIPL in 2013 without subjecting it to the competitive bidding required under the National Tariff Policy read with Section 63 of the Electricity Act, 2003. Further, it is clear from documents submitted that VIPL itself had given assurances to the Supreme Court and MERC that it would not seek

implementation of this Tribunal's order dated 03.11.2016 until disposal of Civil Appeal No. 372 of 2017 pending before the Supreme Court. These facts displace the foundational facts to attribute institutional bias.

95. The suspicion of bias articulated by the appellant is neither real nor reasonable nor probable. We reject the argument whilst placing on record our strong disapproval of the improper language employed against the statutory body.

Reduction in Normative Availability due to Force Majeure?

96. The appellant submits that in the proceedings before MERC, placing reliance on judgment dated 03.11.2016 of this Tribunal in Appeal No. 192 of 2016, and referring to Article 11.1.1 of the PPA, it had contended that Seller Event of default cannot be invoked if the party is affected by *Force Majeure*, but the said plea was brushed aside by the MERC on the perverse grounds that notice of *Force Majeure* was not served upon AEML and that the judgment referred to had not attained finality since it had been challenged by MERC before the Supreme Court (in C.A. No. 372 of 2017).

97. Placing reliance upon views expressed by this Tribunal in Appeal No. 192 of 2016 and by Delhi High Court in the writ proceedings referred to earlier, it is the argument of the appellant that the finding of MERC on the issue reflects fallacious approach

because even though it had met (right from inception) all requirements to qualify for and to secure Coal linkage from Ministry of Coal either under NCDP 2007, NCDP 2013 or even *SHAKTI* Policy, and made best possible efforts in this regard, such linkage had been wrongly denied to it by the concerned authorities for no reasons. In this context, it refers to the facts that on 09.04.2019, CEA had approved VIPL's eligibility for participation in the second round of the linkage auction under para B(ii) of *SHAKTI* policy and that pursuant to the auction process, VIPL had emerged as the Provisional Successful Bidder and was issued the LOI on 11.07.2019 which would have been converted into FSA within two months of submission of the requisite documents, one of which was the amended PPA duly approved by MERC. It is argued that sustaining Termination Letter by the impugned order renders the entire progress of VIPL in obtaining the FSA for Unit-I meaningless, the termination of PPA having actually led to cancellation of LoI by WCL. It is claimed that that owing to sourcing of coal from alternate sources, VIPL has suffered an under recovery more than Rs. 1800 Crores till date even though VIPL is a cost-plus project under Section 62 of the Act and entire cost of coal is pass-through in tariff, the under-recovery of costs having caused tremendous financial hardship impacting the ability of VIPL to sustain its operations. It is the submission that reduction in availability is

attributable to *Force Majeure* conditions for which VIPL cannot be held responsible.

98. It is argued that AEML (the procurer) and also MERC have been cognizant of the *Force Majeure* conditions plaguing the Project of VIPL, such being a finding returned by this Tribunal in Judgment dated 03.11.2016 in Appeal No. 192 of 2016 vis-à-vis delay in execution of FSA, the fact that by a MoU the AEML had solemnly agreed to assist VIPL in all possible manner to secure such Fuel Supply having been conveniently glossed over.

99. It is also argued that rejection of the plea of *Force Majeure* on the ground that it only affected Unit-I of the VIPL and so could not be applied to Unit-II is erroneous because while FSA has not been signed for Unit-I till date cost of alternate fuel has not been granted to VIPL by MERC since its inception and that VIPL has been precluded from performing its obligations under the PPA due to adverse financial circumstances arising from under recovery of more than Rs. 1800 Crores.

100. The findings on the issue of *force majeure* in the Impugned Order are as under:

> *"45. VIPL-G stated that the Hon'ble APTEL in Appeal No. 192 of 2016 held that delay in signing of FSA for Unit 1 is an event in the nature of Force Majeure and as per PPA provisions, the default on account of Force Majeure event is to be excluded, Also, AEML-D has not challenged the*

aforesaid Judgment passed by the Hon'ble ATE. Hence, reduction in availability due to Force Majeure event cannot be considered as default by AEML-D.

46. AEML-D in response has stated that VIPL-G has never issued a notice to AEML-D for occurrence of a force majeure event which is a prerequisite under the PPA. The hindrances cited for executing the FSA are wholly attributable to VIPL-G which cannot be allowed to cover its own failures and at the same time claim benefits of force majeure and change in law under the PPA.

47. The Commission notes that Article 9 of the PPA deals with the Force majeure events. In terms of the Article No. 9.5.1 of the PPA, the affected Party (VIPL-G in this case) was required to notify the other Party (AEML-D) for the event of Force Majeure within seven days of the knowledge of Force Majeure event by the affected Party, i.e. VIPL-G. Also, such notice is a pre-condition to the Affected Party's entitlement to claim relief under PPA. No document is seen from the records placed before the Commission that VIPL-G had notified the Force Majeure event to AEML-D within the stipulated timeframe. Hence, claim for Force Majeure event for justifying the reduction in availability appears to be an afterthought from VIPL-G.

48. Further, the Judgment of Hon'ble ATE referred by VIPL-G was pertaining to FY 2014-15 and FY 2015-16 since the Commission's Tariff Order for truing up for FY 2014-15 and provisional Truing up for FY 2015-16 had been the subject matter of the said Appeal, whereas the period of default as presented in the present Petition is from January, 2016 to December, 2018. The Commission finds that the ruling given by the Hon'ble ATE holding non-signing of FSA, a Force Majeure event was in respect of Unit 1 and the same cannot be applied to Unit 2 of VIPL-G for which there is a valid FSA. Hence, the Commission is of the view that VIPL-G cannot rely on the Judgment passed by the Hon'ble ATE to claim that the reduction in availability was due to a Force Majeure event. Besides, Civil Appeal (Appeal No. 372 of 2017) has been filed by the Commission before the Hon'ble Supreme Court challenging the aforesaid Judgment of the Hon'ble ATE. The matter is pending before the Hon'ble Supreme Court and hence there is no finality to the aforesaid Judgment passed by the Hon'ble ATE. It would

not be out of context to mention here it is an admitted position that during the hearing on the Stay Application of Hon'ble ATE Judgment before the Hon'ble Supreme Court, VIPL-G gave an oral undertaking that it would not press the implementation of the aforesaid Judgement passed by the Hon'ble ATE and hence, no such Tariff recovery for additional expenses incurred by VIPL-G has been pressed for sourcing alternate fuel to maintain Normative Availability. In any case, pending settlement of its claims for the expenses incurred, VIPL-G had been arranging alternate fuel to generate power for RInfra-D. What has suddenly changed for VIPL-G now to take a position that due to Force Majeure event it cannot operate the thermal plant. It has been its own responsibility to maintain normative availability by arranging alternate fuel pending long term FSA as also promised by it to Commission at the time of approval of PPA.

49. In view of the foregoing discussions, the Commission does not find merit in the contention of VIPL-G that its reduction in availability /defaults under the PPA is on account of Force Majeure."

101. In our view, the view taken by the Commission is correct and calls for no interference.

102. The Appellant has relied on this Tribunal's order dated 03.11.2016 in Appeal No. 192 of 2016 to argue that it was affected by a *Force Majeure* event qua non-signing of FSA for Unit 1. But, upon close scrutiny we are unable to locate any such finding returned in that case. The following part of the said order demonstrates the hollowness of the argument:

"7. QUESTIONS OF LAW
As per Appellant, following questions of law arise in the present Appeal:
a) Whether the Appellant, is entitled to claim the fuel costs incurred by it due to delay in execution of Fuel Supply Agreement (FSA) with Coal India Limited ("CIL")

and its subsidiaries for reasons not attributable to the Appellant in its tariff to Respondent No.2, with whom there is a valid, duly approved Power Purchase Agreement, in accordance with the applicable Tariff Regulations of the State Commission?

b) Whether Respondent No.1 has ignored the inordinate delay on part of various Government Authorities and Public Sector Companies which are not within the control of the Appellant and /or are force majeure events which in turn has delayed execution of the FSA between the Appellant and WCL despite all efforts on part of the Appellant?

c) Whether the 1st Respondent could have disallowed such cost of fuel incurred by reason of there being no FSA in favour of the Appellant?

….

8…

A-III After having a careful examination of all the aspects related to Issue No 1 i.e. Disallowance of fuel cost for the period FY 2014-15 and 2015-16 brought before us for our consideration, our observations on the Issue No 1 are as follows:-

….

l) It is abundantly clear that the prime responsibility of arranging coal is that of the Appellant. Inspite of all efforts put in by the Appellant, it could not get the FSA for Unit-I executed. As such the Appellant arranged/is arranging the coal through alternate sources for Unit-I. The Appellant should put in all possible efforts to get the FSA executed for Unit-I at the earliest. It is not at all a fair practice as adopted by the State Commission in the Impugned Order to restrict the actual fuel cost incurred/to be incurred by the Appellant based on the various considerations as detailed out in the Impugned Order for generation from Unit-I for the given period. In the meantime, the State Commission is directed to allow the Appellant the cost of coal supplied/being supplied in the intervening period till the FSA is executed by the Appellant for Unit-I limiting to the extent of the cost of coal what has been allowed/being allowed by the State Commission to the Appellant for Unit-II during the period from COD till the FSA for Unit-I is executed.

m) Having observed as above, we will decide the first issue i.e. Whether the Appellant is entitled to claim the fuel costs incurred by it due to delay in execution of Fuel Supply Agreement (FSA) with Coal India Limited ("CIL") and its subsidiaries for reasons not attributable to the Appellant in its tariff to Respondent No.2, with whom there is a valid, duly approved Power Purchase Agreement, in accordance with the applicable Tariff Regulations of State Commission, in favour of the Appellant for allowing cost of coal for Unit-I limiting to the extent of what has been allowed/is being allowed by the State Commission for the corresponding period for the supply under FSA arrangement for the generation from Unit-II of the Appellant to Respondent No.2.

n) On the related issue at para 7 (b) above i.e. Whether Respondent No.1 has ignored the inordinate delay on part of various Government Authorities and Public Sector Companies which are not within the control of the Appellant and /or are force majeure events which in turn has delayed execution of the FSA between the Appellant and WCL despite all efforts on part of the Appellant, this issue gets covered as per our decision as above."

(Emphasis supplied)

103. It is vivid that this Tribunal had partly allowed to VIPL the fuel cost for Unit 1 for two years (FY 14-15 and FY 15-16) for Unit 2 which had a linkage FSA. The claim that there was a finding of *force majeure* event is fallacious and misleading. There is no discussion whatsoever in the decision of Article 9 of the PPA that deals with *force majeure* defense such clause not even being invoked. Even otherwise, the said order in Appeal No. 192/2016 is irrelevant since it concerned the period up to March 2016 whereas VIPL's default in Normative Availability is subsequent, shown to have begun from July 2016.

104. It has been pertinently noted that VIPL had been arranging coal from alternate sources to operate its Unit-1 and there was no change of circumstances. It has not been the case of the Appellant that Unit-1 had always been affected by *Force Majeure* event and therefore, it was unable to operate it. On the contrary, in terms of Article 3.1.2(a), it has throughout been the obligation of the Seller (Generator) to discharge its responsibilities under the PPA by arranging fuel for both the Units including, if so required, by tapping alternate sources. In fact, the provision contained in Article 3.4.2 of the PPA renders failure to execute the FSA within the specified period (10 months from the PPA signing date) a separate event of default and, if not remedied within three months thereafter, it gives to the Procurer a right to terminate the PPA.

105. The plea of *force majeure* based on difficulties in arranging FSA does not impress. As noted earlier, the appellant couldn't qualify – rather was found to be ineligible by MoC – it having been perceived by SLC(LT) of having attempted to mislead. Though the appellant is before writ court challenging the denial of FSA, the view taken on *prima facie* scrutiny in LPA only reinforces such adverse findings. The LOI issued on 11.07.2019 after successful bidding in the wake of approval of eligibility under *SHAKTI* policy is an event that cannot have retrospective effect so as to invalidate the PPDN or termination for past non-performance. There is nothing shown from which it could

be deduced that AEML had refused to assist or cooperate with the appellant in its efforts to secure FSA in the period prior to termination of PPA. At any rate, there is no decision by a court of it being a *force majeure* event.

106. That such difficulties do not qualify as good defense of *force majeure* finds strength from the ruling of Supreme Court in *Energy Watchdog v. CERC & Ors.* (2017) 14 SCC 80, whereby such claim of power generators on account of higher priced alternate/imported coal was rejected.

107. The plea that the appellant fell in financial distress because non-grant of alternate fuel by MERC has resulted in a loss of Rs. 1800 crores leading to inability to run the plant at Normative Availability is unacceptable in view of the fact that appellant itself assured the Supreme Court that it would not seek implementation of this Tribunal's order dated 03.11.2016 for recovery from its sister concern RInfra until Civil Appeal No. 372 of 2017 is finally disposed-off. This can hardly justify failure to generate.

108. Even otherwise, if the plea of the appellant were to be accepted, it militates against the plea for continuance of the PPA since by clauses contained in Articles 4.7.3 read with 11.5.1, it provides for termination only for the reason that *force majeure* event or its effect had continued beyond the maximum permissible period of twelve months.

109. What, however, must finally nail the issue against the appellant is that the defense of *force majeure* is not available in answer to non-performance of the nature that has led to PPDN and termination. The provision contained in Article 9.4.1 of the PPA expressly excludes unavailability, late delivery or changes in cost of fuel or consumables; insufficiency of finances or funds; or the agreement having become onerous to perform from the ambit of *Force Majeure* events. Further, as already highlighted with reference to the provision contained in Article 9.3.1, denial of FSA by itself cannot constitute defense of *force majeure* unless such denial is declared by a competent court to be "*unlawful, unreasonable and discriminatory*". There admittedly is no such declaration by any court till date upholding the contention of the appellant. The inhibition created by policy decision of the MoP of GoI in an attempt to save the stressed thermal power projects cannot come in the way of exercise of right to terminate on account of defaults by the other party, particularly because the objective of such diktat was different and all the more so as it could not be invoked to negate an action already initiated. Thus, non-availability of FSA does not constitute *force majeure* event even if it were to be presumed (to test the argument) that it was a circumstance beyond the control or in spite of best efforts on the part of the appellant.

110. We, therefore, find no merit in arguments of the appellant based on plea of *force majeure*. The contentions are rejected.

Wrong inclusion of default anterior to Appointed Date?

111. It is the case of the appellant that AEML had acquired rights and interest of RInfra and became a licensee on the appointed date i.e. 29.08.2018 it not being entitled to any benefits or liable for any claims prior to said date (29.08.2018) and, therefore, any default on availability of VIPL, prior to such Appointed Date, could not have been used by AEML in the PPDN and Termination Letter dated 20.04.2019, MERC having disregarded the arrangement between the parties.

112. The appellant submits that, by its letter dated 22.08.2018, RInfra had granted consent for waiver of Clause 11.1.1 (iii) of PPA and confirmed that RInfra shall remain liable to make the payment towards entire outstanding accumulated till Closing Date i.e. 23.08.2018 and that in furtherance to the same, VIPL issued Letter dated 22.08.2018 to RInfra/REGSL confirming and declaring that all outstanding amounts as on the Closing Date, i.e. 23.08.2018, whether receivable or payable from and to REGSL and/or RInfra with respect to the PPA dated 14.08.2013, shall be paid/received exclusively by RInfra and any claims arising from the PPA pertaining to the period up to the Closing Date shall solely be to the account of RInfra, without recourse to REGSL and for the period commencing on and from 29.08.2018, REGSL will be liable for all the obligations to VIPL without any recourse to RInfra. It is submitted that based on

the request of RInfra, VIPL had issued the revised Letter dated 23.08.2018 to RInfra/REGSL confirming and declaring that all outstanding amounts as on the Closing Date whether receivable or payable from and to the Company and/or RInfra with respect to the existing PPA dated 14.08.2013, for supply of power shall be paid / received exclusively by RInfra and any claims arising from the aforesaid agreement pertaining to the period prior to the Closing Date shall solely be to the account of RInfra without recourse to AEML, it to be liable for all the obligations for the period commencing on and from the date post the Closing Date, which was subsequently informed as 28.08.2018. The appellant also craves reference to Letter dated 03.09.2018 signed by all three parties viz. VIPL, RInfra and AEML, by which AEML had stepped into the shoes of procurer as per the PPA dated 14.08.2013, it confirming that the PPA signed between RInfra and VIPL was being assigned to AEML w.e.f. 29.08.2018, R-Infra continuing to be responsible for all aspects prior to said date, the obligation and entitlement of AEML commencing only from 29.08.2018. It is argued that the view taken by MERC has resulted in a preposterous situation wherein VIPL is made answerable to two entities for the same period, this running contrary to AEML's own representation made in the Letter dated 03.09.2018.

113. It is the argument of the appellant that Article 11.1.1 (iii) cannot be invoked. In support of this plea, the appellant relies upon the facts

that ATL had taken over 100% shares of RInfra in REGSL pursuant to SPA entered into by ATL along with RInfra and REGSL, the name of which company (REGSL) was changed to AEML and subsequently Mumbai Distribution Business of RInfra stood assigned to it (AEML), this (transfer of distribution of electricity in favour of REGSL and the name of REGSL being substituted by AEML) being approved by MERC by Order dated 26.08.2018. It is the submission that against such backdrop, any non-achievement of Normative Availability would have to be calculated from 29.08.2018 and since as on 18.01.2019 (date of issuance of PPDN) or even 20.04.2019 (date of Termination Letter), twelve consecutive months had not been completed the very basis for alleging "*Seller's Event of Default*" under Article 11.1.1 (iii) is erroneous and pre-mature.

114. It is the plea of appellant that the impugned notices ought to have been held illegal by MERC because it had been demonstrated that the existing rights of RInfra were transferred to REGSL (now AEML) only on the 'Appointed date'; all Claims and Liabilities up to Closing Date i.e. 28.08.2018 of the Licensed Business initiated and/or to be initiated in any legal and regulatory proceedings shall be retained and accrue to RInfra; Distribution Business stood transferred with effect from the Appointed Date and all past liabilities and gains incurred prior to the Appointed Date shall continue to be to RInfra's account; all Claims and Liabilities for the period prior to the

transaction would be retained by RInfra; matters relating to licensed business up to the appointed date which are under process or to be initiated in relation to any legal proceedings or regulatory proceedings are deemed to have been retained by and belong and accrue to RInfra; and Transfer of Distribution License to REGSL (now AEML) is subject to the condition that the Claims and Liabilities up to the Appointed Date shall vest with RInfra.

115. It is urged by appellant that the Termination Letter dated 20.04.2019 issued by AEML be held legally unsustainable for the reasons that for Termination to take effect under 11.1.1 (iii) of the PPA dated 14.08.2013 it is imperative that VIPL be in breach of its contractual availability for a period of twelve continuous / non continuous months within a span of thirty-six months; AEML having acquired the rights of RInfra only on 29.08.2018, the 36-month window would only expire on 29.08.2021. Hence, the PPDN, as well as the Termination Letter were not only premature but could also not be enforced as valid Notices under the PPA. It is argued that it is only after the Appointed Date of 29.08.2018 that the rights accrue in favour of AEML.

116. It is submitted that the doctrine of election applies since AEML had accepted the project on as-is-where-is basis, foregoing and waiving past liabilities; and that for AEML to contend and MERC to hold that any such defaults in availability against VIPL, contrary to the

Scheme of Arrangement between the agreed parties, would not only be against the terms of the PPA and the SPA, but also against the order of MERC approving such Scheme of Arrangement, which till date has never been questioned by AEML before any superior forum.

117. In above context, the appellant refers to the following observations of Hon'ble Supreme Court in *A. Abdul Rashid Khan v. P.A.K.A. Shahul Hamid,* (2000) 10 SCC 636:

> *"15. So far as the other part of the High Court's order by which it decreed the alternative relief of Respondent 1 for partition of the suit property in six equal shares by metes and bounds and delivering separate possession over these such shares is concerned, on the face of it it is erroneous and cannot be sustained, in a suit for specific performance. The vendee on the date of filing this suit has not yet become the owner of this property, as he merely seeks right in the said property through the decree of specific performance. When the sale deed itself has yet to be executed, his right in the property has not yet matured, how can he claim partition and possession over it? Even after decree is passed, his right will only mature when he deposits the balance consideration and the sale deed is actually executed."*
>
> (Emphasis supplied)

118. It was submitted that a party's right to sue would only arise when it steps into the shoes of the person who can sue in law. Therefore, prior to 28.08.2018 AEML was not the successor in the PPA dated 14.08.2013 and was not even the Distribution licensee in Mumbai, and hence, its right to sue would only originate on the date when it steps into the shoes of the existing/ incumbent licensee RInfra i.e. on 29.08.2018 (the Appointed Date). The Counsel submitted that the

only exception to the aforesaid proposition is a transaction when the business is sold as a '*going concern*' since in such a case the purchaser acquires the entire gamut of rights and obligations from the seller which, it is his argument, is not the fact-situation, the sale of RInfra's Distribution business having been effected on '*as-is-where-is-basis*' as held by the MERC by its Order dated 28.06.2018.

119. The Commission, by the impugned order, rejected the case of the appellant to above effect setting out its reasons thus:

> *"31. The Commission notes that although, it has acknowledged and approved that all matters (including claims and liabilities) relating to Licensed Business upto the Appointed Date, which are under process, initiated or to be initiated , in relation to the period prior to the Appointed Date would be retained with RInfra, the said approval was on the basis of commercial/financial agreement (i.e. Share Purchase Agreement) entered into between RInfra, REGSL and ATL. Also, the said arrangement is in respect of financial claims /liabilities arising out of such matters. Said arrangement does not absolve VIPL-G of performing its PPA obligations regarding achieving and maintaining the Normative availability.*
>
> *32. Further, under the Scheme of Arrangement between RInfra (the Transferor Company) and REGSL (the Transferee Company), the transfer of Mumbai Power Division comprising Generation, Transmission and Distribution, to REGSL had happened on 'going concern' basis under the provisions of the Companies Act, 2013, as applicable. Further, it was held by the Commission in the Order dated 28 June 2018 in Case No. 140 of 2017 that REGSL shall continue with the existing PPA on 'going concern' basis. The relevant extract is reproduced as follows:*
>
> *"The Commission in MYT Order dated October 21, 2016 has approved the power procurement plan for RInfra-D for the Control Period from FY 2016-17 to FY 2019-20. As per the*

Scheme of Arrangement, the existing Mumbai Distribution business is being transferred on a going concern basis. The transferee will continue to meet its obligation of supply of power through existing power procurement contracts."

33. Further, on an Application filed by AEML-D seeking impleadment in earlier Tariff related Appeals initiated by RInfra-D, the Hon'ble ATE has allowed substitution of RInfra-D by AEML-D as the Appellant and RInfra-D has been allowed to participate as proforma Appellant in the interest of equity and meeting the ends of justice…

34. Thus, it is seen that in spite of the commercial/financial agreement between the Parties on the issue of past claims and obligations, the Hon'ble ATE has ruled that past Tariff related litigations were required to be prosecuted by AEML-D and it further held that AEML-D was the proper Party to proceed with these Appeals.

35. The Commission notes that the need for approval of PPA executed between the Generating Company and Distribution Licensee by the Commission arises on account of the fact that the Commission is mandated to regulate the power procurement by the Distribution Licensees under Section 86(1)(b) of EA. The PPA provision puts obligation on the Generating Company to achieve and maintain Normative Availability consistently. This is an important provision and in no way can be diluted for any reason including the circumstance where the cost of alternate power could be lower. It is abundantly clear that if a Generator contracted by a Distribution Licensee under a long term PPA consistently fails to achieve the Normative Availability, there is impact on Tariff payable by the consumers of the said Distribution Licensee as the Distribution Licensee has to arrange power from an alternate source which at times may be a costly power. Hence, the Distribution Licensee needs to be vigilant and needs to take necessary steps in terms of the PPA which was entered for long term procurement and its terms and conditions were approved by the Commission. Thus, the Commission does not find any merits in the contentions of VIPL-G that AEML-D has not been adversely prejudiced on account of lower availability since the cost of alternate power procured during the period of lower availability was less than that of the cost of power for VIPL-G. Hence, the

Commission is of opinion that there is nothing wrong in AEML-D availing the remedy available to it under the PPA.

36. The Commission further notes that the defaults committed by VIPL-G although pertain to earlier years, namely FY 2016-17, FY 2017-18 and FY 2018-19, there is corresponding impact on future Tariff to consumers, since the Distribution Business of RInfra-D/AEML-D is on ongoing basis during the PPA term with VIPL-G. Also, as per the regulatory practices and the Applicable Tariff Regulations, the gaps/surplus for these earlier years are required to be passed on to consumers in future years' Tariff determination.

37. The Commission further notes that prior to Appointed Date, RInfra-D was the concerned Licensee and after Appointed Date, AEML-D is the concerned Distribution Licensee, however, post Appointed Date, neither new PPA has been signed nor any modified terms and conditions have been approved by the Commission under provisions of EA. Same PPA continues with change in Distribution Licensee. Also, no new Distribution Licence has been granted by the Commission to AEML-D. The existing Distribution Licence has been assigned to AEML-D under Section 17(3) of EA by the Commission. Hence, from regulatory perspective, the Distribution Licensee (although there is change in ownership) has remained the same. Further, under the Scheme of Arrangement, all rights and interests pertaining to the distribution business including those arising prior to the Appointed Date have been vested in AEML-D. Also, Article 13.1.1 of the PPA expressly provides for the rights and benefits of the parties under the PPA passing on to their successors. Hence, AEML-D is entitled to exercise all the rights and interests (which are available to be exercised under PPA) of its predecessor i.e. RInfra-D under the PPA.

38. On VIPL-G's claim that RInfra-D had granted consent for waiver of Clause 11.1.1 (iii) of the PPA, the Commission notes that Axis Bank contended that Hon'ble Supreme Court in the matter of All India Power Engineers Federation v. Sasan Power Ltd., held that no waiver which affects the interests of the consumers can be granted by the distribution licensee without prior approval of the concerned State Regulatory Commission. Thus, the Commission finds that

under the present case, RInfra-D being a Distribution Licensee before Appointed Date, has not sought the prior approval of the Commission for waiver of Clause 11.1.1 (iii) of the PPA and therefore, there is no merit in the VIPL-G's argument that a waiver has been effected to VIPL-G by RInfra-D.

39. In view of the foregoing discussions, the Commission is of the opinion that there is no merit in the contentions of VIPL-G that AEML-D is barred from relying on the defaults committed by VIPL-G in the period prior to the Appointed Date and that the PPDN and the Termination Notices were pre-mature in terms of Article 11.1.1 (iii) of the PPA. Thus, there is no infirmity in AEML-D's action wherein it has considered VIPL-G' reduction in availability in the period prior to the Appointed Date, while issuing the PPDN."

(Emphasis supplied)

120. We have considered the submissions and find that the Commission has rejected the arguments of the appellant to above effect on reasoning that cannot be faulted.

121. It is well settled that in every case of transfer, merger, takeover or a scheme of amalgamation under which the rights and liabilities of one company stand transferred to another company, the transferee company being a successor-in-interest becomes subject to all liabilities of the transferor company and is entitled to all rights of the transferor company. [*Bhagwan Dass Chopra Vs. United Bank of India & Ors.,* 1987 Supp (SCC) 536].

122. The Appellant is not right in arguing that AEML has only acquired rights and interest of RInfra on the appointed date i.e. 29.08.2018 and, therefore, any alleged default on availability of VIPL,

prior to such Appointed Date, could not have been used by AEML in the PPDN and Termination Letter dated 20.04.2019. While it is true that AEML could not initiate legal action of the impugned kind before taking over, the contention that it's (AEML's) right would originate only on the date it stepped into the shoes of RInfra is patently erroneous. In fact, the submission that the Appointed Date is 29.08.2018 is factually wrong since as per the Bombay High Court order dated 20.11.2017, the Appointed Date (as defined) under the Scheme of Arrangement ("SOA") is 01.04.2018 (revised from 01.04.2016). After this order of the High Court, RInfra, ATL and REGSL/AEML entered into a Share Purchase Agreement on 21.12.2017 ("SPA") for ATL to purchase 100% shares of REGSL from RInfra. The SPA contains detailed provisions with respect to appropriation/application of receivables/payables of the distribution business for the period prior to the Closing Date (i.e., 29.08.2018) and this arrangement was approved by the MERC in its order of 28.06.2018.

123. The relevant provisions of SOA have been quoted earlier. Their import and effect is that the transferred divisions/businesses of RInfra stood transferred to and acquired by AEML "*on a going concern basis*" and that AEML became the successor-in-interest of RInfra qua the distribution license and distribution business of the licensed areas in Mumbai and, in such capacity, it is entitled to exercise all the rights and interests (which are available to be exercised under law or

contract) of its predecessor-in-interest as per the terms of the contract or applicable law. The very premise of the argument of the appellant that the transfer of business was on '*as-is-where-is-basis*' in contrast to "*on a going concern*" basis is wrong. Article 13.1.1 of the PPA expressly provides for the rights and benefits of the parties under the PPA to be passed on to their successors. All contracts, deeds, bonds and agreements forming part of or relating to the Transferred Divisions of RInfra, which includes the PPA with VIPL, may be enforced effectively by or against REGSL/AEML (being the transferee company) as fully and effectually as if, instead of RInfra, REGSL/AEML had been a party thereto. In terms of clause 6.5 of the SOA, there cannot be any doubt that the PPA can be enforced by AEML as if it had been a party thereto instead of RInfra. There are no exclusions to this arrangement since the contract does not say that AEML could enforce the PPA provisions only with respect to the events occurring after the Appointed Date or the Closing Date (which occurred on 29.08.2018). Having stepped into the shoes of RInfra as a successor Procurer under the PPA, AEML is entitled to enforce the PPA provisions as if it had been a party thereto instead of RInfra since inception. The SOA was approved by the High Court and such decision is binding and enforceable against all stakeholders including the Appellant.

124. The ATL became the owner of shares of REGSL in place of RInfra as a result of SPA which led to acquisition of distribution business by it. The commercial arrangement in relation to apportionment of receivables/payables for the period prior to 29.08.2018, however, can have no impact on the operation of the SOA, which precedes transaction under the SPA and entitles AEML to enforce all contracts as if it had been a party thereto since inception. At any rate, rights other than financial claims of RInfra for the period prior to the Closing Date have not been retained by RInfra under the SPA nor granted by MERC order dated 28.06.2018 whereby it was clarified that "*the Distribution Business is being transferred as a going concern, and the service to the consumers as well as the tariff approved by the Commission shall continue seamlessly after the transaction is completed"* and that the "*regulated books for tariff determination will remain unchanged on transfer of licensed businesses from RInfra to REGSL*" and further that it was incumbent on RIfra to "*ensure that the transfer of all rights, title, ownership, possession and economic interest in the Distribution License vest in REGSL in terms of the Scheme of Arrangement*". We note again that RInfra itself had acknowledged in its letter dated 03.09.2018 to VIPL that the distribution business had been vested and available with effect from 01.04.2018 with AEML and resultantly the rights of AEML and remedies in relation thereto stood vested in

AEML as the Procurer under the PPA including on account of Seller Event of Default even if it had originated prior to the Appointed Date (i.e., 01.04.2018) particularly so if it had continued post the Appointed Date and the Closing Date.

125. It has been rightly pointed out that VIPL is not a party to the SPA and, therefore, cannot seek to rely on its provisions it essentially being a commercial arrangement between RInfra and ATL/AEML. It bears repetition to say that the transferee company is entitled to all the rights of the transferor company just as it inherits its liabilities being the 'successor-in-interest' in every case of transfer, merger, takeover or a scheme of amalgamation whereunder rights and liabilities of one company stand transferred to another.

126. It is not even disputed that VIPL has consistently defaulted in achieving the Normative Availability stipulated under the PPA for twenty out of the preceding thirty-six months ending on 31.12.2018. It is indisputable that failure to achieve and maintain Normative Availability constitutes a Seller Event of Default under Article 11.1.1(iii) of the PPA. In the given facts and circumstances, it is plain that no action was initiated (prior to take over by AEML) by RInfra on such account against VIPL because both of them (RInfra and VIPL) are part of the same group - uterine sisters - operating under the same flagship company and therefore protective of each other's interests. That the well-established commercial principles of working at arm's

length and, more importantly, responsibilities regulated by law of the distribution licensee towards consumers at large – definitely affected due to inadequate or erratic generation of electricity – were jettisoned and neglected (almost brazenly) in the process by the then procurer (RInfra) is a cause for added concern because there seems to have been total vacuum in monitoring the performance of the generator (Seller). In the matter at hand, Article 13.1.1 of the PPA expressly provides for the rights and obligations of the parties under the PPA to be passed on to their successors. Therefore, there is no merit in the argument that past defaults are not available. There is no case for cleaning of the slate at the point of change-over particularly when the period of default overlaps the arrangement under PPA with two different procurers in continuity.

127. We are of the opinion that the issues concerning dispute with RInfra about non-payment cannot arise in the matter at hand because RInfra is not made a party here. Be that as it may, since such arguments have been advanced, we are constrained to observe that the material placed on record by the second respondent, by contrast, shows that the case of financial distress due to defaults by RInfra pleaded by the appellant is merely a smoke-screen. In this context, reference may be made to the order dated 20.06.2016 (in case no. 91 of 2015) and Order dated 21.10.2016 (in case no. 34 of 2016) of MERC whereby while truing up ARR for FY 14-15 and for FY 15-16

of VIPL it was found that RInfra had overpaid to the appellant to the tune of Rs. 740 Crore (Rs. 434.70 crore for FY 14-15 and Rs. 304.91 crore for FY 15-16) which amount was directed to be refunded by the appellant in six monthly instalments from July 2016, this meaning that, contrary to the case of short or delayed payments by RInfra or financial crunch on that account, VIPL had received payments in excess to the tune of roughly Rs. 740 Crore in FY 2016-17 which it was required to refund to RInfra. On basis of RInfra's Annual Report for FY 2017-18, it has been shown that out of the said amount, VIPL refunded only a sum of Rs. 213.50 crore during FY 2016-17 to RInfra, the balance amount of Rs. 526.11 crore remaining unpaid at least until 31.03.2018.

128. The argument of waiver is, to say the least, frivolous and unmerited, founded on wholly impermissible one-sided exchange between RInfra and VIPL to the exclusion of AEML, the documents produced in support of the plea being highly suspect. It renders the contentions of the appellant self-contradictory and amounts to approbation and reprobation at the same time. On the one hand, the appellant asserts that AEML cannot rely on VIPL's defaults under the PPA occurring prior to 29.08.2018 and, on the other, it also asserts that RInfra's alleged breaches of the PPA (admittedly occurring prior to 29.08.2018) are to be attributed to AEML. Evidently, the two averments cannot co-exist.

129. In *State of Punjab and others v. Dhanjit Singh Sandhu,* (2014) 15 SCC 144, it was observed:

> *"23. It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra SRTC v. Balwant Regular Motor Service). In R.N. Gosain v. Yashpal Dhir this Court has observed as under: (SCC pp. 687-88, para 10)*
>
> > *"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."*
>
> *24. This Court in Babu Ram v. Indra Pal Singh and P.R. Deshpande v. Maruti Balram Haibatti, has observed that: (P.R. Deshpande case, SCC p. 511, para 8)*
>
> > *"8. the doctrine of election is based on the rule of estoppel - the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting aright which he otherwise would have had."*
>
> *25. The Supreme Court in Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd., made an observation that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do*

equity, however, it must not be applied in a manner as to violate the principles of right and good conscience."

130. As has been noticed earlier, in the no-dues letter of 23.08.2018, there is no reference of letter dated 22.08.2018 from RInfra unlike in the previous letter of 22.08.18 from VIPL to RInfa. If no-dues certificate was being issued in lieu of the waiver of PPA defaults by RInfra, there was bound to be a reference to such waiver in the letter to REGSL, which was waiting in the wings to take over as successor distribution licensee of RInfra in a few days' time. Pertinently, RInfra had never raised any issue regarding breach of Article 11.1.1(iii) of the PPA by VIPL and there is no explanation as to what was the occasion to seek or grant such waiver just around the time of change of hands at the end of procurer, keeping the in-coming entity out of the loop.

131. Crucially, the SPA dated 21.01.2017 to which RInfra was also a signatory, being the Seller, carried the following clause (the second respondent AEML/ATL having been described as the Purchaser):

"*5.1.2 the Seller shall not, and shall ensure that the Company shall not, do the following without the prior written consent of the Purchaser ….*
(d) Enter into any Related Party Transaction of a value (individually or in aggregate with other Related Party Transactions above an amount of INR 2,00,00,000 (Indian Rupees Two Crore) or whose tenure exceeds a period of 3 (three) months after the Execution Date … It is clarified that any Related Party Transactions other than as aforestated in this sub-clause 5.1.2 (d) shall be with prior written intimation

and discussion with the Purchaser and the Seller shall consider all reasonable requests proposed by the Purchaser in relation thereto."

(Emphasis supplied)

132. It was of utmost necessity to be fair and transparent and act in good faith to the incoming owner/licensee, which conduct is conspicuously missing in the three letters that are relied upon. Both RInfra and VIPL were aware that the distribution business was about to be transferred (following approvals from the Bombay High Court and the MERC). It remains unexplained as to why the transferor (RInfra) failed to discharge its obligation, under the SPA, to inform and consult with ATL before entering into any such related party transaction. The alleged waiver letter is an illustration of a related party transaction which could not have been indulged in without prior consultation with ATL (AEML). The waiver of 22.08.2018 was not even referred to by VIPL in its response to the PPDN on 17.04.2019, as would have been natural if it (the waiver) were genuine, above-board and pre-existing. The correspondence between VIPL and RInfra respecting waiver was conspicuously not disclosed to ATL during its due diligence of RInfra's business as part of the acquisition transaction. There is also no answer to the question raised as to how VIPL could have agreed to rely upon RInfra (outgoing licensee) for its past period claims without the approval of its lenders, a fact that has

not been refuted. It would be apt to view this conduct of the appellant as one reflective of all scruples having been thrown to the winds.

133. The second respondent had acquired, by 22.08.2018, a vital and critical interest in GTD business of RInfra, an advance of Rs. 2,250 crores admittedly having already been transferred by the former to the latter. The Appointed Date had been fixed as 01.04.18 by the High Court by its order dated 20.11.17, as also affirmed by MERC by its order dated 28.06.18, it requiring the transferee (REGSL/AEML) to honour its obligation to the consumers at large in a seamless manner, the distribution responsibilities having been taken over by it on a "*going concern*" basis. By virtue of this, and even otherwise under the scheme of the Electricity Act, the matter of transfer of the distribution business from one licensee to the other and all arrangements – contractual or otherwise – of such distribution licensee for procurement of power carried the element of "*public interest*". These factors render the waiver claimed for by VIPL, or purportedly granted by, RInfra in its favour invalid in law it being detrimental to public interest that must prevail.

134. In *All India Power Engineers Federation v. Sasan Power Ltd. (2017) 1 SCC 487*, the Supreme Court reiterated thus:

> *"19. In P. Dasa Muni Reddy v. P. Appa Rao, (1974) 2 SCC 725, this Court held:*
>
> > *"Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed.*

Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehension as to some facts which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the court in saying that there was no consent." [para 13]

Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Indian Contract Act governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest. This is clear from a reading of the following authorities. …

23. In Krishna Bahadur v. Purna Theatre, (2004) 8 SCC 229, it was held:

> *"The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct." [para 9]*

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

135. In view of the above, the challenge to the impugned decision on the grounds mentioned above must be repelled.

AEML disentitled to invoke Seller Event of Default because it was in breach of PPA?

136. The case of the appellant on the captioned ground was rejected by the Commission, the observations recorded by impugned order on the subject reading thus:

> "*58. As regards non-payment by procurer right from inception, i.e. from FY 2014-15 itself, for the Late Payment Surcharge (LPS) and erratic payments by procurer, qua*

regular Monthly Bills since May 2018 leading to a shortfall of more than Rs. 400 Crores upto appointed Date, the Commission notes that it was RInfra-D which has not paid or short-paid the amounts due to VIPL-G. However, nothing is placed before the Commission, which shows that VIPL-G has chosen to avail the remedy available under the PPA. Its failure to take any legal recourse for the legitimate dues cannot be justification for the defaults committed by VIPL-G for non-achievement of the Normative Availability. Therefore, the Commission does not find any merit in the contentions of VIPL-G on this issue.

70.6 … Similarly, about defaults in payments, the same cannot be taken up in this adjudication as the provisions of the PPA have sufficiently addressed this eventuality and the Seller and the Procurer are required to take necessary actions accordingly to protect their respective rights by invoking appropriate forum."

(Emphasis supplied)

137. It is the case of the appellant that AEML had not made adequate payments which had affected the ability of the former (VIPL) to procure coal and generate power and, therefore, by operation of Article 11.1.1 of the PPA, AEML was barred from invoking Seller Event of Default as the said default was on account of breach committed by the procurer. The view of MERC that PPA Termination is valid since VIPL had not taken any recourse to the breach or because it is not a ground for reduced availability, in submission of the appellant, is fallacious.

138. The appellant elaborates the above argument by pointing out that RInfra had perpetuated erratic payments qua regular Energy Payments/ Monthly Bills from April 2014 to August 2018 which was one of the chief reasons why the Appellant could not achieve

normative availability in the period invoked in the PPDN (Jan 2016 to December, 2018). It is stated that since May 2018 the shortfall had risen to more than Rs. 400 Crores up to Closing Date i.e. 29.08.2018, this having led to severe financial crisis for the Appellant it, in turn, being constrained to reduce its availability as it could not procure coal, such breach being in relation to the period from April 2017 to August 2017 as elaborated in the VIPL's letter dated 04.10.2017 and having continued till closing dated i.e. 29.08.2018. It is submitted that the period of default alleged by Procurer/AEML in its PPDN Dated 18.01.2019 is co-terminus. It is argued that by virtue of Article 11.1.1 of the PPA, the Procurer/AEML was precluded from invoking Seller Event of default as the said provision categorically provides that Seller Event of Default can be invoked "*unless any such event occurs as a result of a Force Majeure Event or a breach by Procurer".* Th appellant contends that AEML invoked the provisions of the PPA for the breach before its birth, which action is *non-est*, not within the four corners of the PPA. The learned counsel for appellant invokes the legal maxim *um commodum ex injuria sua nemo habere debet (a* party cannot take advantage of its own wrong) and submitted that Procurer/RInfra/AEML itself has breached the terms and conditions of the PPA, and it cannot take advantage of its wrong and terminate the said Agreement.

139. It is the argument of the appellant that the view of MERC that the above plea is not available to VIPL since it had not availed any remedy under the PPA as against RInfra amounts to impermissible re-writing the contract since Article 11.1.1, especially the embargo stipulated therein, is not subject to remedy being invoked by the party suffering breach. The appellant relies upon the judgment of Supreme Court in the case of *M. Arul Jothi v. Lajja Bal, (2000) 3 SCC 723*. Also with reliance upon *Narayanrao Jagobaji Gowande Public Trust vs. State of Maharashtra & Ors.*, (2016) 4 SCC 443 and a decision of this tribunal in *M/s Ind Bharat Energies (Maharashtra) Limited vs. MSEDCL & Ors.*, by Judgment dated 27.09.2011 in Appeal No. 91 of 2010, it has been submitted that an agreement must be read in totality and isolated provisions cannot be given effect.

140. It is the argument of the appellant that MERC has overlooked the fact that the PPA is based on the ethos of reciprocity that the Genco (VIPL) will generate power and supply to Procurer (RInfra/AEML) which, in turn, will make requisite payment there against but the Procurer (Rinfra) committed breach of its obligation. It is submitted that the Procurer (AEML/R-Infra) cannot seek enforcement of obligations by Genco (VIPL) when the contract mandates both parties to fulfil their obligations simultaneously. In this regard, reliance is placed upon the ruling of the Supreme Court in *Kusheshwar Prasad Singh vs. State of Bihar*, (2007) 11 SCC 447.

141. In addition, it is argued that post acquisition of the distribution business (i.e. post-closing date), the Procurer (AEML) also carried out set-off to the tune of Rs. 266 Crores from the invoices of VIPL, misinterpreting / violating the undertaking and in breach / violation of the specific terms of the PPA. It is submitted that if AEML was concerned with the lack of Availability of VIPL then it ought to have issued the Preliminary Default Notice immediately after it had acquired the Distribution business of RInfra rather than waiting for the Amendment to MoU dated 15.12.2018 and the execution of the Undertaking dated 15.12.2018. In submission of the appellant, it was a malicious design of AEML because it proceeded to set-off the mammoth sum of Rs. 266 Crores - not in accordance with the terms and conditions of the PPA - as soon as the Undertaking was issued by VIPL.

142. It is submitted by the appellant that in terms of Article 8.3.3 of the PPA, the Procurer (AEML) was obliged to issue an invoice to claim setting off any sums against Genco (VIPL) and could proceed further only if the said Invoice was not disputed by the latter. It is submitted that since no such invoice was issued, VIPL being not aware the basis and method on which AEML had caused the set-off or even whether such money which had been set-off has been paid to MSLDC on account of Procurer's FBSM liability, the terms and conditions of the PPA have been violated.

143. The appellant argues that the finding of MERC is fallacious because the set-off is illegal, in blatant violation of the terms of the PPA approved vide order dated 19.07.2013 in case No. 76/2013, the maximum set-off permissible against VIPL in terms of Article 8.3.3 of the PPA being only Rs. 15 Crores in a Contract Year. It is argued that AEML cannot contend that Article 8.3.3 ceased to have any effect on 15.12.2018 upon execution of the Undertaking, the said clause (Article 8.3.3) being part of the PPA that had been duly approved under Section 86(1) (b) of the Act. The plea is that set-off by AEML was illegal and contrary to the PPA, it having jeopardized the financial health of VIPL which, in turn, resulted in lack of generation since 17.01.2019.

144. The appellant also alleges that there has been violation of the MoU dated 29.08.2018 on the part of AEML. It refers to two clauses (Articles 2 and 8) of the MoU which speak of both parties expected to *"work together to support each other secure the long term coal linkage/FSA for Unit 1 with/ from/ through all forums/ government instrumentalities including but not limited to High Courts, the Supreme Court, Ministry of Coal, Ministry of Power, Central Electricity Authority, Coal India Limited and its subsidiaries so that competitive energy charge could be achieved in the larger interest of consumers"* and neither side to "*directly or indirectly do or cause to be done any such act which is detrimental to the interest of the Other party"*. It is the

argument that though AEML, through the MoU, had undertaken to extend all possible support to VIPL, it instead has surreptitiously undermined the contractual obligations and violated terms and conditions of MoU by issuing the Termination Letter.

145. We have given thoughtful consideration to above submissions but find no substance therein.

146. The extensive reference to the exchange of correspondence between VIPL and AEML after the termination letter is misplaced. It was nothing but a posthumous endeavour by the appellant to salvage the situation and resuscitate a contractual arrangement that had been brought to an end. The effort failed to fructify and did not result in *consensus ad idem*. The letters do carry offers to restore ties followed by counter-offers. Noticeably, the suggestion of AEML in this course was for solution that was based on "*mutually acceptable terms*". There is no substance in the argument that the appellant had entertained a "*legitimate belief*" that AEML would take no further action pursuant to the said letters. The Termination notice had already been issued and after elapse of stipulated thirty days had come into effect. The participation of VIPL as a contracting party of PPA (which continues) could not be resurrected without express consent of AEML. The Termination of PPA with VIPL was a *fait accompli* and this was asserted by AEML by subsequent communication. Since the post-termination exchange of letters did not result in a common

document accepted by both parties such exchange cannot have binding effect.

147. There is no illegality in AEML claiming set-off after termination. The termination due to seller's defaults cannot have the effect of freezing the accounts. The claims and liabilities till the date the termination takes effect have to be answered in terms of PPA.

148. As observed by us earlier, in context of another argument, the appellant has indulged in impermissible approbation and reprobation by arguing that AEML cannot invoke past defaults whilst referring to past defaults in payments by RInfra. Be that as it may, we find the argument of failures of RInfra to pay having led to failure of appellant to achieve Normative Availability of 85% unsubstantiated. Crucially, the unchallenged data furnished by second respondent shows that the default in achieving normative availability was for 20 out of 36 months, the threshold having been met in March 2018, well before the alleged erratic payment by RInfra since May 2018. Pertinent to note that there is absolutely no material to support the Appellant's allegation that RInfra's non-payment was the reason for its failure to achieve normative availability. The default in revenue flow from procurer was not raised as an issue by the Seller, may be because of cozy relationship between two sister concerns – the provision for payment security mechanism having been consciously given up – even though it would constitute Seller's Event of Default giving it

liberty to deny supply to Procurer and instead sell the electricity to third parties so as not to suffer financial losses. That the appellant opted not to exercise prudence by failing to initiate any action under PPA or in law to discipline the procurer (assuming there was default in payments by RInfra) is writ large in the pleadings of the appellant itself and, therefore, it does not lie in its mouth to raise such issues concerning its sister company for its own consistent non-performance, its inaction being the cause for the apparent financial mismanagement.

149. We are of the opinion that the issue as to whether the claim of the appellant in the Invoices issued by it to the second respondent and which allegedly remained unpaid was correct or whether the set-off by the latter was impermissible are irrelevant to the present proceedings. Nonetheless, aside from so contending the appellant has not come up with better particulars in such regard. There is no clarity in pleadings as to what was the dispute raised by AEML in response to the Invoices or as to what is the explanation of the appellant in such regard. In sharp contrast, it has been shown that, by order in Case No. 325 of 2019, on petition filed by AEML for final truing up of ARR for FY 2017-18 and FY 18-19, MERC had recorded that AEML-D (RInfra's successor) had paid the power purchase cost to VIPL for FY 2017-18 and FY 18-19.

150. There is no substance in the argument that the appellant had been induced into executing the Undertaking. That is a document annexed to the Supplementary Share Purchase Agreement (SPA) executed jointly by RInfra, ATL and AEML, having been obtained by RInfra from VIPL. The Clause 3.1(ii) of the Supplementary SPA (RInfra, VIPL and AEML being referred to as "the Seller", "Power Supplier" and "the Company" respectively) states as under:

> "*The Seller has procured and provided from each of the Power Suppliers to the Company an undertaking, (each of which is annexed as part of Annexure A hereto), accepting and acknowledging the above mentioned set-off right available to the Company and agreeing that it shall not encash, or make any demands, or seek to enforce in any other manner, any letter of credit or any other payment security provided to the Power Suppliers by the Company in respect of the amounts set-off by the Company in exercise of its rights under sub-clause (i) above (the "Power Suppliers Undertaking")."*
>
> (Emphasis supplied)

151. The Undertaking contains an independent right of second respondent to set-off any amounts payable to the Appellant to discharge the liability of RInfra and such right is not dependent on provisions of the PPA.

152. It bears repetition to observe in present context that the submissions of the second respondent (AEML) that VIPL's contentions regarding its letter dated 04.10.2017 alleging non-payment by RInfra is incorrect and misleading for several reasons including that VIPL never claimed any late payment surcharge

(LPSC) in its true-up petition before the MERC in all probability because contrary to its claim it was sitting on a cash surplus of Rs. 740 crore for FY 14-15 and FY 15-16. Though it threatened to invoke Article 8.5 of the PPA (permitting sale up to 100% of its power to a third party / in open market), VIPL never took any steps to improve its financial position by such mode, it having not only not retained the payment security provision in the PPA but also not exercising other options to mitigate the alleged erratic payments by RInfra. Clearly, the delay, if any, in revenue flow had had no effect on ability to generate since VIPL's plant availability during October to December 2017 was higher than 90%. The allegation of erratic payment by RInfra is apparently an afterthought in present context since it was not cited as the reason for inability to generate in letter dated 17.04.2019 sent in response to the PPDN.

153. As concluded earlier, the argument that there have been defaults on the part of AEML in breach of Article 11.2.1 (ii) of the PPA disentitling it (AEML) to invoke the provisions of the Article 11.1 to terminate the PPA is based on facts which are without foundation. The undertaking dated 15.12.2018 given by appellant (VIPL), at the request of its group company RInfra, accepting the right of AEML to set-off the amounts payable by RInfra to AEML-D against equivalent amount of monies payable by AEML to VIPL under the PPA, is not tied to the PPA provisions related to set-off of payments. The

appellant in its response to the Termination Notice did not attribute the set-off of Rs. 266 Crore by AEML to be the cause for its defaults on availability, the monies set-off by AEML against the dues of RInfra being rightfully deemed to have been received by VIPL.

154. The plea that there has been a violation of Article 8.3.3 of the PPA on account of set-off carried out under the Undertaking is incorrect. A bare reading of Article 8.3.3 of the PPA reveals that the set-off contemplated therein is in relation to mutual claims under the PPA wherein each side had a claim against the other, the permissible set-off being mutual or reciprocal and limited to Rs. 2.5 lakhs per MW of Contracted Capacity, the key words in Article 8.3.3 being "*under this Article*" as quoted earlier.

155. The irresistible conclusion is that the objection is baseless and an afterthought in context of PPDN and Termination Notice. We agree with the reasoning of MERC that AEML had issued the Termination Notice on account of defaults committed by VIPL on non-achievement of availability for the period January, 2016 to December, 2018 whereas set-off by AEML occurred in during January to April, 2019 which consequently cannot be a legitimate reason for earlier lower availability.

156. There is nothing shown as could or would have inhibited action on the part of the procurer (AEML) to put the Seller (VIPL) on notice to cure by issuing PPDN on account of failure to achieve normative

availability in terms of the obligations under PPA followed by the Termination Notice, the consultation period having been frittered away, steps to mitigate the default or its effect on the part of the Seller being totally remiss. We, thus, unhesitatingly, endorse the finding returned by MERC that the set-off carried out by AEML was in accord with the terms of the Undertaking, it having no bearing whatsoever on the defaults committed by the appellant since such defaults pertain to the period that began much earlier.

Non-Compliance of procedure under PPA by AEML?

157. The Commission has considered this part of the appellant's case setting out the background and its conclusions thus:

> "*25. The Commission notes that AEML-D has admitted that it has not served the copy of PPDN to Lenders as required under the PPA. As regards the Termination Notice, AEML-D stated that it has served the copy of Termination Notice to Lenders and has also attached the copy of the Speed Post receipt. However, Axis Bank, on affidavit, has stated that it has not received the copy of PPDN and Termination Notice.*
>
> *26. The Commission would not like to get into the details of why Axis Bank has not received the Termination Notice when the same was sent by speed post as contended by AEML-D. It is an admitted position that AEML-D has not served the copy of the PPDN to Lenders. While AEML-D is seeking compliance from VIPL-G on various aspects of PPA and was diligent enough to avail the remedy under the PPA for VIPL-G's failure to achieve Normative Availability, it has defaulted in not following an important procedure stipulated in the same PPA. The procedures laid down under the PPA are binding on all the concerned Parties, and hence AEML-D should have ensured that due process has been followed*

by it while issuing the PPDN and the Termination Notice to VIPL-G.

27. Hence, the Commission, prima facie, is of the view that AEML-D in issuing the PPDN and Termination Letter as Procurer under the PPA has not fully followed the due procedure of serving the copy of Notices to the Lenders as stipulated in the PPA.

…

70.1. As analysed and ruled in respect of Issue No. 1, the stipulated procedure in the PPA for issuing the PPDN and the Termination Notice has not been followed by AEML-D in true letter and spirit. The Commission opines that the procedure gives a fair chance to all the stake holders to cure the defects and thus protect the PPA. The provisions serve a purpose but are very specific with timelines specified to the Seller and the Lenders. Having said this, the Commission also notes that there was no response by VIPL-G in curing the defect and Lenders in exercising their rights for substitution even after being made aware of the developments about issuance of the PPDN and Termination Notice to them. Thus, there has been default on part of AEML-D and improper and inadequate response/action on part of VIPL-G and the Lenders as well. Even after being made aware of the Termination Notice on 1st August 2019, the Lenders have chosen not to exercise their rights under PPA and VIPL-G has not been able to demonstrate their operational and financial readiness to start the plant. Thus, all the three stake holders are in part default of the provisions of the PPA about which the Commission expresses its displeasure.

70.2. Though it can be concluded that AEML-D has prima facie defaulted in not following the procedure in serving the lenders, it is also seen that there is no prejudice caused to VIPL-G and the Lenders as in spite of their having sufficient time (at least from August 2019) to exercise their rights, they have chosen not to exercise them. The situation has also remained unchanged from the time the PPDN and subsequently the termination notice was issued. Admittedly, for whatever reasons, the Lenders have not been able to substitute the Seller nor commit their financial support to the Seller as also the fact that no satisfactory resolution plan

has been submitted by VIPL-G to lenders to clear its outstanding dues.

70.3 In order to protect the FSA for Unit 1 under consideration with Western Coal Fields (WCL), which requires PPA to be kept alive and in the overall interest of the Consumers, the Commission holds that termination notice is valid even if there is procedural defect in not serving the PPDN on lenders. The Commission feels that the fact that the thermal station has been inoperative since January 2019 and VIPL-G was in default of making repayment of loan, it should have been matter of great concern to lenders as well, to investigate the reasons for the same. It was also the duty of VIPL-G to immediately disclose to the lenders that PPDN had been served on VIPL-G by the Procurer. It is only during the routine meeting of the consortium of lenders with VIPL-G that the fact about PPDN and Termination Notice was formally made known to the Lenders. There is no response from Lenders beyond invoking legal remedy on procedural default in the instant case. Considering that the plant had been inoperative for the past six months, Lenders should have shown some urgency by taking precipitative remedial steps to safeguard its lent amount by invoking provisions under PPA, relating to their right of substitution. Be that as it may, their right of substitution as accepted by AEML-D is not extinguished but is only deferred. In the interest of justice and to salvage the situation before it deteriorates any further, the Commission deems it appropriate to protect the rights of the Lenders for exercising their right of Substitution. The termination notice shall be deemed to have been issued to the Seller and the Lenders on the Date of the Order in the present case. The Lenders may take further necessary action as per the provisions of the PPA.

…

70.8 As analysed and ruled in Issue No. 5, though sufficient time was available to the Lenders for exercising their rights of substitution, they have not done so. Hence the Commission opines that in spite of default on part of AEML-D and VIPL-G, the Lenders after becoming aware of the Termination Notice could have exercised their rights for substitution. The Commission is concerned about protecting the consumers' interest by way of securing the FSA under consideration of WCL. Thus, even though the Commission

has ruled about the Termination Notice being valid, alongside it has also directed that the deemed date for the notice would be the Date of Order in the present case. Thus, the time of 30 days stipulated in the PPA for substitution is now available to the Lenders for exercising their rights."

(Emphasis supplied)

158. It needs to be highlighted that the prime reasons weighing with Commission in directing the Termination Notice to be "*deemed*" served on Lenders on the date of order were to protect the interests of the Lenders (despite inaction on their part), and of the consumers at large, by attempting to save the Project from total closure.

159. The learned counsel for the appellant submitted that it is settled law that if the Contract provides a procedure to be followed then all actions must be in conformity with the said procedure, it being impermissible to render the contract redundant or otiose by re-writing its express terms and conditions. In support he placed reliance on the judgments of Supreme Court reported as *Datar Switchgears Ltd vs. Tata Finance Ltd.*, (2000) 8 SCC 151, *Ramachandra Narayan Nayak vs. Karnataka Neeravari Nigam Limited*, (2013) 15 SCC 140 and *M. Arul Jothi v. Lajja Bal, (2000) 3 SCC 723*.

160. In *Datar Switchgears Ltd* (supra), it was held:

"23. When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the court has to respect the terms of the contract entered into by parties and endeavor to give importance and effect to it. When the party

has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause." [Emphasis Supplied]

161. In *Ramachandra Narayan Nayak* (supra), the Supreme Court held:

"51. Defendant no. 3 passed the order of rescinding the contract, without issuing any show cause notice or holding an enquiry, as required under clause 3(d) of the contract and therefore the learned trial judge has rightly recorded the findings on the aforesaid contentious issues in favour of the plaintiff and rightly held that the rescinding of the contract was not justified. The unilateral rescission of the contract of the plaintiff by defendant No. 3 is arbitrary and unreasonable. The action of defendant no.3 in rescinding the contract has resulted in serious civil consequences of imposition of penalty and forfeiture of the earnest money deposit amount, security deposit and withholding the bill amount in relation to the execution of the work by the plaintiff. Therefore, defendant no. 3 before rescinding the contract, by invoking his power under clause 3(d) of the agreement, should have complied with the conditions mentioned in the said clause as the same is mandatory."
[Emphasis Supplied]

162. In *M. Arul Jothi* (supra), it was ruled thus:

"10…. Once parties enter into a contract then every word stated therein has to be given its due meaning which reveals the rights and obligations between the parties. No part of the agreement or words used therein could be said to be redundant."
(Emphasis supplied)

163. It is the case of the appellant that to carry out Termination on account of Seller Event of Default, the Procurer/AEML is contractually obliged under Article 11.3.1 of the PPA to serve a copy of the PPDN

on the Lenders, who are defined under the PPA and been granted substantive rights thereunder. It is submitted that while issuing the PPDN dated 18.01.2019, followed by Termination Letter dated 20.04.2019, the mandatory procedural requirement was not followed as the copy of the PPDN dated 18.01.2019 was not served upon Lenders. It is pointed out that MERC has accepted this contention and, by the Impugned Order, held that AEML/Procurer, while issuing the PPDN and Termination Letter dated 20.04.2019, has not followed the procedure prescribed under the PPA dated 14.08.2013. It is argued that the said conclusion of MERC hits at the very root of the impugned Termination letter.

164. It is submitted that once MERC had come to a finding that the procedure has not been followed, the natural sequitur to such non-compliance ought to have been that the impugned letters were set aside. The MERC instead has held that the PPDN and Termination Letter are *deemed* to have been served upon the Lenders as on the date of the Impugned Order i.e. 16.12.2019, ignoring the fact that rights of the Lenders begin with the PPDN under Article 11.3.1, also including the right to help cure the defaults in terms of Article 11.3.2, and end with Article 11.3,4 i.e. by invoking their right of substitution.

165. It is argued on behalf of the appellant that the approach of the MERC was wrong and illogical, indulging in impermissible exercise of rewriting the contract because:

(a) If the PPDN is deemed to have been served upon the Lenders on 16.12.2019 (the date of impugned decision), ninety (90) days' period is available with VIPL to cure the default of the PPDN by virtue of Article 11.3.2. Hence, the Termination, *if at all*, would have to become effective on 16.02.2020 (i.e. after 90 days of service of the PPDN) and not on the date of the Impugned Order. There is thus an inherent vacuum in the Impugned Order which consequently is rendered unsustainable in law.

(b) Mere occurrence of a default does not mean that the PPA can be terminated as Article 11.3.2 of the PPA provides for mitigation. The PPA does not contemplate that PPDN and Termination Letter can be served on the same date as 90 days period is given to the Seller i.e. VIPL to cure any alleged breach/ defect. Such cure period has been snatched away from the Genco (VIPL) and the lender (third Respondent).

(c) The view taken and the directions given have rendered Article 11.3.2 of the PPA (90 days' period to mitigate with procurer) completely redundant and otiose, virtually re-writing the express terms and conditions of the contract (PPA) in teeth of settled law to the contrary.

166. Curiously, the Lenders, represented before us as (and by) the third respondent, have not challenged the impugned decision and thus have accepted it as binding, no appeal having been preferred to

raise any grievance thereagainst, and yet have chosen to argue that the conclusions reached and directions given by the MERC are bad in law, based on wrong construction of the PPA, this having seriously prejudiced and jeopardized their interests as the custodian of public money that was invested in the business of the appellant ("Borrower" in their context). They support the contention that sending copy of the PPDN to the lenders was mandatory under the PPA and in absence of such notice to the lenders, the PPDN and the Termination Notice are invalid.

167. Having bestowed our consideration, we find that the approach of the Commission on the above-mentioned contentions has been partially miscued. Though it understood the matter in correct perspective it faltered in articulating its conclusions properly, the use of expression "*prima facie*" in a final order, amongst others, being indicative of want of proper legal assistance.

168. The clause in PPA requiring a copy of PPDN to be served on the Lenders (as indeed on the Commission itself) is clearly directory, failure to abide by it being of no effect. We do not agree with the submission that the PPA "creates" a right unto the Lenders to "substitute" the defaulting generator. All it professes to do is to lay down procedure for such substitution the right (if any) to so substitute that is to be found in financial (Loan) contract documents which conspicuously have not been shown light of the day in spite of being

repeatedly asked for during the prolonged hearing from the lenders. But then, that issue is academic since the Lenders have elected not to pursue the right of Substitution (for which notice was issued on 31.12.2019) choosing instead to pursue the route of IBC. At any rate, there is no right of Lenders in PPA to such notice of cure issued to the Seller as their role in matter of Substitution would come up only after termination of PPA with the existing Seller.

169. We elaborate our reasons hereinafter.

170. Admittedly, the PPA is a contract between the Seller and the Procurer, they only being the parties in its relation. There is reference in PPA to Lenders' interest and they having been assigned some role in the event of termination due to default of the kind involved here but this does not confer on the lender the status of a "party" to the PPA. The obligation to perform under the PPA is that of VIPL alone and not that of the Lenders and, therefore, the consequences of default and termination of rights and obligations can only be judged qua the appellant and not the Lenders who are not parties to the PPA. The purpose of the PPDN under the PPA is to give opportunity to the party in default (here, VIPL) to take corrective measures to remedy or rectify the default notified by the Procurer (AEML).

171. The language employed in Article 11.3.1 is that "*the Procurer shall have the right to deliver to the Seller a notice with a copy to the Commission and the Lenders' Representative"*. It is Procurer's

discretion and prerogative whether or not to issue such a notice. But if the Procurer chooses to do so, then what is mandatory is that the notice must "*specify in reasonable detail, the circumstances giving rise to the issue of such notice*". This mandatory requirement is for maintaining transparency in the *inter se* relationship between the parties. After all, the expectation of the noticee (the defaulting party) is to cure the default so as to mitigate its effect and that cannot be achieved unless that party is fully abreast of facts concerning the default attributed to it. If the default is cured or its effect mitigated to the satisfaction of the other party, the matter is closed and normal relationship continues. The failure to achieve cure or mitigation is what might lead to termination by a formal notice at the end of cure period (90 days) at which stage the Lenders are allowed to step in. The provision to serve a copy of the PPDN upon the Lenders' representative cannot be construed as mandatory requirement controlling its validity. It is definitely not an inviolable obligation non-compliance with which by the Seller (second respondent) would render the PPDN bad in law qua the Procurer (appellant). The "*right*" to issue PPDN notice is given to the Procurer it intended to be addressed to Seller (defaulting party) since it is in the nature of a cure notice and the ability to cure the defaults lies with Procurer (in default) alone.

172. In contradistinction, in context of Termination Notice, Article 11.3.4 of the PPA while again giving to the Procurer a discretion (*"may terminate"*) to issue such notice to bring an end to the contractual arrangement with the Seller, requires it to mandatorily serve a copy thereof on the Lenders' representative using the words "(a) *copy shall be given*"*.* Thus, there cannot be any doubt as to the fact that the second respondent was not obliged by PPA to mandatorily send a copy of the PPDN to the Lenders' Representative.

173. In above context, it is rightly argued that such provisions as do not provide for penal consequences in default of their compliance are generally construed as directory and not enforced as mandatory. In support, we may quote, with advantage, to the ruling of Supreme Court reported as *Mahadev Govind Gharge and Others Vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka*, (2011) 6 SCC 321. Examining the issue as to whether Order 41 Rule 22 of Civil Procedure Code (CPC) was mandatory, and quoting with approval from the book titled Justice GP Singh's Principles of Statutory Interpretation, it was ruled thus:

> *"32. The learned author while referring to the judgments of this Court in the case of Sangram Singh v. Election Tribunal, Kotah (1955) 2 SCR 1 recorded (at page 384) that:*
>
> > *"while considering the non-compliance with a procedural requirement, it has to be kept in view that such a requirement is designed to facilitate justice and further its ends and therefore, if the consequence of*

non-compliance is not provided, the requirement may be held to be directory..."

…

37. Procedural laws, like the Code, are intended to control and regulate the procedure of judicial proceedings to achieve the objects of justice and expeditious disposal of cases. The provisions of procedural law which do not provide for penal consequences in default of their compliance should normally be construed as directory in nature and should receive liberal construction. The Court should always keep in mind the object of the statute and adopt an interpretation which would further such cause in light of attendant circumstances. To put it simply, the procedural law must act as a linchpin to keep the wheel of expeditious and effective determination of dispute moving in its place. The procedural checks must achieve its end object of just, fair and expeditious justice to parties without seriously prejudicing the rights of any of them."

174. It has been argued before us that service of copy of PPDN on the Lenders' representative would have provided an opportunity to the Lenders and the Procurer to collaborate with each other and devise a cure plan for the default notified by the Procurer. This plea was not raised by the appellant before MERC. The plea to this effect urged by the third respondent (Lenders) before us, with added argument that non-service of copy of PPDN has caused serious prejudice jeopardizing their financial interests concerning public monies, are nothing but an attempt to cover up (or acquire fig leaf of some self-defense) for defaults committed by the concerned financial companies in exercising prudence at right time.

175. It is trite that a person not party to the contract cannot challenge termination of contract as per the terms of the contract by the other party. In *Cox and Kings India Ltd. Vs. Indian Railways Catering and Tourism Corporation Ltd.***,** (2012) 7 SCC 587, the issue before the Supreme Court was as to whether a joint venture partner of a company which was not a party to the contract awarded by IRCTC could challenge termination of that contract by IRCTC. It was held thus:

> *"25. It is evident from the submissions made on behalf of the respective parties that the arrangement between the Respondent No.1 IRCTC, was with the petitioner Company and, although, it was the intention of the parties by virtue of the joint venture agreement that the luxury train, belonging to the Respondent No.1, was to be operated by the joint venture company at least for a minimum period of 15 years, what ultimately transpired was the termination of the Agreement by the Respondent No.1 in favour of the joint venture company. As pointed out by the Division Bench of the High Court, the petitioner was not entitled to question such termination as by itself it had no existence as far as the running of the train was concerned and it was not a party to the proceedings. In fact, what the petitioner has attempted to do in these proceedings is to either restore the lease agreement, which had been terminated, or to create a fresh agreement to enable the petitioner to operate the luxury train indefinitely, till a decision was arrived at in Section 9 application.*
>
> *26. It is no doubt true that the petitioner has invested large sums of money in the project, but that cannot entitle it to pray for and obtain a mandatory order of injunction to operate the train once the lease agreement/arrangement had been terminated. We are also unable to accept Mr. Rohatgi's submission that the joint venture agreement was akin to a partnership. Such submission had been rightly rejected by the Division Bench. As rightly pointed out by the Division Bench of the High Court, the petitioner's remedy, if any, would lie in an action for damages against IRCTC for breach*

of any of the terms and conditions of the joint venture agreement and the memorandum of understanding."

(Emphasis supplied)

176. The Lenders are not granted any substantive right by the PPA. By the provisions which have been referred to, the document (PPA) merely acknowledges that the financial health of the Seller may be tied up with the terms of arrangement with its Creditors (investors). Since this has a bearing on performance, the PPA acknowledges existence of loan contracts giving some rights to the Lenders (not a party to PPA) to control the Seller's conduct and performance. Since both the Procurer (Distribution licensee) and the Lenders have a stake in continued good (or optimum) performance on the part of the Seller (generator), the former two have been given for mutual benefit the liberty to collaborate with each other to substitute the Seller (borrower for Lenders and generator for the Procurer) so that the power plant continues to produce. The PPA is conceived as one that would survive the termination of arrangement between existing parties (Seller/generator and Procurer/Discom). But, the express language of PPA is unequivocally clear that the participation of Lenders in exercise to substitute the Seller is only if there are stipulations to this effect in the loan documents and not otherwise. The phraseology deployed in Article 11.3.4 ("*Lenders may exercise or the Procurer may require the Lenders to exercise <u>their substitution</u>*

rights and other rights provided *to them, if any, under Financing Agreements*") does not permit interpretation so as to be creating a substitution right. It instead qualifies the expression "*substitution rights and other rights*" by the words "*if any, under Financing Agreements*" making it obligatory on part of the Procurer to cooperate (*"would have no objection"*) though making it a pre-condition that exercise of such rights of the Lenders (to substitute) be "*in consonance with provisions of Schedule 12*". Schedule 12 reinforces this view since it begins with the words "(*s)ubject to the terms of the PPA*" and, therefore, is amenable to the controlling language in Article 11.3.4. This validates the argument of the second respondent that Schedule 12 to PPA only sets out the procedure for exercise of substitution rights by the Lenders, such right essentially to be located, if existing, in Loan documents.

177. That defaults in achieving and maintaining normative availability for more than twelve months in preceding thirty-six months did occur is not disputed. That such default did constitute a Seller's event of default is not denied. That the PPDN was duly served on the Seller is admitted. There is no denial that the cure period of 90 days virtually lapsed before the Seller at the eleventh hour (just before midnight hour of 90th day) responded to PPDN with some defenses. There was no endeavor made at any point of time to take corrective steps or cure or mitigate. There was no offer of consultation to the aggrieved side.

It has instead been own case of the appellant that the default notified by the Procurer (i.e., failure to achieve Normative Availability) was "*incurable*" in so far as it (VIPL) was concerned. In these circumstances, the third respondent cannot be permitted to speculatively argue that if copy of PPDN had been served on them the situation could have been saved by defects being cured.

178. That the above noted argument of the Lenders (third respondent) is frivolous and merely a search for legitimacy of its past neglect (which stands out as a sore thumb) is demonstrated by certain facts which may be noted at this stage. Interestingly, while arguing that they had the ability to cure, if notified in time by a copy of PPDN, the Lenders also submit that their own conduct post-issuance of termination notice be not looked into or considered. Given the argument of public monies and interest having been jeopardized, we feel that there is no escape from such scrutiny.

179. As observed earlier, in terms of PPA (Article 11.3.2), the parties alone have the right or the ability to discuss mitigation or rectification steps. During the contractually prescribed consultation period and process of 90 days, the Lenders are complete strangers in so far as the Procurer (AEML) is concerned. The latter (AEML) was not concerned if the Seller (VIPL) was (or not) choosing to confer with its lenders or with any other person to help it rectify the notified defaults. It is significant that the defaulting party (appellant/VIPL) did not even

attempt at any consultation with AEML to mitigate or rectify the notified defaults. The Procurer (AEML), it is not disputed, does not have any corresponding right against the Lenders' Representative to seek cure of defaults committed by the Appellant. Their role, it bears repetition to say, would kick in after termination notice and not at any point of time anterior thereto.

180. The Lenders and the Procurer have been wedded to each other by Financing Agreements. That is the contract from which their *inter se* rights and obligations flow. Though in the context of their assertion that the lenders could have exercised their rights to bail out the borrower (Generator/Appellant), they have scrupulously avoided to share the Loan contracts with us, this despite direct questioning on the subject. The second respondent instead has placed on record, and the other parties made no attempt to refute the same, a copy of the Term Loan Agreement dated 30.03.2017 between VIPL and Axis Bank (pages 222-23 of IA 493/2020). Under Clause 10 of the said contract, the borrower (VIPL) was required to immediately notify the bank if "*any circumstance or event occurs which would or is likely to prejudicially or adversely affect in any manner the capacity of the Borrower to repay the Loan or any part thereof (or the implementation of the Project)"*. It is not claimed by the appellant, nor the third respondent seems to have been bothered about it, that it did not notify the investors (Lenders) about PPDN. On the contrary, it admittedly

did not share the information about PPDN and also as to the fact of total shutdown of generation since 17.01.2019. The specious explanation is that the appellant did not wish to alarm its creditors.

181. At the same time, it is inconceivable that the Lenders would not have known that the borrower (appellant) was in dire straits. It was brought out during hearing, and the appellant and third respondent put no contest to this, that the appellant was in serious default in repayment of loans. In fact, having been served by the borrowers (third respondent) with preliminary demand notices, the appellant was eventually declared NPA (non-performing asset) in June 2019. Admittedly, the Lenders were made aware by the borrowers (VIPL) about PPDN and the Termination Notice during their meeting held on 01.08.2019. The Lenders were thus bound to be aware at least since beginning of 2019 that the borrower's (VIPL's) capacity to repay stood impaired and that the plant had been shut down since 17.01.2019. The second respondent argued, and the counsel for appellant and third respondent didn't deny, that given the past conduct and performance, the Lenders (third respondent) in their meeting (23.10.2019) with the borrowers (appellant) had expressly refused to extend any financial support to the defaulting generator (VIPL).

182. There is ample material to reveal that the Lenders have been remiss in watching over their interest vis-à-vis the debtor (appellant). Having taken conscious decision to pursue their remedies for

recovery of the monies lent (in distress) by declaring the latter NPA, and having refused to pump in further funds, their attempt before us to claim prejudice on account of denial of copy of PPDN at a stage when they had no role under PPA is nothing but an endeavor to somehow acquire the status of a party that had been wronged.

183. It is, therefore, clear that substitution rights of the Lenders are not lost due to procedural default on the part of AMEL. The provisions in PPA for substitution of the defaulting generator (VIPL) by a Selectee acceptable to the Procurer (AEML) were intended to ensure that the plant operations resume as quickly as possible. Pertinently, Clause 12.7.8 of Schedule 12 of the PPA requires the Lenders to provide a fresh proposal for another Selectee if the previous proposal is rejected by the Procurer. It is inconceivable that the Lenders have unlimited time to submit an initial proposal for a Selectee but only 60 days to submit an alternate proposal after a rejection. Even after seven months of the Impugned Order, the Lenders have failed to exercise the substitution right, it rather having been given up once the remedy under IBC was elected.

184. It is noteworthy that though the Lenders did issue a Substitution Notice on 31.12.2019, they failed to follow that up by any steps whatsoever. On the contrary, only a few days after having informed us on 06.01.2020 that the lead Lender would take 4-6 weeks to issue expression of interest for substitution of VIPL, the Lenders

approached the MERC to seek a go-ahead for pursuing the course under the Insolvency and Bankruptcy Code, 2016 (IBC) and then filed petition before NCLT invoking the remedies under IBC thereby abandoning the substitution process under PPA. The procedure under IBC is a statutory process and that under PPA a contractual mechanism in which, unlike the former, the Procurer has an important role to play. Both processes are different, election of remedy under IBC clearly designed to keep the Procurer (in PPA) out of the loop. The arguments of the Lenders seeking to support the grievance of the borrower-in-default (appellant) are unsustainable in law and in fact.

185. The argument of the appellant that the view taken by the Commission in the impugned order "*deeming*" the service of termination notice on the date of the impugned order amounts to rewriting the contract and consequently bad, though attractive on first blush, doesn't impress us as of any effect. The appellant had admitted service of both the PPDN and Termination Notice. The third respondent denied service of Termination notice which plea of denial is unacceptable. The second respondent has established dispatch of the Termination Notice to the lenders by speed post and they are deemed to have received it. [*Parimal v. Veena* (2011) 3 SCC 545; *C.C. Alavi Haji v. Palapetty Muhammed* (2007) 6 SCC 555]. Proof of dispatch by speed post having been adduced by the second respondent, there is a presumption of due service which has not been

displaced. The Commission was not right in observing that "*there is no clarity on service of copy of Termination Notice to Lenders*". It instead should have rejected the plea of denial of receipt and there was no occasion for directing deeming of service on any later date, particularly when it had been demonstrated that there was lack of action on the part of both the appellant as well as the Lenders.

186. The argument of the appellant, in which the third respondent joins to indirectly gain wrongfully, attempts to make out a case that it ought to be granted a fresh 90 days' period to cure the default in light of the MERC order as to deemed service on the Lenders on the date of the Impugned Order. There is no basis for such a plea either in the impugned order or even in PPA. Though in the course of discussion there are some observations to such effect, in the final operative part of the impugned order, the MERC has not directed that PPDN is to be deemed served on the date of its decision which is impugned before us. There is no water in the plea that an incongruous situation is created by MERC wherein the appellant is entitled to renewed cure period from the date of impugned order because that is the date on which PPDN is also deemed to be served. The deeming has been directed in respect of the Termination notice but it was wholly uncalled for. Since the said notice had demonstrably been served in due course of postal transit after dispatch by speed post, there was no justification for its service to be deemed from such late a date as the

order of the Commission. We do appreciate that the Commission felt persuaded to do so because it did not wish to deny - rather was inclined to renew - the opportunity for the Lenders to proceed further in the direction of substitution. But, as has been discussed earlier, the Lenders were never serious about their right (if any) for substitution. Having abandoned the said course by electing the remedy under IBC, the issue about direction of deeming has been rendered academic.

187. Be that as it may, there is no question of rewriting of contract by the adjudicating authority. The contractual terms agreed upon only can regulate the *inter se* rights and obligations of the parties. The rulings in cases of *Datar Switchgears Ltd* (supra), *Ramachandra Narayan Nayak* (supra) and *M. Arul Jothi* (supra) persuade us to undo what is unnecessary in the impugned order. The direction of MERC about deemed date of service is thus liable to be vacated.

188. The fact remains that the Appellant did not take any steps to cure the default in the contractually prescribed ninety days and, in addition, has failed to operate the Plant for over nineteen months. It has never been the Appellant's case that the PPDN and the Termination Notice were not duly served on it. As already concluded, the right or the opportunity to cure default is permitted only for a period of ninety days after the date of PPDN and such right vests only in the Appellant and not in the Lenders. Therefore, it does not follow from the special dispensation created by the MERC to allow the Lenders

to exercise their substitution rights (which they have failed to carry out) or to argue that the Appellant, being a persistent defaulter, should be given another opportunity to cure the defaults when it has miserably failed to do so within the contractually stipulated period.

189. Thus, while holding that the direction of MERC regarding the date of its decision to be the "*deemed*" date of service of the termination letter is erroneous and so liable to be vacated, we reject the argument that the process of termination of PPA by AEML was faulty or vitiated.

CONCLUSION

190. We, thus, find no merit in any of the contentions of the appellant. The appellant had set up the thermal power project for generating electricity knowing full well that in the capacity of generator it was always to be its own responsibility to arrange for regular fuel supply and also to manage its resources and finances such that it did not face any crunch on either front. The fact that it proceeded to take its own sister company (RInfra) as its partner in business for commercial use of the electricity generated by it, entering into a PPA with them, could not have meant that it had the liberty to operate by maintaining any standards less than professional. It is revealing, however, that in the PPA executed with its sister company, the usual payment security mechanisms or consequences flowing from defaults were

consciously omitted. This case has led to exposures that in the long association with RInfra under the PPA, the defaults (as alleged by appellant) of the other party (RInfra) were ignored, they leading to no action except lip-service in the form of some correspondence. It is vivid that the prudence in dealing with a sister company by keeping each other "*at arms' length*" was not maintained and this possibly led to most of the difficulties which have been unjustifiably touted as the reason to explain the default leading to the termination of the PPA by the subsequent procurer (the second respondent). The appellant has been consistently and conspicuously remiss in justifying the total shutdown of its operations since January 2019.

191. As concluded above, the appellant itself is to blame for the failure to secure timely payments from its sister company. That such defaults in receipts from the previous partner in PPA had had no effect on the generating capacity has been noted at length in earlier part of this judgment. We have also concluded, for detailed reasons given earlier, that the appellant cannot blame the second respondent for own failure to secure FSA for one of its two units. The facts that one unit respecting which the appellant did have arrangement for fuel and despite absence of FSA for the other unit it had been generating optimally in the past leads to the irresistible conclusion that it had the capacity to maintain availability, the real reasons for its consistent failure to do so during the relevant period (as referred to in PPDN and

termination notice) being such as have not been shown the light of the day. We have also found, on careful scrutiny, that there is absolutely no justification on the part of the appellant for raising the issue of set-off by the second respondent, the claim of the latter on that account being covered by the specific agreement to that effect which had been supplemented by another agreement and formal undertaking given by the appellant itself, in terms of which the second respondent had discharged the past liabilities of the appellant. The attempt to wriggle out of the said undertaking and understanding, in our view, is not only unfair but also unconscionable and impermissible.

192. From the above, it naturally follows that arguments of disputes with the previous partner in PPA i.e. RInfra and the substituted procurer i.e. AEML are a camouflage to cover-up – rather preclude discovery of – the failures in performance. The long history of facts narrated right from the inception and birth of the power plant of the appellant appears to us to be intended to create a labyrinthine maze. The said historical facts actually had no relevance to the core issue of non-performance – failure to achieve availability. The appellant has tried to blame everyone else – including its sister company and, unfortunately even the statutory Regulatory Commission – but not so as to explain its own conduct. The plea of institutional bias was wholly uncalled for and deserves to be rejected

with the contempt it deserves. The litigating parties cannot be permitted to take liberty of raising such arguments without foundational facts since such pleas have the potential to erode the confidence of people at large in statutory adjudicatory mechanism. It appears the intent was to throw red herring and mislead.

193. Under the regime for power sector established by the Electricity Act, 2003, the interest of the consumers reigns supreme. The failure of a generating company to produce and supply electricity in terms of the commitment under the PPA has the ripple effect of the distribution licencee being rendered incapable of discharging its statutory responsibility. A licencee in such position is within its legitimate rights to take suitable remedial steps under the contract to caution the generator asking it to cure and mitigate and upon this not bearing results to look elsewhere. But last said segment of the path is not available so long as the parties (seller and procurer) are bound by the contract. The initiation of action to break free from such failed generator cannot be resented, not the least by the party whose failures brought about such situation.

194. We reject the challenge of the appellant to the legality and propriety of the impugned decision of MERC and uphold the PPDN and the termination notice issued by the second respondent, vacating the direction of the State Commission respecting the deeming of the

date of impugned order being the date of service of the latter (termination notice).

195. For the foregoing reasons, and in the circumstances, we find no merit in the appeal. While directing above-mentioned partial modification in the operative part of the impugned order of MERC, the appeal and the applications filed therewith by the appellant, are dismissed.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS DAY OF 15th SEPTEMBER, 2020.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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