IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 326 OF 2019 &
IA NOs. 1289 & 1712 OF 2019
AND
APPEAL NO. 327 OF 2019 &
IA NOs. 1292 & 1711 OF 2019

Dated: **30th January, 2020**

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

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

APPEAL NO. 326 OF 2019 &
IA NOs. 1289 & 1712 OF 2019

IN THE MATTER OF

1. **Andhra Pradesh Power Coordination Committee**
Vidyut Soudha,
Vijayawada – 520004
Represented by its Chief Engineer ..... Appellant No.1

2. **Southern Power Distribution Company of Andhra Pradesh Ltd. (APSPDCL)**
Kesavayanigunta, Tiruchanoor Road,
Tirupati – 517 503
Represented by its Managing Director ..... Appellant No.2

3. **Eastern Power Distribution Company of Andhra Pradesh Ltd. (APEPDCL)**
P&T Colony, Seethammadhara,
Visakhapatnam – 530013
Represented by its Managing Director ..... Appellant No.3

4. **Chief General Manager, IPC, APSPDCL**
Corporate Office, Kesavayana Gutta,
Behind Srinivasa Kalyana Mandapam,
Tirupathi – 517 504 ..... Appellant No.4

VERSUS

1. **M/s NSL Sugars Ltd**
Regd Office # 60/1, 2nd Cross, Residency Road,
Bangalore – 560 025
Represented by its AGM – Power Trading ..... Respondent No.1

2. **Andhra Pradesh Electricity Regulatory Commission**
4th Floor, Singareni Bhavan, Red Hills,
Hyderabad – 500 004 ..... Respondent No.2

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VERSUS

1. **M/s NSL Sugars (Tungabhadra) Ltd**
Regd Office : Desanur Village, Siruguppa Taluk,
Bellari District – 583 140
Represented by its AGM – Power Trading ..... Respondent No.1

2. **Andhra Pradesh Electricity Regulatory Commission**
4th Floor, Singareni Bhavan, Red Hills,
Hyderabad – 500 004 ..... Respondent No.2

Counsel for the Appellant … Mr. Yelamanchili Shiva Santosh Kumar
for Appellant Nos. 1 to 4

Counsel for the Respondent(s)… Ms. Ranjitha Ramachandran
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Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
for Respondent No. 1

J U D G M E N T

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

1. Both these Appeals brought before this Tribunal under Section 111 of the Electricity Act, 2003 challenge a common Order passed on 30.03.2019 by the second Respondent i.e. Andhra Pradesh Electricity Regulatory Commission (for short, *"State Commission"*) in proceedings arising out of two Original Petitions registered as Nos. 33 of 2017 and 34 of 2017. The background leading to the two original petitions that had been instituted before the State Commission by the first Respondent i.e. M/s NSL Sugars Limited (in OP No. 33 of 2017) and M/s NSL Sugars (Tungabhadra) Limited (in OP No. 34 of 2017) (co-generators) were almost common, barring some distinction on factual matrix and since they gave rise to common questions essentially of law, they were dealt with and decided by the State Commission by a common order. For similar

reasons, we have heard these appeals together and are deciding them by this common judgment.

2. As noted above, the first Respondents are generating companies, they being companies incorporated under the Companies Act, 1956 having their registered offices at # 60/1, 2nd Cross, Residency Road, Bangalore (Appeal No. 326 of 2019) and Desanur Village, Siruguppa Taluk, Ballari District (Karnataka) (Appeal No. 327 of 2019), engaged in the business of manufacturing and sale of sugar and allied products, having set up two bagasse based cogeneration plants, one with a capacity of 26 MW in sugar factory at Koppa, Mandya District, Karnataka and the other with a capacity of 28.2 MW in sugar factory at Desanur, Ballari District, Karnataka.

3. The first captioned appeal arising out of Original Petition No. 33 of 2017 relates to the co-generation plant at Koppa and second captioned appeal arising out of Original Petition No. 34 of 2017 relates to the co-generation plant at Desanur.

4. The second and third Appellants are distribution companies established by the Government of Andhra Pradesh in the State of Andhra Pradesh (hereinafter referred to as "*DISCOMs*"). The first Appellant is a Committee constituted by the Government of Andhra Pradesh vide Government Order Ms.No. 59 dated 07.06.2005 to advise, guide and coordinate the functions of government distribution companies.

5. The second and third Appellants (DISCOMs) had floated Tender No. 182/14 dated 17.07.2014 for purchase of power during the period from 29.05.15 to 26.05.2016 from various trading licensees / State utilities / CPPs / IPPs / Distribution licensees / SEBs on a short term basis on the e-procurement platform. The first Respondents (i.e. co-generators) had participated in the said tender and emerged as successful bidders. Pursuant to this, two purchase orders/LoIs were issued by the DISCOMs to the respective co-generators for purchase of power during the aforementioned period. The first of the said purchase order/LoI bearing Lr. No. CGM/P&MM.IPC/SPDCL/Tender 182/F-NSL(T)/ D.No. 300/14 dated 09.10.2014 related to the power proposed to be supplied from the co-generation plant at Koppa. The second purchase order/LoI bearing Lr. No. CGM/P&MM.IPC/SPDCL/ Tender 182/F-NSL(T)/ D.No. 301/14 dated 09.10.2014 related to the power proposed to be supplied from the co-generation plant at Desanur. The rate in each case was fixed at Rs.5.95/KW.

6. The quantum of supply to be provided by the concerned co-generator and purchased by the DISCOMs in relation to Koppa plant was communicated in the LoI as under:

PERIOD OF SUPPLY	QUANTUM OF SUPPLY (MW)
29.05.15 to 10.06.15	23.4
01.07.15 to 31.07.15	23.4
01.08.15 to 15.03.16	12.15
16.03.16 to 26.05.16	23.4

7. On the other hand, the quantum of supply to be provided by the concerned co-generator and purchased by the DISCOMs in relation to Desanur plant was communicated in the LoI as under:

PERIOD OF SUPPLY	QUANTUM OF SUPPLY (MW)
29.05.15 to 31.05.15	24.23
21.06.15 to 14.10.15	24.23
15.10.15 to 15.04.16	15.91
16.04.16 to 26.05.16	24.23

8. In the follow-up on the above mentioned purchase orders, two separate Power Purchase Agreements (PPAs) were executed on 28.10.2014 between the respective parties. The time frames for applying for corridor under Medium Term Open Access (MTOA) and Short Term Open Access (STOA) were specified in terms of Central Electricity Regulatory Commission (CERC) Regulations.

9. The key terms of the Power Purchase Agreements are set out by the Appellant as under:

(a) *Respondent was required to apply for MTOA with PGCIL as per the CERC regulations prior to five months and not later than one year. In the event Respondent failed to secure approval for the corridor as aforesaid for the full quantum, it was required to book the corridor under advance STOA for the balance quantum;*

(b) *If Respondent defaulted, it was liable for forfeiture of the EMD (Earnest Money Deposit) and compensation of 85% on the shortfall of LOI quantum.*

(c) *The corridor was to be booked under MTOA with PGCIL before 31.10.14 for flow of power to be commenced from 01.06.15 to 26.05.16. Similarly for the flow of power from 29.05.15 to 31.05.15,*

STOA application was to be filed with SRLDC under 3 months advance basis.

(d) *Both parties were required to ensure that the actual scheduling did not deviate by more than 15% of the contracted power and if the deviation from procurer's side was more than 15% of the contracted energy for which open access has been allocated on monthly basis, procurer had to pay compensation at 20% of the tariff per kWh for the quantum of shortfall in excess of the permitted deviation of 15% while continuing to pay open access charges as per the Power Purchase Agreement.*

(e) *If the deviation from seller's side was more than 15% of the contracted energy, the seller was required to pay compensation at 20% of the tariff per kWh to the procurer for the quantum of shortfall in excess of the permitted deviation.*

(f) *The compensation for interstate sources, such as the Respondent herein, would be calculated based on the energy supplied at regional periphery for STOA approvals and at injecting point for MTOA approvals.*

(g) *The compensation was to be levied on yearly basis of 85% of cumulative corridor approved quantity but the compensation would be calculated on running monthly average basis and reconciled on annual average basis at the end of contract period.*

(h) *Force Majeure events included any restrictions imposed by RLDC/SLDC in scheduling of power due to breakdown of Transmission/Grid Constraint and any events or circumstances such as act of God causing disruption of the system. Change of Law includes any change in transmission charges and open access charges or change in taxes etc*

10. With mutual consent, purchase orders were amended by amendment Orders dated 08.04.2015 and 10.06.2015 reducing the quantum of power supply to 70% and rate to Rs. 5.90 / kWh, all other terms and conditions having remained unaltered.

11. The final quantum of power to be supplied from Koppa plant is stated to be as under:

PERIOD OF SUPPLY	QUANTUM OF SUPPLY (MW)
29.05.15 to 10.06.15	16.38
01.07.15 to 31.07.15	16.38
01.08.15 to 15.03.16	8.51
16.03.16 to 26.05.16	16.38

12. Similarly, reduced quantum of power to be supplied from Desanur plant is stated to be as under:

PERIOD OF SUPPLY	QUANTUM OF SUPPLY (MW)
29.05.15 to 31.05.15	16.96
21.06.15 to 14.10.15	16.96
15.10.15 to 15.04.16	11.14
16.04.16 to 26.05.16	16.96

13. It has been fairly conceded at the hearing by the Appellants that there was a break in continuity in the supply of electricity intended to be purchased, the first of the aforementioned blocks of periods ending on 10.06.2015 and 31.05.2015, the next block of periods commencing only on 01.07.2015 and 21.06.2015 respectively. Having regard to the limited number of days to which the first block period related, the open access could be applied for and procured in such respect only under STOA provisions. Further, it is not disputed that under CERC Regulations, MTOA can be granted only for "uniform quantum" for the specified period. Since the quantum required for the third block period (i.e. 01.08.2015 to 15.03.2016 and 15.10.2015 to 15.04.2016) was less than that for the second block period (01.07.2015 to 31.07.2015 and 21.06.2015 to

14.10.2015) and the fourth period (16.03.2016 to 26.05.2016 and 16.04.2016 to 26.05.2016), the parties were *ad-idem* as to the arrangement that quantum of 12.15 MW and 15.91 MW (as initially specified) would be supplied under MTOA and the balance under STOA. Thus, the co-generator applied for and obtained approval for MTOA for the second to fourth block periods (i.e. commencing from 01.07.2015 and 21.06.2015 respectively ending with 26.05.2016) and for the balance quantum depended on STOA, month after month. Since the quantum of electricity to be supplied/purchased was later reduced (as per amendment orders), the co-generators also took steps to downsize the quantum/capacity for MTOA to 8.51 MW and 11.14 MW respectively w.e.f. 01.08.2015 for the entire remainder period of contracts ending with 26.05.2016, approval to such effect having come from Power Grid Corporation of India Limited (Central Transmission Utility) by their letter dated 10.07.2015. In this view, for the last block periods (from 16.03.2016 and 16.04.2016 respectively to 26.05.2016), the balance quantum i.e. 7.87 MW (16.38 MW – 8.51 MW) from Koppa plant and 5.82 MW (16.96 MW – 11.14 MW) from Desanur plant – was to be applied under STOA, on monthly basis.

14. The State Government is vested with the power to issue directions to generating companies "in extraordinary circumstances", by virtue of Section 11 of the Electricity Act, 2003, which reads thus:

"11. ***Directions to generating companies****. – (1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.*

Explanation. -- For the purposes of this section, the expression "extraordinary circumstances" means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate."

15. On 16.09.2015, the Government of Karnataka had promulgated Government Order No. EN 11 PPT 2015 issuing certain directions under Section 11 of the Electricity Act, 2003 in "public interest", taking note, *inter-alia,* of major power crisis then faced by the State stemming from "failed monsoon causing severe draught", it requiring measures to be taken "to tide over the crisis" so as to meet "widened demand supply gap". The relevant part of the said order may be quoted thus:

"In the circumstances explained in the Preamble and in exercise of the powers conferred under section 11 of Electricity Act 2003, the State Government hereby issues the following directions in the public interest with immediate effect and until further orders.

a) All the Generators in the State of Karnataka shall operate and maintain their generating stations to maximum exportable capacity subject to following conditions:

i) The tariff determined for current short term procurement through bid route is Rs. 5.08/unit hence for supply of energy by the Generators under Section 11 Rs. 5.08/unit is fixed provisionally subject to determination of final tariff by Hon'ble KERC.

ii) Joint meter readings shall be basis for raising the monthly bills.

iii) Rebate of 2% shall be allowed on the bill amount if payment is made within 5 days from the date of presentation of bill or other wise 1% shall be allowed if the payments are made within 30 days.

iv) Due date for making payment shall be 30 days from the date of presentation of the bill.

v) Surcharge at 1.25% per month shall be payable if the payments are made beyond due date.

vi) The Jurisdictional Distribution Licensee shall raise the bill for the energy imported by the Generators Under Section 11.

vii) Energy pumped by Generators under Section 11 shall be allocated amongst ESCOMs as per Govt., Order dated 05.09.2015 as follows:

BESCOM	*46.39%*
MESCOM	*07.89%*
CESC	*11.60%*
HESCOM	*19.00%*
GESCOM	*15.12%*
Total	*100%*

viii) The Generators shall raise the bills in the above proportion to respective ESCOMs.

b) The above tariff is provisional and is subject to approval of Karnataka Electricity Regulatory Commission (KERC).

c) The above proposal shall not be applicable for the Intra-State Generators who are having valid PPA's with the Distribution Licensees in the State of Karnataka.

d) All State Electricity Supply Companies (ESCOMs) shall submit a Memorandum on the power situation within 15 days from date of this order before the Karnataka Electricity Regulatory Commission (KERC) and request to fix the tariff for supply of energy by the Generators source-wise (i.e. Cogeneration, Biomass, Captive, IPP, etc) under Section 11 of Electricity Act 2003."

16. On 18.09.2015, the State Load Dispatcher (i.e. Karnataka Power Transmission Corporation Ltd) issued a direction to the first Respondent by communication No. CEE/SLDC)/EE/AEE3/-6039/41 on the subject of supply of all exportable power to State Grid with immediate effect (i.e. from 16.09.2015) stating thus:

"In exercise of powers conferred under Section 11 of Electricity Act 2003, the state Government of Karnataka has issued an order vide No EN 11 PPT 2015 Bangalore, Dated 16.09.2015 with the following directions in the public interest.

"All the generators in the state of Karnataka shall operate and maintain their generating stations to maximum exportable capacity subject to the detailed condition mentioned in the GO".

The detailed copy of the order is herewith enclosed.

As per the GO, we are here by withdrawing/cancelling all the MTOA/STOA consents & NOC's issued by this office with immediate effect from 16th Sep-2015 onwards and this will be in force until further orders. Therefore, it is requested to inject all the exportable power to Karnataka state grid as per GO."

17. It is fairly conceded by the learned counsel for the Appellants that Government of Karnataka would be the "appropriate government" in relation to the co-generators (first Respondents) within the meaning of the provision contained in Section 11 of the Electricity Act, 2003 and, further, that in terms of the Government Order dated 16.09.2015, the entire energy pumped by the generators having been "allocated" for distribution by companies within the State of Karnataka, there was no power intended to be left with the co-generators for supply or sale to an entity outside the State of Karnataka.

18. The dispute which arose between the parties (co-generators on one hand and the DISCOMs on the other) and which has persisted leading to the appeals at hand being preferred concerns non-supply during the last block period, the generator pleading inability to do so on account of the order dated 16.09.2015 of Government of Karnataka followed by directions communicated by the State Load

Despatch Centre through letter dated 18.09.2015. Reliance is placed primarily on the *force-majeure* clauses in the two PPAs. The DISCOMs (procurers), on the other hand, took the position that the *force-majeure* clauses would not apply, the same not covering restrictions imposed under Section 11 of Electricity Act, the generator having failed to take steps to ensure continued supply, no application for STOA having been moved nor alternative mode tapped for discharge of the contractual obligations. The DISCOMs (procurers) unilaterally invoked the compensation clauses of the PPAs and taking the default on the part of the generators to supply electricity in terms of the contracts as a breach justifying claim to such compensation (liquidated damages) made certain deductions from the bills that had been raised thereby withholding money – to the extent of Rs.1,04,95,066/- in relation to supply from Koppa plant and Rs.35,88,371/- in relation to supply from Desanur plant.

19. It is against the above back drop that the generators (first respondents in these appeals) had approached the State Commission by the two original petitions which resulted in the impugned order being passed.

20. The issues, which were considered by the State Commission in the impugned order, were formulated thus:

“...

24. The points that arise for consideration are:

(i) Whether the respondents are entitled to deduct any compensation due to the failure of the petitioners in applying for corridor under STOA during the relevant period ?

(ii) Whether Section 11 order by the Government of Karnataka has to be treated as change in law under Force Majeure of the Power Purchase Agreements ?

(iii) Whether any amounts deducted from the power bills due to the petitioners by the respondents have to be refunded and if so, with any interest and if so, at what rate ?

(iv) To what relief ?

....”

21. The contentions of the first Respondent were upheld by the State Commission and the issues answered accordingly against the Appellants (DISCOMs). In terms of the directions in the impugned order of the State Commission the Appellants are obliged to “refund” the abovementioned amounts to the first Respondents though without levy of any interest or cost.

22. The Appellants reiterate in these appeals that the reliance on *force-majeure* clauses was incorrect and that there has been a default on the part of the generators (first Respondents) in discharge of its responsibility under the PPAs justifying invocation of the compensation clauses on the part of the procurer in that notwithstanding the government order under the Electricity Act, the generator could have made endeavour to supply under STOA or by tapping alternative source of electrical energy. It is submitted that the view taken by the State Commission in this regard is incorrect and perverse. At the same time, it is argued that the State

Commission has failed to exercise its jurisdiction under Section 11(2) by not considering the issuance of appropriate directions to *“offset adverse financial impact”* suffered by the DISCOMs on account of the directions of the State Government inhibiting supply of electrical energy beyond the State. The generator, on the other hand, argues primarily submitting that the view taken by the State Commission is just, proper and in accord with law, this being a scenario of “change in law”, the *force-majeure* clauses duly covering, within the knowledge and agreement of the procurers, consequences flowing from such “change in law”.

23. It will be appropriate to take note of at this stage the compensation and *force majeure* clauses forming part of the PPAs. The same (to the extent relevant here) read as under:

> *“...*
>
> ***3.3 Compensation for default in Scheduling:***
>
> *a) NSL Sugars Ltd (Koppa) has to initially apply for MTOA with PGCIL as per the provisions of the CERC regulations i.e. prior to 5 months and not later than 1 year. In the event of NSL Sugars Ltd (Koppa) not getting the corridor approved for full quantum, they have to book corridor under STOA for the balance quantum under 3 months advance basis. The 3 months in advance basis for STOA will be repeated for subsequent months till the end of contract. However, NSL Sugars Ltd (Koppa) is at their discretion to file subsequent OA applications for particular month without any liability or obligation whatsoever on it. If NSL Sugars Ltd (Koppa) has not applied for the MTOA and subsequent advance STOA, he is liable to forfeit of EMD and compensation of 85% on the shortfall of LoI quantum.*
>
> *...*
>
> *c) Both the parties would ensure that actual scheduling does not deviate by more than 15% of the contracted power as per the approved open access on monthly basis.*
>
> *...*

e) In case deviation from Seller side is more than 15% of contracted energy for which open access has been allocated on monthly basis. Seller shall pay compensation to Procurer at 20% of Tariff per kWh for the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied and pay for the open access charges to the extent not availed by the Procurer.

...

3.11 Force Majeure:

Events shall mean the occurrence of any of the following events:-

a Any restriction imposed by RLDC/SLDC in scheduling of power due to breakdown of Transmission/Grid constraint shall be treated as Force majeure without any liability on either side.

b. Any of the events or circumstances, or combination of events and circumstances such as act of God, exceptionally adverse weather conditions, lightning, flood, cyclone, earthquake, volcanic eruption, fire or landslide or acts of terrorism causing disruption of the system. The contracted power will be treated as deemed reduced for the period of transmission constraint. The non/part availability of transmission corridor should be certified by the concerned RLDC.

*c. **Change in Law: Change in Law shall include***

** Any change in transmission charges and open access charges.*

** Any change in taxes (excluding income tax), duties, cess or introduction of any tax, duty, cess made applicable for supply of power by the Seller.*

d. Statutory inspections like boiler maintenance to be included for a period not exceeding 15 days.

... " *[Emphasis supplied]*

24. During the course of arguments, aside from clauses relating to period, quantum of power, duration, source and rate of supply, reference was also made to certain other clauses of PPAs which may be quoted (to the extent germane) as under:

"...

***2.** The quantum of power, however will be supplied matching with the Open Access granted and subject to the transmission constraints/Force Majeure and the agreement shall become effective to the extent and period for which open access is granted by Nodal RLDC/PGCIL.*

...

*3.2 **Transmission Charges & Losses:***

NSL Sugars Ltd (Koppa) shall book the Transmission corridor after making advance payment to the nodal RLDC/PGCIL towards PoC Charges as per CERC regulations for STO/MTOA. The PoC injection charges and losses (including STU/CTU transmission charges, SLDC/RLDC operating charges and SLDC/RLDC application fee, Annual fee, PGCIL Application Fee, SRLDC Application Fee and SRLDC Operating charges etc.) up to delivery point will be borne by NSL Sugars Ltd (Koppa). The Andhra Pradesh withdrawal charges and losses, APSLDC application fee, operating charges, Annual fee and APTransco transmission charges will be borne by APSPDCL/APDISCOMS.

...

*3.10 **Revision of Schedule/Cancellation of Open Access***

APSLDC shall intimate one day in advance regarding any backing down to all the generators as provided in the LoI conditions. In case of revision/cancellation of MTOA/STOA, the party seeking revision/cancellation of MTOA/STOA shall bear the entire cost on its account due to such revision/cancellation of MTOA/STOA as per the applicable CERC regulations for MTOA/STOA.

...

*3.13 **Alternate Supply of Power***

NSL Sugar Ltd (Koppa) is allowed to supply power through alternate sources. However, the incidental charges applicable to file OA application for 3 months, 2 months, 1 month in advance basis & FCFS is allowed only for one alternate source. If the power is being supplied through more than one alternate source, any additional charges and losses if any, due to cancellation of existing corridor and booking of new corridor etc., shall be to the account of NSL Sugars Ltd (Koppa). If NSL Sugars Ltd (Koppa) wants to supply from more than one alternate source, they have to bear if any additional financial commitment applicable.

..." [Emphasis supplied]

25. It may be added here that above have been extracted from the PPA relating to Koppa plant. It was conceded by learned counsel on both sides that similar clauses are the part of the PPA relating to Desanur plant, the only difference being in the name of the relevant plant.

26. It is submitted by the Appellants that there are only four situations conceived in the *force majeure* clause, three of which have no relevance here. It is clause (c) on the subject of "change in law" which is primarily invoked by the respondents. We are not impressed with the argument that the restriction imposed by the Government of Karnataka, by Order dated 16.09.2015, in exercise of its power under Section 11 of Electricity Act, 2003 would not constitute a *force majeure* situation for the PPAs in question for the reason that such scenario is not expressly covered by the language employed in the said clause. The submission of the Appellants that the "change in law" scenario was primarily restricted to "change in" appropriate "charges" or "taxes" is fallacious for it ignores the opening word that change in law "shall include". We agree with the argument of the respondent DISCOMs that the use of the expression "include" signifies that what follows is only illustrative, the clause as articulated in the PPAs being "not exhaustive" -- not restricted to the items contained or included in such definition.

27. In taking the above view, we draw strength from the observations of the Supreme Court in judgment reported as *"Krishi Utpadan Mandi Samiti v. Shankar Industries, 1993 Supp (3) SCC 361 (2)* which read thus:

> *"**12.** We have considered the arguments advanced on behalf of the parties and have perused the record. A perusal of the definition of agricultural produce under Section 2(a) of the Act shows that apart from items of produce of agriculture, horticulture, viticulture, piculture, sericulture, pisciculture, animal husbandry or forest as are specified in the Schedule, the definition further 'includes admixture of two or more such items' and thereafter it further 'includes taking any such item in processed form' and again for the third time the words used are 'and further includes gur, rab,*

shakkar, khandsari and jaggery'. It is a well settled rule of interpretation that where the legislature uses the words 'means' and 'includes' such definition is to be given a wider meaning and is not exhaustive or restricted to the items contained or included in such definition. Thus the meaning of 'agricultural produce' in the above definition is not restricted to any products of agriculture as specified in the Schedule but also includes such items which come into being in processed form and further includes such items which are called as gur, rab, shakkar, khandsari and jaggery."

[Emphasis Supplied]

28. In same context, we may also quote, with advantage, the view taken by Hon'ble Supreme Court in *ESI Corpn. v. High Land Coffee Works, (1991) 3 SCC 617 which reads thus:*

> ***"7.*** *The view taken by the High Court seems to be justified. The Statement of Objects and Reasons of the Bill which later became the Act 44 of 1966 indicates that the proposed amendment was to bring within the scope of the definition of "seasonal factory", a factory which works for a period of not exceeding seven months in a year — (a) in any process of blending, packing or re-packing of tea or coffee; or (b) in such other manufacturing process as the Central Government may, by notification in the official Gazette, specify. The amendment therefore, was clearly in favour of widening the definition of "seasonal factory". The amendment is in the nature of expansion of the original definition as it is clear from the use of the words "include a factory". The amendment does not restrict the original definition of "seasonal factory" but makes addition thereto by inclusion. The word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. [See (i) Stroud's Judicial Dictionary, 5th edn. Vol. 3, p. 1263 and (ii) C.I.T. v. Taj Mahal Hotel [(1971) 3 SCC 550 : AIR 1972 SC 168 : (1972) 1 SCR 168] , (iii) State of Bombay v. Hospital Mazdoor Sabha [AIR 1960 SC 610 : (1960) 2 SCR 866 : (1960) 1 LLJ 251] ."*

[Emphasis Supplied]

29. Even otherwise, the contract (PPA) has to be read in entirety to understand the meaning and import of its various clauses. As was pointed out by the respondent DISCOMs, and rightly so, the obligation to supply electricity on the part of the generators was "*subject to*" not only "*force majeure"* situation but also "*transmission constraints*", the quantum expected to be supplied to be invariably matching with the open access "*granted*" (clause 2). Further, the stipulation as to "*compensation for default in scheduling*" was also mutually agreed to be contingent upon and in accord with "*approved open access on monthly basis*" (clause 3.3). Pertinent to add that even sub-clause (a) of *force majeure* clause (3.11) expressly treats "*any restriction imposed by RLDC/SLDC*" as *force majeure "without any liability on either side*".

30. As noted earlier, the co-generators (first respondents), having set up their plants in State of Karnataka, the Government of State of Karnataka is the appropriate Government in their respect. The order promulgated on 16.09.2015 by the Government of Karnataka was issued in exercise of the power vested in the said State Government, the justification for invoking the said extraordinary power having being set out in the preamble to the said orders, the scrutiny of correctness whereof is beyond the scope of the present appeals. Even otherwise, it may be noted that same very order dated 16.09.2015, and the consequences flowing therefrom, had become the subject matter of challenge before High Court of Karnataka in the matter of *Star Metallics and Power Private Limited v State of Karnataka,*

The Department of Energy and Ors. [AIR 2017 Kant 178] and it was, *inter-alia,* held thus:-

> "...
> ***19.*** *In view of the aforesaid, this Court is of the clear opinion that Section 11 of the Act operates in a special field and in extra-ordinary circumstances and the State can mandate all the concerned Power generating companies in the State to not only operate and maintain any Generating Station at optimum or particular level but also to supply its entire Electricity produced to the State Grid to meet the extra-ordinary circumstances for serving the overriding cause of public and if because of such mandatory and overriding directions if the Generating Companies suffer any adverse financial impact, they may be compensated in the manner as the Regulatory Commission considers it appropriate.*
> ***....*"** *[Emphasis Supplied]*

31. Some arguments were raised on the question as to whether in the wake of directions, such as above, under Section 11 of Electricity Act, 2003 of the State Government; the No Objection Certificate (NOC) that had been issued prior to such order could be withdrawn or cancelled by the State Load Dispatcher. It has been pointed out that there is a difference of opinion on this issue between judgments of High Court of Judicature of Andhra Pradesh on one hand and High Court of Karnataka on the other. Reference was made to Order dated 22.04.2014 passed on an interim application in WP No. 10464 of 2014 in the case of *APCPDCL v The Southern Regional Load Dispatch Centre & Ors*. by a learned single Judge of the High Court of Judicature of Andhra Pradesh and judgment dated 26.03.2010 passed by a Division Bench of the High Court of Karnataka in a batch of Writ Petitions, led by Writ Petition No. 2703 of

2009 in the case of *Government of Karnataka v Central Electricity Regulatory Commission & Ors.*

32. It appears that in the matter of *APCPDCL* (supra), a similar situation had arisen on account of issuance of a similar order under Section 11 by the Government of State of Karnataka. The NOC granted by the transmission company had been withdrawn, this disrupting the supply contracted under PPA. The learned single Judge of High Court of Andhra Pradesh was of the view that withdrawal of NOC was impermissible as no rule or regulation was referred to in support. On this reasoning, holding that the procurers would suffer irreparable losses, interim relief was granted by suspending the order whereby NOC was withdrawn. Pertinent to add here that this was a *prima facie* view at stage of interim relief. The main matter, it has been stated, is still pending.

33. In sharp contrast to the above, in the matter before the Division Bench of High Court of Karnataka in *Government of Karnataka v CERC & Ors*, the direction issued by Central Electricity Regulatory Commission (CERC) to grant concurrence to the open access, in teeth of an order under Section 11 of Electricity Act, 2003, was disapproved and it was ruled thus:

> *"…*
> ***18.*** *In those connected matters this Court has upheld the order passed under Section 11 of the Act by the Government. It is held therein the concept of open access is not an unbridled right conferred on a generating company or a licencee or a distribution licenceee. Such an open access is also regulated by the Act and Regulations. In the absence of any order under Section 11 passed by the*

Appropriate Government, the provisions of the Act and the Regulations have to be interpreted so as to respect the concept of open access and the rights conferred thereon. This concept of open access only means that the private generating companies shall not be discriminated in the use of transmission lines or distribution system or associated facilities. It does not mean a right is conferred on them absolutely to supply electricity to a consumer or a licencee of their choice and that such right cannot be curtailed under any circumstances. The Central Electricity Regulatory Commission (Open Access in Inter State Transmission) Regulations, 2008 regulates such open access in the normal circumstances. When once in an extra-ordinary circumstance as contemplated under Section 11(1) of the Act, the Government issued the direction to a generating company to operate and maintain a generating station and supply electricity generated to the State Grid, the said order would have over-riding effect on the orders passed by the authorities under the Act. Before a person can claim open access from the Appropriate Commission. No Objection from the State Load Despatch Centre is a must. When once the State passes the order under Section 11, the State Load Despatch Centre granting concurrence for open access would not arise. The Central Commission cannot find fault with such an action of the State Load Despatch Centre and it was in total error in passing the impugned orders in these Writ Petitions. Therefore, for the reasons set out in the aforesaid judgment, the impugned orders are liable to be quashed.

...." *[Emphasis Supplied]*

34. We find merit in the submission of the respondent generators that State Load Dispatcher, in the present case, being an entity of the State of Karnataka, as indeed the generators themselves on account of area of their operations, were bound by the order promulgated by the State Government under Section 11 and the view taken in such respect by the High Court of Karnataka. As was observed by High Court of Karnataka in *Government of Karnataka v CERC & Ors* (supra), the "open access" granted earlier could not be claimed as an "*unbridled right*". The order under Section 11 to the State Grid would have an "*overriding effect*" on the orders passed by the authorities under the Act. In the given sequence of

events where the entire electrical energy generated within the State stood allocated, for distribution and use, within the State of Karnataka, there was no occasion for any further order to be issued withdrawing or cancelling the NOC or open access granted earlier. The order under Section 11 of the State Government would itself lead to such consequence. Nevertheless, for ensuring due compliance, the State Load Dispatcher issued further order, by communication dated 18.09.2015, intimating the withdrawal or cancellation of the open access consent or NOC issued prior to the promulgation of such order. This inhibition would make it impossible for the generators to book or avail of the transmission corridor in terms of PPAs.

35. It is fairly conceded by the Appellant that without "*open access*" being facilitated by the State Load Dispatcher, or Regional Load Dispatcher, the co-generators (first Respondents) could not have complied with the contractual obligation to supply electricity to the Appellant. To expect them to do so in such scenario is actually asking them to achieve the impossible. As has been ruled by the High Court of Karnataka in *Government of Karnataka v CERC & Ors* (supra), after the promulgation of order under Section 11, the grant of concurrence by the State Load Dispatcher for "*open access*" would not arise. This itself is sufficient to reject the argument of the Appellants -- based on decision in *Energy Watchdog v Central Electricity Regulatory Commission & Ors. [(2017) 14 SCC 80]* -- that the generators were "*not absolutely impeded*" owing to the

Government order or that they could have applied for revised open access – medium term or short term -- for the remainder period.

36. In the facts and circumstances, we find no fault in the view taken by the State Commission rejecting the contentions of the Appellant about inapplicability of *force majeure* clause. As a result of issuance of the order under Section 11 by the State Government on 16.09.2015, followed by the directions of State Load Dispatcher issued on 18.09.2015, the generators had been denied open access for the purposes of the two PPAs whereunder electricity supply was meant to be made beyond the State of Karnataka. As noted earlier, the obligation to supply electricity to the Appellants was dependent upon availability of open access. This legitimately gave rise to the invocation of *force majeure* clause. Even otherwise, in absence of availability of "open access", it had become "impossible" for the generators herein to ensure continued supply, any act indulged in contrary to the inhibition under Section 11 order being "unlawful", the contracts (PPAs) to that extent consequently being rendered frustrated within the meaning of the second para of Section 56 of Indian Contract Act, 1872, which reads thus:

> *"56.* ***Agreement to do impossible act.***
> *...*
> ***Contract to do act afterwards becoming impossible or unlawful.*** *– A contract to do an act which, after the contract is made, become impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*
> ***... "***

37. In above context, we may also refer to the following observations of the Hon'ble Supreme Court in the case of *Energy Watchdog v CERC & Ors. (supra)* :

> ***"36.*** *The law in India has been laid down in the seminal decision of Satyabrata Ghosh v. Mugneeram Bangur & Co.[AIR 1954 SC 44] The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word "impossible" has not been used in the section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. <u>If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do</u>. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. <u>If, however, frustration is to take place dehors the contract, it will be governed by Section 56</u>.*
> *…"* *[Emphasis Supplied]*

38. There is absolutely no substance in the submission that the generators (first Respondents) could have discharged their contractual obligation by drawing power from alternative sources, as was envisaged in clause 3.13 of PPAs. The explanation of the first respondents is that the alternative sources of electricity for purposes of the generators herein would also have had to be generators within the State of Karnataka, other such generators also being placed under the same restrictions as the first respondents, by virtue of order under Section 11 of the State Government.

39. There is no dispute as to the fact that during the currency of the order under Section 11 issued by Government of Karnataka which concededly remained operative beyond the contracted period between the parties – the State Utility (SLDC) would not have entertained a request for transmission of electricity to the other State. This indisputably was a situation beyond the control of the generators -- definitely not a scenario of their making. In this fact situation, no case of default on part of generators giving rise to obligation to pay compensation is made out.

40. The submission of the Appellants about the State Commission having failed to adopt measures to "*offset the adverse financial impact*" of the order under Section 11, within its jurisdiction under sub-section (2), must also be rejected in the present fact and circumstances primarily for the reason the Appellant had not staked only such claim before the State Commission. Even otherwise, as is pointed out by the generators (first Respondents), the supply made by them to the distribution companies within the State of Karnataka, in terms of the mandate of the State Government under Section 11 of the Electricity Act, was not "free", the distribution companies which received such supply being liable to pay tariff for the same as determined by the State Commission, tariff for such supply of power being not related to any compensation claims of the Appellants.

41. For the foregoing reasons, and in the circumstances, we do not find any merit in these appeals. The appeals and the pending applications are thus dismissed.

42. Parties are left to bear their own costs.

PRONOUNCED IN THE OPEN COURT ON THIS 30TH DAY OF JANUARY, 2020.

(Justice R.K. Gauba) Judicial Member	**(Ravindra Kumar Verma)** Technical Member

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