FIN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 183 OF 2019 &
IA NOs. 907, 909 & 1059 OF 2019

Dated: 27th September , 2019

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

In the matter of:-

RENASCENT POWER VENTURES PVT. LTD.)
C/O The Tata Power Company Limited,)
Corporate Centre, A-Block, 34,)
Sant Tukaram Road,)
Carnac Bunder, Mumbai – 400 009)
) **… Appellant**

AND

1. **Uttar Pradesh Electricity Regulatory Commission**)
Through its Secretary)
Vidyut Niyamak Bhawan,)
Vibhuti Khand, Gomti Nagar,)
Lucknow 226010)

2. **State Bank of India**)
Through its Assistant General Manager, Samb- II)
Corporate Centre,)
21st Floor, Maker Tower 'E',)
Cuffe Parade,)
Mumbai – 400 005

3. **Prayagraj Power Generation Company Limited**)
Through its Director,)

Sector 128, Noida Bhangel,)
Uttar Pradesh – 201 304)

4. **Uttar Pradesh Power Corporation Limited**)
Through its Managing Director)
Shakti Bhawan, 14 Ashoka Marg)
Lucknow – 226 001)

5. **Dakshinanchal Vidyut Vitran Nigam Ltd**)
Through its Managing Director)
Urja Bhawan 220 K.V. UP-Sansthan Bypass)
Raod,)
Sikandra Agra -282 007)
)

6. **Purvanchal Vidyut Vitran Nigam Ltd.**)
Through its Managing Director)
Purvanchal Vidyut Bawan,)
P.O. Vidyut Nagar, DLW)
Varanasi – 221 004)
)

7. **Madhyanchal Vidyut Vitran Nigam Ltd.**)
Through its Managing Director,)
4 Gokhale Marg,)
Lucknow – 226001)
)

8. **Paschimanchal Vidyut Vitran Nigam Ltd.**)
Through its Managing Director)
Urja Bhawan,)
Victoria Park,)
Meerut – 250 001)

9. **Kanpur Electricity Supply Company Limited,**)
Through its Managing Director)
14/71, Civil Lines, Kesa House,)
Kanpur – 208 001)
)

Counsel for the Appellant(s)	:	Mr. Basava Prabhu Patil, Sr. Adv. Mr. Apoorva Mishra Mr.Shreshth Sharma Mr. Geet Ahuja Mr. Ishaan Mukherjee
Counsel for the Respondent(s)	:	Mr. S.B. Upadhyay, Sr Adv. Mr. C.K. Rai Mr. Sachin Dubey for R.1 Mr. Ramji Srinivasan, Sr. Adv. Mr. Ramanuj Kumar Mr. Manpreet Lamba Mr. Priyal Modi for R.2 Mr. Raghavendra Singh, Sr. Adv. Mr. Altaf Mansoor Mr. Sunil kumar Rai for R.4 to 9

JUDGMENT

(Per Hon'ble Mrs. Justice Manjula Chellur- Chairperson)

1. This Appeal is directed against the Order dated 29.03.2019 passed by Uttar Pradesh Electricity Regulatory Commission in Petition No. 1403 of 2019. The background for filing this Appeal is as under:

2. On 04.11.2008, Respondent-Commission by virtue of its Order approved Request for Qualification (**"RFQ"**) and Request for Proposal ("**RFP"**) floated by Uttar Pradesh Power Corporation Limited (**hereinafter referred to as "UPPCL"**) on behalf of its State distribution licensees (DISCOMs). This was admittedly for tariff based bidding process for long term procurement of power from three units having 660

MW thermal power each from generating plants set up by Prayagraj Power Generation Company Limited (**hereinafter referred to as "PPGCL"**) a Special Purpose Vehicle, at Tehsil Bara, District Allahabad, Uttar Pradesh.

3. It is also not in dispute that the RFP was based on Case-II bidding guidelines and competitive bidding guidelines under Section 63 of the Electricity Act, 2003 (**hereinafter referred to as "the Act"**).

4. Admittedly on 21.11.2008, Power Purchase Agreement (**PPA**) was executed between PPGCL and UPPCL for purchase of 1980 MW power from the above-said thermal project. Out of 9 (nine) bidders who were successful at the stage of RFQ, only 3 (three) bidders i.e., M/s Jaiprakash Associates Limited, M/s Lanco Infratech Ltd. and M/s Reliance Power Limited submitted their respective response to the RFP. Ultimately, Letter of Intent (**LoI**) came to be issued to M/s Jaiprakash Associates Limited (**hereinafter referred to as "JAL"**) after evaluation of the bids, since it had quoted lowest levelised tariff of INR 3.020 per unit.

5. Apparently, on 20.03.2009, a Share Purchase Agreement (**SPA**) was signed between UPPCL, PPGCL and M/s Jaiprakash Power Ventures Limited (**hereinafter referred to as "JPVL"**), a nominee of JAL.

6. On 27.08.2010, on the application of UPPCL along with the DISCOMs for adoption of PPA tariff under Section 63 of the Act, the Uttar Pradesh Electricity Regulatory Commission (**hereinafter referred to as "UPERC" or "Commission"**) adopted the PPA tariff discovered under the bid process.

7. Admittedly, PPGCL had raised loans from seven financial institutions for the purpose of execution, operation and maintenance of the Prayagraj project. State Bank of India (**SBI**) along with other lenders entered into several credit facility agreements with PPGCL agreeing to give credit facilities. *Interalia*, the said credit facilities were secured by a pledge of 88.51% of equity shares and 27,00,00,000 (Twenty Seven Crores) preference shares of PPGCL held by JPVL. Admittedly, these shares were pledged in favour of SBI Caps Trustee Company Limited for the benefit of all lenders of PPGCL. Apparently, PPGCL, for various reasons, failed to service its debt obligations under credit facility agreement, which resulted in lenders classifying the accounts of PPGCL as Non-Performing Asset (**NPA**).

8. On 21.11.2017, SBI issued Notice of Enforcement of Pledge on the shares of PPGCL held by JPVL wherein it was made clear that in case JPVL failes to pay the outstanding amount as on 31.10.2017, the pledge on the shares of PPGCL held by JPVL shall be enforced. On

15.12.2017, PPGCL informed UPPCL about Pledge Invocation letters by lenders and lenders proposing to undertake a Competitive Bidding Process for selection of a new entity for transfer of management and ownership of PPGCL.

9. Admittedly, on 22.01.2018, SBI issued RFP for competitive bidding for selection of a new entity which shall take over the control in shareholding of PPGCL. Resurgent Power Ventures, Singapore (**hereinafter referred to as "Resurgent Power"**) submitted its offer to acquire 75.01% of equity shareholding along with 100% of preference shares of PPGCL and transfer balance 13.50% equity shares to existing lenders.

10. On 27.08.2018 and 13.11.2018, SBI issued in-principle and final Letter of Intent respectively to Resurgent Power confirming it to be the successful bidder. On 14.11.2018, lenders including SBI Caps Truestee, PGDCL, Resurgent Power, and Appellant being the wholly owned subsidiary of Resurgent Power, entered into a SPA for effectuating transfer of shares of PPGCL in favour of the Appellant - Renascent Power Ventures Pvt. Ltd, i.e. 75.01% of equity shares and 100% of preference shares.

11. On 17.11.2018, SBI informed UPPCL that since PPGCL was unable to fulfil its financial obligations under the loan facility, the lenders

through a bid process had selected Resurgent Power for transfer of pledge shares of PPGCL and sought approval of UPPCL for transfer of shares of PPGCL in favour of the Appellant. However, by its letter 06.12.2018, UPPCL sought clarifications from SBI pertaining to the transactions undertaken for transfer of the above-said shares in favour of the Appellant. SBI did furnish clarification to UPPCL. Ultimately, UPPCL informed SBI on 29.12.2018 that since the bidding documents and tariff has been adopted by Respondent-Commission, SBI may have to approach Respondent-Commission for approval of the said process.

12. Apparently, SBI seems to have filed Petition No. 1403 of 2019 before the Respondent-Commission seeking for transfer of 75.01% of equity shares and 100% preference shares in favour of the Appellant. Respondent-Commission directed UPPCL to file its counter affidavit to bring on record as to how transfer of shares in favour of the Appellant was in the interest of all the stakeholders including the consumers of the State of Uttar Pradesh.

13. Admittedly, the Appellant filed its reply before the Commission so also UPPCL filed counter affidavit on 05.03.2019. Stand of the Appellant before the Commission was that it offered to settle all pending disputes (petitions 1277/2018 filed by PPGCL against UPPCL/DISCOMs, 1333/2018 filed by PPGCL against

UPPCL/DISCOMs, 1357/2018 filed by UPPCL/DISCOMs against PPGCL, and LD notice issued by PuVVNL to PPGCL) resulting in net benefit of Rs.3700 Crores to UPPCL (DISCOMs), settlement of capital creditors in excess of Rs.1000 Crores and additional capital expenditure to the tune of Rs.450 Crores (approximately) for improvement of plant performance, improvement in availability from the current 49% to normative levels of 80% which would substantially improve the savings in excess of Rs.450 Crores per annum to UPPCL and DISCOMs, since they ensure availability of competitively priced power from the plant in question; and finally, the Appellant offered that it would complete the balance works and improve rail logistics ensuring all units to perform in terms of the PPA.

14. UPPCL in its counter affidavit stated that there shall be certainty of supply of power from the generating project to UPPCL at a very low tariff compared to prevalent cost of procurement of power; therefore, the said transfer would be in the interest of consumers. UPPCL also brought on record that the applicability of the change in shareholding restriction was to ensure continuity and consistency for the power plant; therefore, it had created bar for the selected bidder from unilaterally changing equity shareholding in PPGCL. UPPCL also pleaded that the transfer in

question did not amount to shareholding change by original shareholder voluntarily.

15. After hearing the parties on 07.03.2019, Respondent-Commission observed that it has no objection in transfer of shares but reduction in fixed charges by a reasonable amount was sought from the Appellant on the ground that it would save purported undue enrichment to the Appellant and also safeguard consumers' interest. At this juncture, the Appellant filed an extensive response to clarify the alleged/misplaced observations of the Respondent-Commission in its Order dated 07.03.2019. The Appellant had to file commercial submissions and explanations to the Respondent-Commission as response to the observations made in the Order dated 07.03.2019. SBI also filed its response to the Order of the Respondent-Commission dated 07.03.2019.

16. On 25.03.2019, Respondent-Commission heard the submissions at length on various aspects including the purpose as to why the Petition No. 1403 of 2019 was filed before the Respondent-Commission, the jurisdiction of the Commission under Section 63 of the Act and the additional offers made by the Appellant.

17. On 26.03.2019, additional response came to be filed by the Appellant clearly indicating certain additional offers discussed with

UPPCL i.e., (i) increase in normative availability from 80% to 85% from 01.04.2010 for full recovery of capacity charges while keeping the total capacity charges to be recovered under the PPA unchanged (this would benefit UPPCL and its consumers approximately Rs.1,700 Crores for the balance life, subject to consent by UPPCL for additional coal), (ii) reduction in net Station Heat Rate (**"SHR"**) linked to improvement in plant performance, and (iii) off-take of additional power i.e., 150 MW available to PPGCL for sale in market beyond contracted capacity by UPPCL for a period of five years from 01.04.2010.

18. Similarly, UPPCL filed an additional submission to Appellant's response wherein UPPCL made a counter offer to the Appellant on the issue of net SHR while accepting Appellant's proposal for increase in normative availability; however, rejected Appellant's proposal for off-take of additional power on Round the Clock (**"RTC"**) basis.

19. Again the Appellant filed additional submission pointing out that the parties are agreeable on the issue of normative availability; however, on reduction of net SHR and off-take of additional power beyond contractual capacity on non-RTC basis is not acceptable to the Appellant.

20. On 29.03.2019, Respondent-Commission passed the impugned order. Aggrieved of the order, Appellant approached High Court of

Judicature at Allahabad, Lucknow Bench challenging validity of the impugned order on the ground that it had exercised beyond its jurisdiction as prescribed under the Act. On 25.09.2019, the High Court disposed of the Writ Petition directing the Appellant to approach Appellate Tribunal for Electricity.

21. The present Appeal is filed challenging the impugned order on various grounds, which are as under:

i) The Commission has acted beyond its jurisdiction and powers under the Act by directing to reduce the PPA Tariff. Commission has no powers to reduce the PPA Tariff discovered by way of competitive bidding process undertaken pursuant to Section 63 of the Act read with Competitive Bidding Guidelines, in absence of parties having agreed to that effect.

ii) The Commission has committed an error of jurisdiction by directing change to the PPA Tariff thereby changing the terms of the PPA which was adopted and approved under Section 63 of the Act. It was not open for the Commission to change the PPA Tariff or the terms and conditions of the PPA which have been arrived at and were approved by the

Commission especially when the parties to the PPA had never sought for any such alteration.

iii) The Commission fell into error by assuming the power to review the PPA Tariff, which was adopted as per the Section 63 of the Act read with Competitive Bidding Guidelines.

iv) The Commission has acted arbitrarily, without application of mind and beyond its jurisdiction in holding that the present transaction will result in undue gain to the Appellant which was not contemplated at the time of original bidding. The role of Appropriate Commission is limited only to adoption of tariff and to evaluate whether the provisions of the Competitive Bidding Guidelines have been followed.

v) The Commission has erroneously assumed authority to examine the revised financial structuring and other nuances of the Project. While such interference was not warranted and was in fact not done during the time of adoption of tariff proceedings under Section 63 of the Act, therefore, the Commission could not have assumed such authority during the impugned proceedings. The impugned order projecting a

saving or reduction on capacity charges is completely arbitrary, illegal and devoid of any merit;

vi) The Commission has misplaced reliance in the matter of **Energy Watchdog vs. Central Electricity Regulatory Commission and Others.** It is submitted that the above referred order of the Hon'ble Supreme Court was passed in a totally different factual situation and cannot be applied to the facts of the present case.

vii) The Commission was wrong in placing reliance on the Energy Watchdog's case since no general proposition that Commission has the power to revise and re-determine tariff in public interest was laid down in that case.

viii) Similarly, the Commission has wrongly relied upon the decision of the Hon'ble Supreme Court in the matter of **All India Power Engineers Federation and Ors vs. Sasan Power Limited and Others**, reported in (2017) 1 SCC 479, as the same is out of context and inapplicable to the facts and circumstances of the instant case.

ix) It is well settled that the Regulatory Commissions while adopting tariff under Section 63 of the Act read with

Competitive Bidding Guidelines is only required to satisfy itself that the process stipulated under the Competitive Bidding Guidelines has been followed strictly and there are no deviations and the jurisdiction of the Commission cannot be expanded at a later stage on an issue which does not relate to tariff at all. Reliance is placed on the judgment of the Appellate Tribunal in the matter of **ESSAR Power Limited (Mumbai) v. UPERC & Anr.,** reported as 2012 ELR (APTEL) 0182.

x) The Commission after applying its mind and on being satisfied with the legitimacy of the process being followed had adopted the Tariff and therefore at this stage the Ld. Commission clearly fell in error by assuming the power beyond its scope to review such Tariff.

xi) The Commission failed to appreciate the law laid down by the Appellate Tribunal in the matter of **DB Power v. RERC & Others** reported as 2018 ELR (APTEL) 0251, wherein it has been held that consumers' interest cannot be the sole basis to act on an issue relating to process under Section 63 of the Act; otherwise the other provisions of the Competitive Bidding Guidelines would be held to be meaningless. It is

submitted that Section 61 of the Act provides for consumer interest and also provides for recovery for cost of electricity in a reasonable manner. Further, the Commission has failed to appreciate the settled legal position as enunciated by this Hon'ble Tribunal in the matter of **Madhya Pradesh Power Trading Company Ltd. vs. MPERC & Ors.** (Order dated 06.05.2010 passed in Appeal No. 44 of 2010).

xii) The bidding process undertaken by SBI has been under a different statutory scheme as a resolution mechanism to safeguard not only its own (and the public money) interest but also the interest of the consumers and the same cannot be interfered in a proceeding under the Act.

xiii) The Commission failed to appreciate that SBI/ lenders invoked the pledged shares of PPGCL pursuant to the financing documents, which is a recognised document under the PPA and then proceeded to bring in a new entity through a transparent competitive bid process and in view thereof, the Appellant herein has a legitimate expectation to the effect that the bid would be awarded to it as per the said competitive bidding process, particularly after being found successful in the bid and the letter of intent being issued to

them and the said bidding process did not contemplate any change in the existing PPA and/or any tariff reduction. The Commission not only diluted the sanctity of the bidding process but introduced regulatory uncertainty which militates against the objective of Act to bring private player participation and competition in the Sector.

xiv) The Commission fell into error by reducing the PPA Tariff which clearly results in post—facto change in the bid condition where certainty of PPA Tariff and associated revenue stream was the basic input for inviting the bids. The law does not permit any court/tribunal/authority/forum to usurp jurisdiction on any ground whatsoever, in case, such an authority does not have jurisdiction on the subject-matter.

xv) The Commission failed to appreciate that the PPA Tariff was the fundamental basis for arriving at the settlement amount by the bidder(s), and any subsequent reduction in the PPA Tariff post conclusion of the bid process by lenders/SBI amounts to changing the fundamental basis of the bid.

xvi) A statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all

and the State and other authorities while acting under the said Act are only creature of statute. They must act within the four corners thereof. In other words, under the guise of exercising its inherent power the commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically not provided under the Act.

xvii) The Commission failed to appreciate that the present transaction was not a wilful dilution of the shares holding by the existing promoter but it was invocation of pledge rights by the Banks and therefore, the clause 2.7.4.1 was not strictly applicable, however on the insistence of UPPCL, SBI filed the present Petition in a bona fide manner and by way of abundant caution and the scope of the Petition was very limited and confined and in all fairness the Ld. Commission ought to have allowed the transfer of the shares as prayed.

xviii) There was nothing before the Ld. Commission to intervene or interfere with the already concluded process both under the SBI Bidding and Section 63 Bidding under Act and adopted by UPPCL.

xix) There was no pleading in writing by any party in the petition before the Commission seeking for tariff reduction.

xx) The Commission in the Impugned Order has wrongly recorded that the offer of Appellant for settling the dispute with UPPCL will result in a huge benefit of about Rs. 3000/- Crores to UPPCL and Discoms, which is contrary to the statement made by the Appellant in its Additional Response dated 18.03.2019 wherein it has clearly stated that the "The offer in effect provides a benefit of approximately Rs. 3,700 crore to UPPCL and DISCOMs which translates into substantial savings to UPPCL and DISCOMs, which will in turn be beneficial to the consumers of UP". Similarly, in Para (5) (ii) of the Impugned Order amount payable to capital creditors is wrongly recorded. The Appellant vide its Additional Response dated 18.03.2019 submitted that the assumed loan amount was Rs. 6700 Crores. This clearly reflects how the Commission has lost sight of the matter and passed the Impugned Order without proper application of mind.

xxi) The Commission in paragraph 9 of the Impugned Order erroneously observed that "the table of Cash Flow submitted

with the affidavit filed by the Answering Respondent is not correctly drawn. Even though the computation of revenue has to be made on the basis of 80% availability of 90% share of UPPCL, the Respondent-Commission has wrongly computed the same. Further, the secondary fuel cost, under recovery of GCV and CSR expenditure are not part of the fixed cost and should not have been included in computation/in preparation of the cash flow of the capacity charges and related expenditure".

The Commission's observation that the secondary fuel cost, under recovery of GCV and CSR expenditure are not part of the fixed cost and should have been recovered out of Variable PPA Tariff itself shows that the Commission overlooked key terms of the PPA Tariff, under which these charges are not reimbursable under the Variable PPA Tariff. It is also pertinent to mention that all the above costs add upto Rs. 130 crore per annum and evidently exclusion of these costs by the Ld. Commission in its calculations resulted in incorrect and over-stated profitability.

xxii) The Commission erroneously in the impugned order held that "The project achieved COD on Mar 26, 2017 and as per

the above provision of the RFP the 75.01% of the equity shareholding cannot be transferred before 25.05.2022. Maximum 49% equity holding can be transferred after 26.05.2019 and 74% equity can be transferred after 25.05.2022." Evidently the Commission has erred in its reading of the Clause 2.7.4.1.

A bare reading of the said Clause shows that 2 years from the date of COD i.e. 26.05.2017 will be 25.05.2019 and after the said date 74% equity of PPGCL can be transferred. Further the restriction of maintaining minimum of 26% of equity is only for 3 years thereafter it will end on 25.05.2022. Therefore, 100% equity can be transferred by 25.05.2022.

xxiii) The Commission has wrongly observed at Para 15 (b) of the Impugned Order that when it asked the Appellant to provide financial projection post takeover of PPGCL, the Appellant provided inaccurate information by way of its affidavit dated 18.03.2019. As a matter of fact, the financial projections shared by the Appellant were based on the actual revenue stream under the PPA and costs to be incurred for operations of the plant. Further, the Commission has also stated that Appellant has not disclosed the interest on fresh

loans but the Appellant had by way of its Additional Response dated 18.03.2019 submitted calculations wherein it has indicated loan repayment over 18 years with an interest rate of 11% p.a. (which is inherently variable linked to market benchmark rates, credit rating, payment security mechanism etc. and is also lower than existing applicable rate of 12.5% p.a.).

xxiv) Even with regard to debt amount being reduced to Rs. 6000 crore against original amount of Rs. 8000 crore resulting in savings of Rs. 200 crore per annum was wrong observation of the Commission.

xxv) Finding on the issue of Increase in Normative Availability is erroneous. Normative availability increase was proposed by the Appellant such that Capacity Charge revenue from the PPA remains same for each year, while at the same time there is a per unit benefit available to UPPCL since the aggregate Capacity Charge revenue would now be required to be paid for a higher number of units (i.e. this was a revenue neutral proposal indicated from Appellant's side) but the Commission has incorrectly and arbitrarily attributed a fixed discount of Rs. 0.08 / kWh on Capacity Charges which

is not correct and sustainable. Apart from that the Appellant was confident of achieving high availability in excess of 80% owing to its world class operating practices. Hence, there cannot be an automatic fixed discount to the capacity charges.

xxvi) The Commission's finding on the issue of sale of 10% of untied power under the PPA is also incorrect. Sale of 10% merchant power under the PPA was offered to UPPCL at the PPA tariff for 5 years which would have only benefited UPPCL in reducing their average procurement cost from other higher cost PPAs. However, although UPPCL declined the Appellant's offer, the Commission wrongly opined that the Appellant would derive fixed profits from the 10% capacity by assuming that there would be guaranteed merchant off-take at 80% PLF on RTC basis from the plant. Therefore, the approach adopted by the Commission is completely erroneous and lacks proper rationale.

xxvii) The savings in net SHR were proposed to be passed on by the Appellant in a case when the same materializes (i.e. this was a cost neutral proposal indicated from Appellant's side).

It is pertinent to mention that the current norms prescribed by the Central Electricity Regulatory Commission (**"CERC"**) itself lead to a higher net SHR figure than what is permitted under the PPA. However, the Commission has incorrectly arrived at a Rs. 0.07 / Kwh fixed discount considering a much lower net SHR figure which has no basis and implies a real cost to the Appellant in case these efficiencies do not materialize. The Commission has wrongly recorded that as per UPPCL the net station heat rate should be 2294 kCal / Kwh against PPA quoted net heat rate of 2350 kCal/ Kwh. UPPCL's computation considers norm for aux consumption of 5.25% as specified under the UPERC Regulations whereas the same is actually 5.75% p.a. as per the norms specified by the CERC for the control period 2020-24. Also, at the time of the original bid, there was no correlation between the applicable auxiliary consumption and what was considered under the PPA (which was higher than CERC norm). Further, while UPPCL has highlighted norm for auxiliary consumption as prescribed under the Regulations issued by the Ld. Commission it does not consider norm for Gross SHR of 2248 Kcal / Kwh (i.e. 1.05 x 2151 Kcal / Kwh) as prescribed by the Ld. Commission, which is much higher

as compared to the gross SHR of 2174 kCal / Kwh indicated by UPPCL. Ld. Commission itself in paragraph 15(b) has incorrectly stated that CERC norm for net SHR is 2250 kCal/ Kwh (while this figure corresponds to gross SHR as per CERC norms for the control period 2014-2019). Based on the CERC norms which are applicable from FY 2020 onwards, the net SHR actually works out to 2353 kCal / Kwh, which is higher than quoted net SHR of 2350 kCal / Kwh. Further the actual design TG heat rate of the plant equipment is 1,838 kCal/kWh with boiler efficiency of 87% and permitted tolerance of 5%, the Gross SHR of the plant is 2,218 kCal/kWh, with a 7.5% auxiliary power consumption as permitted under the PPA, the Net SHR is 2,398 kCal/kWh. Considering these figures, achieving a Net SHR of 2,350 kCal/kWh is itself a challenging task. It is Appellant's understanding that projects with similar BTG technology at other sites are allowed for Net SHR from 2364 to 2383 kCal/kWh. Thus, it is evident that Ld. Commission's calculations on SHR are based on incorrect inputs and incorrect representation of the norms prescribed by it.

22. The Appellant further contends that Respondent-Commission was not justified in reducing the PPA tariff adopted under Section 63 of the Act under the assumption that it can do so in cases pertaining to change in law, force majeure or other compelling circumstances. Petition No. 1403 of 2019 was not the basis of any of such circumstances. It is also contended that Respondent-Commission was not correct in saying that it has power to revise tariff to obviate the difficulty of a generator on the ground of change in law or force majeure, since there was no difficulty as such pointed out by the Appellant.

23. According to Appellant, the action of Respondent-Commission in reducing the tariff is not only arbitrary and unjustifiable, but also it has resulted in post-facto change in the bid conditions including the bid process conducted by SBI where certainty of PPA tariff and associated revenue stream was the basic input for inviting the bids. The Appellant, therefore, contends that the reduction in tariff has vitiated the premise on which the entire bidding process was taken up; therefore, the impugned order violates settled principles laid down by the Apex Court in the matter of **Siemens Public Communication Networks (P) Ltd. v. Union of India**, *[(2008) 16 SCC 215]* and **West Bengal State Electricity Board v. Patel Engineering Co. Ltd.** *[(2001) 2 SCC 451]* .

24. The Appellant further contends that Respondent-Commission was not justified in holding that the present transaction will result in undue gain to the Appellant which was not contemplated at the time of original bidding. Appellant also contends that Respondent-Commission failed to appreciate that bidding process undertaken by SBI/lenders altogether was under a different statutory scheme in the process of resolution mechanism to safeguard not only its interest (and public money) but also interest of consumers; therefore, the Respondent-Commission ought not to have interfered the said bidding process taken by SBI.

25. The Appellant also contends that Respondent-Commission could not have changed the shareholding envisaged by introducing conditions for debt resolution process, since the entire commercial terms of the PPA are interfered with by the impugned order. In other words, the Appellant contends that, Respondent-Commission interfered with the security rights available to lenders under the financing documents.

26. According to the Appellant, Respondent-Commission acted against the well settled legal principles that statutory quasi-judicial bodies like State Commissions and creatures of statute that draw powers from the statute concerned and are authorities having limited jurisdiction cannot go beyond the scope of statute while discharging their duties.

27. Similarly, Respondent-Commission wrongly placed reliance on the judgment of the Apex Court in **Energy Watchdog vs. Central Electricity Regulatory Commission and Others** case, and contends that since the facts involved in the case on hand before the Commission was totally different from the factual background under which *Energy Watchdog* case came to be passed. Similarly, the Commission was wrong in placing reliance in **All India Power Engineers Federation and Ors. vs. Sasan Power Limited and Others** *[(2017) 1 SCC 487]*, since facts of the said case are totally different from the case on hand before the Commission, is the stand of the Appellant.

28. The Appellant further contends that Respondent-Commission failed to appreciate the well settled principle of law laid down in the case of **DB Power vs. RERC & Ors.** *[2018 ELR (APTEL) 0251]* that consumers' interest cannot be the sole basis to act on an issue relating to process under Section 63 of the Act, because other provisions of the Competitive Bidding Guidelines would become meaningless, if such consideration were to place on consumers' interest alone.

29. The Appellant further contends that in the process of exercising regulatory powers, Respondent-Commission, under Section 63 of the Act, has to see "whether the process stipulated under the Competitive Bidding Guidelines has been strictly followed or not" and "whether there

were any deviations in the adoption of the said process". Beyond this, under Section 63 of the Act, while adopting the tariff, it cannot expand the scope by holding a roving enquiry when issue does not relate to adoption of tariff at all.

30. According to the Appellant, Respondent-Commission ought not to have examined the revised financial structuring and other nuances of the project. Assuming such authority, the Commission has wrongly allowed reduction of tariff which was already adopted by it.

31. The Appellant on 18.03.2019 clearly explained factual scenario with relevant applicable regulatory framework and explained that the apprehension/assumption of the Commission was not justified. The Appellant further contends that the additional response dated 18.03.2019 placed by the Appellant, so also arguments addressed on 25.03.2019 were not properly appreciated by the Respondent-Commission.

32. With the above submissions, the Appellant had sought for the following reliefs.

"a) Allow the present Appeal and set aside the Impugned Order dated 29.03.2019 passed by the Uttar Pradesh Electricity Regulatory Commission in Petition 1403 of 2019 to the

extent and in so far as it imposes the arbitrary and unreasonable pre-conditions for grant of waiver/approval to the Opposite Party No. 2 vide paragraph 16 (a) to 16 (f) of the Impugned Order;

b) Approve the transfer of 75.01% equity shareholding and 100% preference shareholding of Respondent No. 3 PPGCL in favour of the Appellant Renascent Power Ventures Private Limited; and/or

c) Pass any other order(s) as this court may deem fit in the interest of equity and justice."

33. The 2nd Respondent-SBI in its reply to the main Appeal contends as under:

SBI in its reply challenges the impugned order only to the extent that it imposes precondition while granting waiver/approval to the change in shareholding of 3rd Respondent by reducing the approved tariff on the ground that it is arbitrary and unreasonable. This statement of SBI is on the ground that the 1st Respondent has no jurisdiction to pass such direction since the Respondent-Commission wrongly assumed that the proposed transfer of equity shareholding of the 3rd Respondent would impact the consumers of the State of Uttar Pradesh.

34. According to SBI, the 1st Respondent was required to just approve the change in ownership of the 3rd Respondent, as a part of debt resolution process initiated by SBI as a lead Bank (lender) and pledging of the shares of the 3rd Respondent Company. SBI is the largest public sector bank having headquarters at Mumbai.

35. SBI further states that the project was awarded to JAL pursuant to a competitive bidding process undertaken by the 4th Respondent on behalf of procurers under RFP. It was a procurement of power on long term basis, based on domestic fuel to be set up at Tehsil Bara, District in Allahabad. It was for three units having 660 MW capacity each. The tariff was discovered through competitive bidding process in accordance with the guidelines for the same. As a matter of fact, 1st Respondent had approved and adopted the tariff discovered through bidding process in its Order dated 27.08.2010 in Petition No. 645 of 2010.

36. According to SBI, it is the lead Bank having a consortium of 18 banks and financial institutions and it is the largest lender to the 3rd Respondent. The 3rd Respondent availed various loans from different banks and financial institutions and SBI is the largest lender. The credit facility was secured by pledging of equity shares and preference shares of 3rd Respondent which could be described as controlling shareholder.

37. Further, SBI contends that the 3rd Respondent suffered significant financial crisis and defaulted in repayment of its debt obligation to various lenders which resulted in treating the account of 3rd Respondent as a Non-Performing Asset (NPA). Therefore, the lenders lead by SBI, in order to recover their dues and salvage the project, invited the bids through a transparent bidding process to replace the existing promoters/sponsors of 3rd Respondent through transfer/sale of the pledged shares. SBI also submits that one Resurgent Power emerged as the successful bidder and consequently, the lenders, Resurgent Power, 3rd Respondent, and the Appellant entered into SPA dated 14.11.2018 in order to transfer 75.01% equity shareholding/ownership of 3rd Respondent in favour of the Appellant. The outer limit of completion of sale of such shares was mutually agreed between the parties in terms of SPA is 30.06.2019 and now extended up to 30.09.2019.

38. SBI further contends that the procurers i.e., 4th to 9th Respondents, when sought approval of the proposed transaction, was directed to approach 1st Respondent, since 1st Respondent had approved the bid documents and adopted tariff for the project under Section 63 of the Act.

39. The sole purpose of Petition No. 1403 of 2019 was to complete the debt resolution to salvage the project by bringing a strong sponsor/promoter (both financially and technically), which would be able

to provide the requisite financial and operation support to 3rd Respondent, so that the project in question could run in a smooth and sustainable manner and this would enable the lenders to recover their debts is the stand of the SBI.

40. According to SBI, the 1st Respondent asked 4th Respondent during the proceedings to explain how the interest of DISCOMs and the consumers of the State would be benefitted by the proposed transaction. 4th Respondent accordingly explained what all the benefits that could accrue to the DISCOMs as well as consumers and requested 1st Respondent to pass necessary and appropriate orders. 4th Respondent, at no point of time, sought any reduction in the tariff adopted for the project as precondition for approving transfer of 75.01% of equity shareholding of 3rd Respondent. However, 1st Respondent proceeded to reduce the tariff by Rs. 0.14 per unit while approving the transfer of equity shares of 3rd Respondent and this reduction of tariff, according to SBI, is unilateral and without jurisdiction. The opinion of the 1st Respondent-Commission that the proposed shareholding transfer would result in undue gains to the Appellant; therefore, the Appellant has to pass on some benefit/concession to consumers is erroneous.

41. 2nd Respondent-SBI further contends that prior to the impugned order, on 06.03.2019, Respondent-Commission did observe in its

proceedings that by the proposed transaction of transfer of 75.01% equity share holding of the 3rd Respondent would result in the entire debt burden of PPGCL to go off the books. It also opined that with zero debt, the element of interest on loan, which is part of fixed cost, would become zero. In response to the said erroneous observation, SBI clarified that the proposed transaction does not result in the entire debt burden of 3rd Respondent to go out of books and it is only to ensure that the project would run smoothly and would be sustainable for future and the lenders would be able to recover best value of the outstanding debts. SBI also submitted that the offers for debt resolution for 3rd Respondent were to ensure the best possible realisation of outstanding debt and minimise any sacrifices or hair-cuts that would be suffered by lenders.

42. SBI further contends that in the competitive bidding process for transfer/sale of shares, the 2nd Respondent-SBI and the project lenders had received optimal and market discovered commercial offer for acquiring 75.01% of equity shares of 3rd Respondent. It further submits that the said offer was much better than the independent valuation received by the 2nd Respondent-SBI for the outstanding debt of the entire lenders.

43. According to SBI, all the prospective bidders including the Resurgent Power had submitted financial offers only by taking into

account the tariff already adopted by the 1st Respondent in pursuance of Section 63 of the Act. Such tariff was in the interest of consumers when it was discovered and there was no need or scope for further enquiry into the cost of generation or the remaining debt in the books of 3rd Respondent. If the bidders including the Resurgent Power were aware of any possibility of reduction in the already adopted tariff, the price discovered for the pledged shares in the bidding process would have been much lower resulting in the project lenders suffering much bigger loss adding to their outstanding debts.

44. 2nd Respondent-SBI further submits that any reduction in the adopted tariff at this stage would vitiate the transparent bidding process undertaken by the project lenders. SBI approached 1st Respondent as a responsible public sector organization seeking approval of change in ownership by way of abundant caution. SBI approached 1st Respondent for approval of change in shareholding of 3rd Respondent, since it is not a case of voluntary sale of shares or voluntary exit by the existing promoters/sponsors. Strictly speaking, the terms and conditions rather restrictions pertaining to change of shareholding within five years of COD would not even apply to a change in ownership initiated by the lenders. Therefore, the exercise of 1st Respondent in reducing the tariff by Rs. 0.14 is arbitrary and without jurisdiction.

45. 2nd Respondent-SBI further contends that the 1st Respondent was set up by Government of Uttar Pradesh as an autonomous body corporate under Section 82 of the Act. Its primary duty is to regulate power sector in a manner that uninterrupted and cost effective electricity is available to each and every consumer of State of Uttar Pradesh. 1st Respondent totally ignored the fact that the Petition filed by SBI was not for determination of tariff, but it was approval of 1st Respondent to the proposed sale of shareholding of 3rd Respondent. The exercise in question was not only to help the project lenders to alleviate the financial stress but also to benefit the stakeholders including distribution companies and consumers of the State of Uttar Pradesh. It was part of debt resolution effort made by the lenders of the project. But the 1st Respondent proceeded on an erroneous premise holding that undue gains were provided to Appellant; therefore, the Appellant must give some discount to the consumers of the State of Uttar Pradesh. This reasoning is totally misplaced is the stand of SBI.

46. The relaxation or waiver sought in the Petition (prior to completion of specified period under RFP) would not have any impact on the rights and obligations of respective parties under the PPA especially the tariff already adopted by the 1st Respondent in terms of Section 63 of the Act. 1st Respondent was expected to discharge its powers within the

statutory boundaries and it could not have undertaken the exercise of redetermination of tariff which was already adopted by it. 1st Respondent should have considered the fact that the unilateral tariff reduction would go to the very root of the bids invited by SBI to resolve the nonperforming account of 3rd Respondent and recover the best value for the pledged shares.

47. According to SBI, once the approval for change in shareholding of 3rd Respondent is in place, the Appellant needs to decide whether it is ready to complete the transfer/sale transaction within the mutually agreed period. Beyond the said date, lenders could not be put in any kind of restraint in exercising their rights as secured creditors. The reduction of tariff as a condition for waiver/approval by 1st Respondent would cause grave injustice to the interest of SBI and other project lenders.

48. With the above submissions, SBI sought for interference with the impugned order.

49. 4th to 9th Respondents also place their response to Appeal Memo. The answering Respondents deny assertion on behalf of the Appellant with respect to quantification of any financial gain to the answering Respondents since they had no occasion or question doing micro

financial calculation vis-à-vis the Appellant while filing the reply before UPERC.

50. According to 4th to 9th Respondents, the Appellant has offered a proposal of settling all existing disputes between UPPCL/DISCOMs and PPGCL, which was beneficial to both at the time of giving no objection for transfer of equity. It was mutually understood that it would end various litigations existing between the answering Respondents and Prayagraj Power Company Ltd. The answering Respondents are also foregoing their right to claim liquidated damages against PPGCL for installing second ICT at Prayagraj Thermal Power Station.

51. According to 4th to 9th Respondents, SBI, the 2nd Respondent being the lead lender of PPGCL intimated the answering Respondents about the fact that PPGCL was unable to fulfil its financial obligations made under loan facility. Therefore, lenders through bid process had selected the Appellant for transfer of pledged shares of PPGCL.

52. Further, 4th to 9th Respondents submit that in the light of the specific Clause 2.7.4.1 of RFP, it would therefore, be appropriate to approach the 1st Respondent even with regard to change in ownership being brought about by the course of action of lenders. Apparently, lenders have not followed certain terms and conditions under the PPA which gives right to the lenders to exercise right of substitution as per

Article 16 read with Schedule 17 of the PPA. Appellant being the successful bidder who entered into an MOU with the lenders; therefore, it was incumbent upon the lenders and the Appellant to secure necessary permission from the 1st Respondent for transfer/sale of pledged shares of the 3rd Respondent.

53. The answering Respondents did submit before the 1st Respondent-Commission in their affidavit that the larger public interest and the benefit that the consumers are likely to derive from the transfer of shares to a company which is creditworthy group and therefore, it is able to provide better management to PPGCL. They only mentioned better availability of electricity which is possible. The answering Respondents being a company of Government of Uttar Pradesh have to consider interest of the consumers, therefore, their decisions have to be necessarily in larger public interest.

54. So far as contentions raised by the Appellant in the Appeal, the answering Respondents state that the Petition of the lenders was filed under Section 86 (1) (f) of the Act and not under Section 63 of the Act; therefore, it was not a case of adoption of tariff where the 1st Respondent-Commission had to merely look into the procedure followed under the bidding process and the bid submitted by the bidders whether it is transparent, publicity and participation. It is also incumbent upon the

Commission concerned under Section 63 of the Act to see whether the discovered bid price is in tune with the market rate or not. Since proceedings under Section 63 of the Act were completed long back and having regard to change in situation, the answering Respondents contend that no reliance could be placed to the fact that the 1st Respondent, while approving the change of ownership under the changed circumstances, cannot look into the impact on tariff in larger public interest. The guidelines under Section 63 of the Act issued by Government of India are not static in nature.

55. 4th to 9th Respondents further contend that the 1st Respondent-Commission is not only an adjudicatory body but it is also a Regulatory Authority to consider matters with respect to generation, distribution and transmission. Therefore, they contend that while fixing appropriate tariff by Regulatory Authority either through the process of Section 62 or Section 63 of the Act, the paramount consideration would be larger public interest apart from the fact of ensuring maintenance of transparency and fairness in the procurement process.

56. Further, they contend that the 1st Respondent-Commission not only adjudicates the matter but also takes care of the fact that generation, distribution and transmission company while charging the rate of tariff are not only able to recover the cost of capital investment

but also cost of maintenance and operation apart from reasonable profits. Therefore, higher degree of duties cast on the 1st Respondent to ensure the interest of consumers who have limited representation.

57. The Respondent-Commission cannot be a mere spectator to the proposal of sale of shareholding of PPGCL. The Commission must be sensitive to the rights and interest of consumers and must look into the circumstances as to whether the new generator would be in a position to give certain benefits which may ultimately benefit consumers at large, since Government of Uttar Pradesh has facilitated the easy procurement of land apart from providing other benefits to PPGCL (a Special Purpose Vehicle).

58. 4th to 9th Respondents further contend that the 1st Respondent-Commission cannot be treated as mere post box to give approval to the petition. The guidelines of Government of India issued under Section 63 of the Act cannot be misinterpreted to mean that appropriate Commission has no role to play post bidding. The 1st Respondent-Commission being an expert body was justified in calling for details from the Appellant with respect to future profitability, since the Appellant was not the original bidder. Therefore, the 1st Respondent-Commission applied its best judgment to conclude that apart from the gain working out in favour of the Appellant, it would be just and appropriate to reduce

the tariff by Rs. 0.14 per unit in capacity charges, since the benefit from the present transaction works out on the capital invested in the project.

59. With the above submissions, 4th to 9th Respondents sought for dismissal of the appeal of the Appellant.

60. The points that would arise for our consideration are –

(a) "Whether the 1st Respondent-Commission was justified in reducing the tariff by Rs. 0.14 as a condition for sale/transfer of shareholding of 3rd Respondent in favour of the Appellant"?

(b) "Whether such act of the 1st Respondent-Commission is beyond the scope of its jurisdiction, since it had already adopted the tariff which emerged from competitive bidding process under Section 63 of the Electricity Act, 2003"?

61. Learned senior counsel, Mr. Basava Prabhu S. Patil, arguing for the Appellant, apart from reiterating the contentions raised in the Appeal memo proceeded to argue that there is clear error of jurisdiction apart from error of facts while passing the impugned order. Contending that the 1st Respondent-Commission had no authority to change the PPA tariff since it was already adopted by the Commission, the learned senior

counsel submitted that the 1st Respondent-Commission has expanded its jurisdiction by deciding an issue which does not relate to tariff at all. For this proposition, the Appellant placed reliance on **ESSAR Power Limited (Mumbai) vs. UPERC & Anr.** *[reported as 2012 ELR (APTEL) 0182]*.

62. Learned senior counsel contends that the 1st Respondent acted beyond its scope by reviewing a tariff which was already adopted. There was no justification to evaluate the financials of the process undertaken by the 2nd Respondent-SBI, since such exercise was not undertaken while adopting the PPA tariff. For this, the Appellant placed reliance on this Tribunal's judgment in **Madhya Pradesh Power Trading Company Ltd. vs. MPERC & Ors.** *[dated 06.05.2010 passed in Appeal No. 44 of 2010]*.

63. According to the learned senior counsel, the 1st Respondent had to consider different scenarios and it was not open for the Commission to evaluate financials of the process adopted by SBI at this stage.

64. He further submits that the adoption of expeditious resolution of a stressed asset by the 2nd Respondent-SBI, a lead Bank representing all lenders of the project, will not amount to vesting of a jurisdiction in the 1st Respondent-Commission which otherwise does not exist or available under the Act.

65. Learned senior counsel for the Appellant further submits that the approach of the 1st Respondent-Commission placing reliance in the matter of **Energy Watchdog vs. Central Electricity Regulatory Commission & Ors.** *[Order dated 29.10.2018]* was not justified since the Hon'ble Supreme Court, in the said case, was referring to concerned generators who (were selling power under Section 63 of the Act) were allowed relief to approach Central Electricity Regulatory Commission for approval of the proposed amendments in the Power Purchase Agreements. However, the 1st Respondent-Commission ought not to have applied the same approach pertaining to change in ownership which is an outcome of financial distress of the project.

66. On similar grounds, learned senior counsel contends that placing reliance in the matter of **All India Power Engineers Federation's** case is also out of context and inapplicable to the facts and circumstances of the case in hand.

67. Learned senior counsel for the Appellant also brought to our notice the alleged errors of facts with reference to quantum of equity shares and preference shares in the impugned order pertaining to Clause 2.7.4.1. Since the said Clause clearly indicates that after two years from the date of COD, 74% of equity of 3rd Respondent can be transferred. The restriction pertaining to maintenance of minimum shares of 26% of

equity is only for three years which would end on 25.05.2022. Therefore, after 25.05.2022, 100% equity can be transferred.

68. The Appellant through its response to the query by the 1st Respondent-Commission filed information pertaining to Cash Flow.

69. The Appellant further contends that observation of 1st Respondent-Commission that recovery of GCV and CSR expenditure are not part of the fixed cost and should have been recovered out of variable PPA tariff itself, clearly indicates that the 1st Respondent-Commission overlooked key terms of the PPA tariff under which secondary fuel cost under recovery of GCV and CSR cannot be reimbursed under variable cost. By considering the above cost, which amounted to Rs.130 crores per annum, and exclusion of these costs in its calculation the 1st Respondent-Commission arrived at, overstate profitability of the Appellant.

70. According to the Appellant financial projections shared by it were based on actual revenue stream under the PPA and costs to be incurred for operation of the plant. Unfortunately, the Respondent-Commission itself erred on certain assumptions and wrongly concluded that the Appellant's affidavit is inaccurate. Similarly, the Respondent-Commission has wrongly stated that the Appellant has not provided the interest to be paid by them on fresh loans though by additional response

dated 18.03.2019, the repayment of loan scheduled for 18 years was shown and the interest on these 18 years is at the rate of 11 % p.a. According to the Appellant, this variable linked to market bench mark rates, credit rates and also payment mechanism. They also contend that it is lower than the existing applicable rate of interest i.e., 12.5% p.a.

71. They also contend that the Respondent-Commission wrongly computed undue gain of Rs.0.39 /kWh to be accruing to the Appellant and therefore concluded that 35% of the said undue gain, which comes to Rs.0.14/kWh has to be passed on to UPPCL. This assumption by the Respondent-Commission was totally on account of non-application of mind. The Respondent-Commission totally ignored the relevant facts, some of which are as under**:**

The Respondent-Commission was wrong in opining that debt amount has reduced to Rs. 6000 crores as against original debt of Rs.8000 crores. Consequent errors that flowed in the opinion of Respondent-Commission are saving of Rs.200 crores per annum, which again resulted in savings of Rs.0.17/kWh. Respondent-Commission ignored the fact that total liabilities that are to be cleared by the Appellant not only include Rs.6000 Crores debt but also additional amounts of Rs.1073 crores which has to be paid to capital creditors;

Rs.450 crores of additional expenditure to maintain and keep the plant alive and additional working capital debt of Rs.700 crores to be raised. All these amounts aggregate to Rs.8223 crores. Respondent-Commission totally ignored the additional amount of Rs.2223 crores over and above the amount of Rs.6,000 crores, the existing debt. As a matter of fact, Rs.2223 crores is an additional cost of Rs.245 crores per annum, which completely offsets hypothetical gains of Rs.200 crores per annum, which was projected by Respondent-Commission.

72. Similarly, according to the Appellant, the Respondent-Commission ignored the debt reduction that should have happened in the first three years of the project through repayment (when the quoted capacity charges were the highest) wherein the original debt was Rs.8100 crores which should have been reduced to Rs.6700 crores. This amount Rs.6700 crores is the correct figure which should have been used for comparison with the total liabilities of Rs. 8,223 crores which has to be serviced by the Appellant.

73. Similarly, the Respondent-Commission ignored the quantum of sustainable debt assessed by an independent exercise carried out on behalf of the lenders (which was lower than the quantum offered by the Appellant), based on the existing PPA Tariff. They also point out that the Respondent-Commission's finding on the issue of increase in

normative availability is erroneous. The Appellant proposed normative availability increase, so that the Appellant could remain neutral, while UPPCL would have had a notional benefit for each unit of energy supplied under the PPA, because of the increase in normative availability. The capacity charge revenue from PPA remains unaltered for each year while per unit benefit would accrue to UPPCL, since UPPCL is required to pay the same aggregate capacity charge revenue for a higher number of units. Unfortunately, the Respondent-Commission, according to the Appellant, has incorrectly and arbitrarily attributed fixed discount of Rs.0.08/kWh on capacity charges, which is incorrect and not sustainable. The Appellant is confident of achieving higher availability in excess of 85% (normative availability) since it has world class operating practices. Therefore, it has a revenue neutral effect on the project.

74. The Appellant further contends that the Respondent-Commission's opinion about fixed annual benefit of Rs.0.07/kWh by assuming hypothetical profits from the untied capacity of the plant is erroneous and wrong. Sale of 10% merchant power under the PPA was actually offered to UPPCL at the PPA tariff for 5 years, which would benefit UPPCL in reducing their average procurement cost by purchasing energy under other higher cost PPAs. However, the Respondent-Commission failed

to consider that the UPPCL has declined to accept this offer of the Appellant. It wrongly proceeded to opine that the Appellant would derive fixed profit from the 10% capacity by assuming that there would be guaranteed merchant off take of power at 80% PLF. The figure of Rs. 80-90 crores per year was the indicative savings, for which UPPCL would have given their own estimated cost of power procurement. The Respondent-Commission wrongly implied that the Appellant would make fixed profits with certainty from sale of untied capacity.

75. Similarly, the Respondent-Commission failed to appreciate the savings in net SHR were proposed to be passed on whenever the same materializes. The current norms prescribed by CERC indicate that there would be higher net SHR figure than what is permitted under the PPA in question. But, Respondent-Commission erroneously arrived at Rs.0.07/kWh fixed discount to the Appellant in case the efficiencies do not materialise, therefore, they have arrived at wrong computation of station heat rate figure as well. Based on CERC norms for the control period of 2020-2024, which are applicable from FY 2020 onwards, the net SRH rate works out to Rs.2353 kCal/Kwh which is higher than quoted net SHR of 2350 kCal / Kwh. As a matter of fact, the actual design TG heat rate of the plant equipment is 1,838 kCal/kWh with boiler efficiency of 87% and permitted tolerance of 5%, which results in Gross

SHR of the plant at 2,218 kCal/kWh, with a 7.5% auxiliary power consumption as permitted under the PPA. The net SHR comes to Rs. 2,398 kCal/kWh. Therefore, achieving a net SHR of Rs.2350 kCal/kWh itself is a challenging task. The Appellant's understanding is that similar projects with BTG technology at other sites are allowed for Net SHR between 2364 to 2383 kCal/kWh. Based on incorrect inputs and incorrect representation of the norms prescribed by it, the Respondent-Commission has arrived at wrong calculation even on net SHR, is the stand of the Appellant.

76. The Respondent-Commission's stand through its arguments is as under:

The petition presented before the Respondent-Commission was for approval of change in controlling shareholding of PPGCL. The project achieved COD on 26.05.2017. As per the restrictions contemplated under PPA provision and RFP provision with regard to transfer of more than 49% of equity shareholding prior to 26.05.2019, required approval of the State Commission is necessary for waiver of such restriction or condition provided in RFP and PPA when there was a proposal to transfer 75.01% equity holding of PPGCL to the Appellant.

77. According to the Respondent-Commission the impugned order is totally based on the consumers' interest on the basis of offer/discount

given by the Appellant itself. The Respondent-Commission opined that the Appellant was going to get huge hair-cut on the original cost of the project of Rs.10,780 crores, which includes Rs.8000 crores by way of loan and rest by way of equity. The Respondent-Commission adopted the tariff based on the above capital cost. When the plant was sold at a huge hair-cut of Rs.6000 Crores, saving of Rs. 200 Crores per annum by way of interest on loan amount and the said reduction translates to Rs.0.17 per unit in capacity charges, the Commission therefore was justified in opining that total gain to the Appellant as indicated by the Appellant itself would be Rs.0.39 per unit. In terms of UPERC (Terms and condition of Generation Tariff) Regulation, 2014, the Respondent-Commission was justified in sharing the gain between Appellant and the Consumers in the ratio of 65:35. Accordingly, it was calculated at Rs.0.39 per unit and the reduction as benefit to the consumers was arrived at Rs. 0.14 per unit.

78. According to the Respondent-Commission, paramount consideration has to be to protect the interest of the consumers and supply of electricity to all areas. Section 61 of the Act refers to tariff regulations; under what terms and conditions tariff has to be derived and the guidelines are provided at Section 61 (c) and (d) of the Act. According to the Appellant, Section 63 of the Act provides procedure to

be followed by the Commission while determining the tariff by it in a bidding process. Similarly, Respondent-Commission is guided by Sub-Regulation 1(b) of Section 86 of the Act. According to the Respondent-Commission it continues to protect the interest of consumers on one hand and the generators on the other.

79. In the case on hand, adopted tariff was Rs.3.02 per unit, which was determined under Section 63 of the Act. The Respondent-Commission places reliance on paragraphs 19 and 20 of the decision in the case of **Energy Watchdog vs. CERC** *[(2017) 14 SCC 80]* on how regulatory commissions must act, when the guidelines are not provided, while discharging regulatory powers of the respective commissions. Therefore, according to the Respondent-Commission, it is empowered to alter the bid documents/PPA, if there is change in situation which is not covered by the guidelines of the Central Government. Since the controversy raised in this appeal is pertaining to change of ownership with significant changes in the finances of the project resulting in reduction in original project cost, there is requirement on the part of the Commission to restructure the tariff based on capital structure of Rs.6000 crores as against original loan of Rs.8000 crores. Therefore, it was justified in opining that the Appellant saves about Rs.200 crores per annum by way of interest.

80. Similarly, Respondent-Commission found that right to sell 10% power (untied capacity) in the market at rate higher than what is admissible in PPA would result in profit to the Appellant. Therefore, the Commission was justified to reduce the rate by 14%. The Commission rightly placed reliance in the case of **All India Power Engineers Federation and Others.**

81. Since Respondent Bank sought for waiver or relaxation of clauses in RFP and PPA, which restricted the transfer of shareholding before completing certain period, the Respondent-Commission was justified in opining that there has to be sharing of profits between Appellant and the consumers.

82. They further contend that though there is a provision for substitution of seller upon occurrence of default on the part of seller, the lenders have chosen to sell the share holding of the default seller discarding its right seeking substitution of seller for the rest of the period of PPA. Further, since the sale is at huge discount of Rs.5000 crores, the Respondent-Commission has rightly exercised its regulatory power to protect the interest of the consumers. They refer to paragraph 15 of the impugned order to contend that in terms of Section 61 of the Act, recovery of cost of generator includes reasonable return on equity and since the new incumbent would be benefited beyond what is

contemplated under Section 61 of the Act, Respondent-Commission was justified to interfere with the tariff and reduce the same while granting approval for sale/transfer of shareholding of the debtor. They further contend that even in **Sasan Power Limited'**s case, waiver of some of the provisions of PPA was sought. Hon'ble Supreme Court at Paragraph Nos. 25 and 31 of the judgment opined that since the said waiver results in affecting public interest, the Commission has to intervene. Since the Appellant submitted to the State Commission by placing reliance on provisions of Section 86 (1) (b) of the Act, the Respondent-Commission, after analysing the additional information supplied by the Appellant in its Response dated 26.03.2019 pertaining to increase in normative availability rightly opined with regard to reduction in station heat rate and off-take of additional power beyond contracted capacity of UPPCL.

83. They further contend that one Shri Avdhesh Verma, a consumer representative appeared before the State Commission on 07.03.2019 and pleaded that Respondent-Commission should not allow transfer of shares to new incumbent unless there is reduction in tariff, since huge hair-cut is taken by the Appellant. At Paragraph Nos. 5 and 7 in the proceedings dated 07.03.2019 those observations are made.

84. Based on the Appellant's submissions, the Respondent-Commission has rightly concluded that total gain works out to Rs.0.39 per unit and therefore, the breakup of the said profit to Appellant and consumer is justified.

85. They also contend that non-escalable capacity charges of Rs. 0.14 per unit was to be reduced in terms of the PPA and the same is justified. According to the Respondent-Commission, interest of the Appellant is also protected by allowing it to retain profit of 65% of the total gain of Rs.0.39 per unit.

86. Lastly, they contend that the argument of the Appellant that the adoption of tariff under Section 63 of the Act cannot be interfered or altered once it is adopted, is not correct.

87. Per contra, 2nd Respondent-SBI in its written arguments contends that the relief sought in the Petition before the Respondent-Commission was limited to relaxation/waiver of RFP and PPA conditions. The jurisdiction of the Respondent-Commission was limited to the said relief set out in the Petition. None of the Respondents sought reduction of tariff, which was already adopted by UPERC, before the Respondent-Commission. Therefore, the Respondent-Commission exceeded its jurisdiction by reducing tariff by Rs. 0.14 per unit while granting approval/waiver of certain Clauses in RFP and PPA. The contention

made on behalf of the Commission about the new incumbent being benefitted beyond what is contemplated under Section 61 of the Act is erroneous. They reiterate their stand that once tariff is discovered by adopting the guidelines evolved by Government of India under Section 63 of the Act by order dated 27.08.2010, the Respondent-Commission has no jurisdiction to relook into the rate of discovered tariff and reduce the same totally ignoring several relevant facts.

88. They further contend that Section 63 of the Act is not like Section 62 of the Act, since under Section 62, tariff of the project is determined based on the capital cost of the project, debt and equity amounts invested. There is no such examination of capital cost or capital structure of the project when tariff is discovered through competitive bidding, especially once it is adopted by the appropriate Commission. Such examination of capital cost or capital structure of the project was totally beyond the scope of the Petition filed by the 2nd Respondent-SBI seeking waiver/relaxation imposed in terms of RFP and PPA for transfer of shareholding of the project proponents.

89. Since tariff was discovered under Section 63 of the Act, neither UPERC nor UPPCL would have any right to return that would be or could be earned by the original bidder being JAL. In the absence of any figure determining the return that was available to original bidder, the

exercise of comparison between the alleged return and the putative return that would accrue to the Appellant while acquiring the equity shares of 75.01% belonging to PPGCL would not arise is the stand of 2nd Respondent-SBI.

90. With regard to the proposal for transfer of 75.01% of equity shares of PPGCL, the Appellant, apart from payment of Rs.6000 crores to the project lenders (term loan and working capital loan) made commitment to settle liabilities towards capital creditors of PPGCL and CAPEX commitment which comes to Rs.1073 crores. Similarly, additional capital expenditure of Rs.450 crores and additional working capital loan of Rs.700 crores are not taken into consideration by the Respondent-Commission. Therefore, total financial commitment made by the Appellant at Rs.8223 crores as against the proportionate figure of Rs.8085 crores, original project cost relied upon by the UPERC would have led to proper consideration of the matter. Unfortunately, wrong figures were considered by the Respondent-Commission and arrived at wrong conclusion that the Appellant would earn higher return than what was available to the original bidder.

91. They further submit that the Respondent-Commission also failed to appreciate that post-acquisition of shareholding by the Appellant, the project lenders will own 13.5% equity shares of PPGCL; therefore, they

would retain the ability to partly benefit from any improvement in financial performance of PPGCL. They further contend that there was no justification for the Respondent-Commission to consider as to what capital cost or return on equity was envisaged or contemplated at the time of adoption of tariff. It wrongly assumed that consumers' interest will be adversely impacted if all the terms and condition of PPA including tariff remains unaltered. In spite of Section 63 process being adopted for adoption of tariff, Respondent-Commission erroneously exercised its regulatory powers beyond the scope of the Petition by placing reliance on the above said two decisions - **SASAN Power** and **Energy Watchdog's** cases. Since the facts of those two cases are quite different from the facts or controversy involved in the Appeal on hand, the impugned order, according to SBI, seeks to penalise the prompt corrective action taken by the project lenders to salvage the project by inducting a technically and financially credible sponsor to operate and manage the project for the remaining period of PPA.

92. They also brought to our notice that as a matter of fact, UPPCL admitted in its affidavit before UPERC that such change in promoter/sponsor of the project would be in the interest of consumers of the State of Uttar Pradesh, since the project would be able to operate consistently at or above normative PLF which results in consumers of

Uttar Pradesh to receive one of the cheapest source of electricity. Despite this stand of UPPCL, the Respondent-Commission passed the impugned order which is unreasonable and arbitrary.

93. Similarly, the Respondent-Commission failed to appreciate that project lenders have right to exercise their right envisaged in the documents of pledge of PPGCL's shares to recover the best value from the pledged shares, which was necessary for liquidation of their outstanding debts of approximately Rs.11900 crores. PPGCL failed to make payments of interest and scheduled repayment of principle amount to the lenders from February 2017 onwards, which resulted in treating the account of PPGCL as NPA.

94. The Respondent-Commission failed to appreciate the distinction between sustainable and unsustainable debts. The offer made by Resurgent Power was the best offer the project lenders received after two rounds of bidding process, since the Resurgent Power represented that the sustainable debt can be serviced by the cash flows of PPGCL receivable from the tariff already adopted by UPERC. The balance debt of Rs.5000 Crores becomes unsustainable debt. The cash flows on the basis of PPA i.e, the adopted tariff would not be sufficient to service or ensure repayment of this portion of the debt. Therefore, the opinion of the Respondent-Commission about wind fall or unwarranted gain or

saving by the new promoter has no locus to stand and it is nothing but a speculative exercise.

95. The Respondent-Commission ought to have considered that the loans advanced by the lenders did not result in any tariff increase under the PPA. It is not a case where additional loans over and above the loan of Rs.8000 crores made by the lenders resulted in an increased tariff burden on the consumers and therefore the Respondent-Commission was bound to reduce the tariff. If the adopted tariff under PPA was sufficient to service the debts availed by PPGCL, the account would not have become NPA, thereby need for enforcing the salvage of debt by selling collateral security which are in the form of shares would not have arisen at all is the stand of 2nd Respondent-SBI.

96. The Respondent-Commission ought to have appreciated the fact that on account of failure of PPGCL to repay interest and principle amount to the lenders in accordance with the terms of financing documents, the whole problem has arisen. If payments were made as accrued, Rs.8100 crores debt would have been reduced to Rs.6700 crores. As on 31.03.2019 the commitment made by the Appellant to purchase 75.01% equity shares of PPGCL is well in excess of Rs.6700 crores. The unsustainable portion of the debt can never translate into unwarranted gain for the new promoter/sponsor in the above

circumstances. There is no gap in the standard bidding guidelines framed by the Central Government, which needed to be filled up by the Respondent-Commission while discharging its regulatory powers. The entire controversy arose since the project lenders were forced to enforce their rights based on the pledged documents for salvaging their debt. It is not a situation where there was voluntary exit by the existing promoters. The Petition in question was filed by project lenders by way of abundant caution, so that no scope for any dispute pertaining to seller event of default under the PPA. As a matter of fact, the imposition of tariff reduction by Respondent-Commission in case of Section 63, PPAs would actually affect debt resolution efforts made by project lenders. This would affect other lenders of different projects, therefore, impugned order has created a regulatory un-certainty upsetting legitimate expectation of the lenders/bidders that the sanctity of the bidding process under Section 63 of the Act would be maintained.

97. According to 2nd Respondent, there is approximately 40 GW of thermal power assets facing financial stress with project cost of Rs.2.91 lakh crores, the impact of the impugned order would lead to disastrous and significant roadblocks for debt resolution especially in the process of revival of these projects suffering under debt burden. In all, projects facing cost overrun or different forms of financial stress would attract

bidders who would come forward to offer discount on the existing debt levels and could potentially be subjected to reduction, if impugned order is sustained; therefore, they also refer to proposal of Ministry of Power advising DISCOMs, CIL and PGCIL not to cancel PPAs, FSAs, environmental clearance etc. even if the project is referred to NCLT or is acquired by another entity subject to the provisions of PPA and/or applicable rules.

98. The tariff adopted under the project is one of the cheapest sources of power in the State of Uttar Pradesh. The new promoter has to invest additional amounts in the form of CAPEX and working capital to enable the project to operate at a higher PLF; therefore, if average per unit cost of electricity is reduced by impugned order, it would affect the entire economics of the project. In terms of order dated 07.05.2019 passed by CERC wherein the CERC has fixed the national average power purchase cost for FY 2018-19 at Rs.3.60 per unit. The levelised tariff of the project in question under PPA is Rs.3.02 per unit, which is much lower and reasonable compared to national average power purchase cost. Therefore, the opinion of the Respondent-Commission to impose unilateral and arbitrary tariff reduction by reducing tariff by Rs. 0.14 per unit is nothing but arbitrary and illegal.

99. With the above arguments, SBI submitted that the exercise adopted by the Respondent-Commission is beyond the scope of the petition filed by the Appellant; therefore, it warrants interference of this Tribunal with the impugned order.

REASONING AND DECISION

100. The 2nd Respondent-SBI approached UPERC/Commission seeking waiver/relaxation in Petition No. 1403 of 2019. The following are the reliefs sought in the said petition:

a. *"Approve the transfer of 75.01% equity shareholding and 100% preference shareholding of the Respondent No. 7 (earlier held by JPVL) in favour of Respondent No. 8; and*

b. *pass such further orders or directions as this Hon'ble Commission may deem just and proper in the circumstances of the case*."

From the above, it is seen that it's not 100% shareholding of PPGCL that was agreed to be purchased by the Appellant but 75.01% equity shareholding and 100% preference shareholding of 7th Respondent before the Commission. The original capital cost of Rs.10780 crores as stated by UPERC is equal to 100% equity shares of PPGCL. 75% of Rs.10780 crores works out to Rs.8085 crores. The proposed transfer of above said equity shares of PPGCL was based on the following commitments made by the Appellant to the project lenders:

i) Rs.6000 crores payment to project lenders towards term loan and working capital loan;

ii) Rs.1073 crores towards settlement of liabilities towards capital creditors;

iii) Rs.450 crores towards additional capital expenditure

iv) Rs.700 crores towards raising additional working capital loan for the plant.

All these works out to Rs.8223 crores against proportionate figure of Rs.8085 crore (in lieu of acquiring 75.01% of equity shareholding of PPGCL). Apart from this, the project lenders will also own 13.5% equity shares of PPGCL on the basis that post acquisition of shareholding by the Appellant may partly benefit from any improvement made in financial performance of PPGCL.

101. It is not in dispute that Petition No. 645 of 2010 came to be filed before the Commission for adoption of tariff found in the bidding process in terms of bidding guidelines issued by Ministry of Power, Government of India, for procurement of power on long term basis from Thermal Power Projects. Competitive bidding process was conducted by UPPCL, 4th Respondent herein. On 27.08.2010 the said Petition came to be disposed of wherein the operative portion of the order reads as under:

"*Under clause 3.1.2 A (i) of PPA, the Procurer has to obtain approval of the Commission for adopting the tariff and quantum as per section 63 of the Electricity Act, 2003 which stipulates that the Commission shall adopt the tariff if such tariff has been determined through transparent bidding process in accordance with the guidelines issued by the Central Government.*

In light of above, the Commission concludes that the Petitioner has followed the guidelines issued by the Central Government under CBG for procurement of power under Case-II through transparent process of bidding and submitted the certificate of conformity to these guidelines. Therefore, the Commission adopts the levelized tariff of Rs. 3.02/kwh for a period of 25 years from the respective CODs of the three units of 660 MW each of PPGCL."

102. The 1st Respondent-Commission justifying its action has submitted as under:

I. **"*On Account of Saving of Interest*–***Original project cost was Rs. 10,780 Crore out of which Rs.8,000 Crore was by way of loan and rest as equity on this capital structure of 10,780 Cr. the approved tariff was considered sustainable. Since the debt amount as admitted by the Appellant is reduced to Rs. 6000 Cr. against original debt of 8,000 Cr. this will result into saving of interest of Rs 200 Cr per annum. This reduction translates to Rs. 0.17 per unit in capacity charges.*

II. ***Increase in Normative Availability*** *– It is submitted that it is appellant itself by way of filing additional affidavit on 26.3.2019 offered discount in capacity charges in FY2019 to Rs. 0.08/ kwh in lieu of the increase of normative availability from 80-85 percent for recovery of capacity charges.*

It is submitted that it was the appellant's own statement in its additional response dated 26.3.2019 that there would be saving of Rs. 1700 Cr to UPPCL for the balance 22 years of the plant operation. ***(Kindly See Para B.3 hereinabove)***

III. ***Sale of Remaining 10 Percent of Power Not Contracted in PPA****– With respect to remaining 10 percent power of 198 MW it was submitted by the appellant that after meeting requirement of 48 MW in cement grinding unit, railways etc., remaining 150 MW of additional power is available to the M/s. PPGCL for sale in the market at the market rate. The Appellant in its affidavit has worked out a gain of Rs. 80-90 crore per annum being the difference between the tariff approved in the PPA and the market rate at which this power would be available. The UPPCL is buying 1150 Mu under the PPA. If the gain is allocated on this quantum of power the per unit gain works out to about Rs. 0.07 per unit.*

IV. ***Saving in Station Heat Rate*** *- It is submitted that in its additional response dated 26.3.2019 filed before the State Commission, the Appellant proposed that the energy charge is calculated based on SHR of 2350 kCal/kWh or the actual net SHR whichever is lower. That in response to the above submission of the appellant it was the submission of the UPPCL that on applying the normative auxiliary consumption as allowed in UPERC Tariff Generation Regulations, 2014 of 5.25 percent the Net SHR is computed at 2294kCal/kWh against the quoted SHR 2350 kCal/kWh. Thus, the UPPCL stated before the State Commission that the margin of 56 kCal/kWh (2350kCal/kWh-2294kCal/kWh) is available to PPGCL in Station Heat Rate which should be passed on the consumers.*

It is thus submitted that the UPPCL worked out realistic SHR at 2294 kCal/kWh against the appellant claim of SHR at 2350 kCal/kWh. As per the CERC norms the Net SHR for this kind of super critical plant is somewhere about 2250 kCal/kWh. In the impugned order the State Commission allowed the appellant to

continue with SHR 2350 kCal/kWh and directed to retain the 65 percent of the saving of Rs.0.07 per unit on this account and share the remaining 35% with the consumers."

103. As contended by the Appellant and the 2nd Respondent-SBI, in the process undertaken under Section 63 of the Act, question of examination of capital cost or capital structure of the project by UPERC at the time of adoption of tariff would not arise. However, such examination can be undertaken by the Commission if it is a case of determination of tariff by the appropriate Commission under Section 62 of the Act. Under Section 62 PPA, tariff is determined based on the capital cost of the project, debt and equity amounts invested or capital structure of the project. Whereas if tariff is discovered through competitive bidding process, the same has to undergo the process of adoption of tariff by appropriate Commission under Section 63 of the Act. During such examination, the Commission has to see "whether the guidelines issued by the Ministry of Power for procurement of power on long term basis is complied with or not and whether the bidding process was transparent, fair and justified"?

104. The contention of the Respondent-Commission that Petition was not filed under Section 63 of the Act but was filed under Section 86 of the Act while seeking adoption of tariff by the Commission may not be correct on the part of the Respondent-Commission. Section 86 of the

Act deals with several functions which the State Commission discharges. Section 63 of the Act relates to determination of tariff by bidding process and duty is cast on the appropriate Commission to adopt the tariff by verifying whether it was determined through transparent process and it was in accordance with guidelines issued by the Central Government. To discharge this function or exercise under Section 63 of the Act a Petition has to be filed under Section 86 of the Act since the State Commission is required to regulate electricity purchase and procurement process including the price at which power was procured from the generating companies. Therefore, the argument of the Respondent-Commission that the tariff was adopted under Section 86 of the Act and not under Section 63 of the Act is not justified, since while disposing of Petition under Section 86 of the Act, the principle postulated under Section 63 of the Act has to be seen by the appropriate Commission.

105. The controversy raised before us is "***Was the Respondent-Commission justified in disturbing the quantum of tariff which was already adopted way back in 2010?"***

106. The reason for filing Petition No.1403 of 2019 by the 2nd Respondent-SBI seems to be on account of one clause in RFP

document i.e., clause 2.7.4.1. Clause 2.7.4.1 of RFP document reads as under:

> *"2.7.4.1. The aggregate equity shares holding of the selected bidder in the issued and paid up equity share capital of the seller shall not be less than the following:*
> *(a) Fifty One percent (51%) up to (2) two years after COD of the Power Station; and*
> *b) Twenty – Six (26%) for a period of three (3) years thereafter."*

107. The above clause clearly indicate that from the date of COD (happens to be 26.05.2017) if the shares of PPGCL were to be transferred, after 25.05.2019 74% of equity shares could be transferred. It also refers to maintaining minimum 26% of equity for three years which would end in the present case on 25.05.2022. This would mean without any restriction/condition the 100% equity share can be transferred by 25.05.2022 by PPGCL. In that situation, necessity of seeking approval/waiver for transfer of shareholding would not arise at all. Similarly, question of examining capital structure vis-a-vis the price offered by the purchaser of shares does not arise for consideration of appropriate Commission.

108. The Respondent-Commission has wrongly held in the impugned order that maximum of 49% of equity holding can be transferred after 26.05.2019 and 74% of equity can be transferred after 25.05.2022. It

seems to be quite contrary to the terms of clause 2.7.4.1. One more aspect has to be seen at this stage. The said clause refers to transfer of equity share capital of PPGCL that means the said clause refers to voluntary transfer of equity share capital by PPGCL. The transfer/sale in question was not at the instance of the PPGCL (voluntarily), but it emerged out of financial commitment made by PPGCL with the lenders of project led by State Bank of India.

109. The project faced heavy burden of debt and the PPGCL was not in a position to pay required instalments along with interest i.e., was unable to repay the debt in terms of financial documents entered into between the PPGCL and the lenders. When financial burden became severe and PPGCL was unable to repay the amounts overdue, twice attempts were made by the 2nd Respondent, lead Bank SBI to sell the pledged shares through bid process. Apparently, no one offered through bid process the amounts as offered by the Appellant which are detailed above. Offers in the bid was much less than the amounts now offered by the Appellant. Therefore, the lenders, SBI lead Bank in order to recover their dues and salvage project invited bids through transparent bidding process to replace the existing promoters/sponsors of 3rd Respondent–PPGCL through transfer/sale of the pledged shares. Since the bid offered by the Resurgent Power was much better than previous bidders, the

lenders/Resurgent Power, PPGCL and the Appellant entered into Share Purchase Agreement (SPA dated 14.11.2018) for transfer of 75.01% equity shares of the 3rd Respondent in favour of the Appellant. Since the transfer/sale of equity share capital was prior to the period (restricted period) indicated at clause 2.7.4.1 of the RFP, they approached Respondent-Commission for waiver/relaxation of condition. It was definitely not for verification of capital investment/financial structuring of the project or adoption of tariff by the Respondent-Commission. If the transaction was to be effectuated after 26.05.2019 to the extent of 74% of shares then there was no need for any waiver/relaxation of RFP condition at clause 2.7.4.1. Even in the case of SBI and other lenders agreed for restructuring loan with JPVL (original promoter) and had such restructuring (substitution) resulted in substantial waiver of the loan amount, then also requirement of approval from the Respondent-Commission would not have arisen.

110. In the above circumstances "***was Respondent-Commission justified in reducing the adopted tariff by Rs. 0.14 per unit out of Rs. 3.02 per unit adopted tariff way back in 2010?***" The process adopted by the lead Bank SBI was with the sole purpose of debt resolution to salvage the project by bringing a strong sponsor/promote (both technically and financially) so as to provide not only requisite

financial support but also operational support to 3rd Respondent in order to make the project in question to run smoothly in a sustainable manner. This according to the lead Bank and the Appellant would enable the lenders to recover their debts to certain extent.

111. The total debt seems to be beyond Rs.11000 crores. This was on account of non-payment of agreed instalment in terms of loan documents. The instalment of overdue principal amount and the interest was beyond Rs.11,000 crores. The process adopted by the lead Bank to get maximum amount towards recovery of debt cannot be found fault with and apparently there is no challenge to the said process adopted. We also note that the 3rd Respondent for that matter or anyone else till date was able to get better solution or better offer to salvage the project in question.

112. In the above circumstances, ***"was Respondent-Commission justified in reducing adopted tariff by Rs.0.14 per unit?"*** The Petition from which the impugned order has emerged was not for adoption of tariff. It was only for waiver of restriction/condition for transfer/sale of shareholding of PPGCL in terms of clause enunciated under RFP. "***Whether the Respondent-Commission was justified in comparing the capital cost of the project with the offer made by the Appellant?***" The Respondent-Commission opined that the Appellant

was going to get huge hair-cut on the original cost of the project amounting to Rs.10780 crores i.e., Rs.8000 crores by way of loan and rest by equity.

113. The first and foremost fact which the Commission lost sight is that adopted tariff in terms of PPA was the basis to bid for purchase of equity shareholding of PPGCL. If only the bidders knew that there was possibility of reduction in the already adopted tariff the bid amount would not have been Rs.6000 crores plus other amounts and it would have been much less.

114. It is also seen that without changing any terms and conditions of PPA, the transparent competitive bidding process was to secure new promoter. The offer is at Rs.6000 crores plus other amounts.. This was against the maximum sustainable debt of Rs.5514 crores assessed by CRISIL an independent rating agency. The Resurgent Power Ventures is the holding company of the Appellant. As a matter of fact, UPPCL explicitly admitted in the affidavit filed before the UPERC that the change offered through the bid process would be in the interest of consumers of Uttar Pradesh, since the project would be able to operate consistently at or above normative PLF, apart from receiving one of the cheapest sources of electricity by the Discoms and consumers of Uttar Pradesh.

115. As on 31.10.2017 outstanding debt was approximately Rs.11900 crores, since PPGCL failed to make payment of interest apart from principal amount to the project lenders right from February 2017. We find force in the arguments of the Appellant as well as the 2nd Respondent SBI that the proposed transfer of 75.01% equity shares of PPGCL would come to Rs.8085 crores. The amounts offered by the Appellant would come to Rs.8223 crores. This additional amount of Rs.2223 crores is over and above the amount offered towards debt by the Appellant. The Respondent-Commission has lost sight of this Rs.2223 crores in the impugned order. On the other hand, the Respondent-Commission opined that about Rs.200 crores per annum would be the wind fall available to Appellant in the bid process. If Rs.2223 crores over and above debt of Rs.6000 crores is taken into consideration, this would become Rs.245 crores per annum (burden to sponsor). Similarly, the Respondent-Commission failed to take into consideration the reduction of the debt that should have happened within first three years of the project thorugh repayment wherein the original debt of Rs.8100 crores was scheduled to reduce to Rs.6700 crores. Instead of comparing this figure of Rs.6700 crores with Rs.8223 crores, the Respondent-Commission has proceeded on wrong presumptions adopting wrong figures.

116. So far as increase in normative availability of power, the Respondent-Commission proceeded wrongly. The Appellant had proposed increase in the normative availability of power which would indicate that capacity charge revenue from the PPA remains the same for each year but the cost of per unit benefit would be available to UPPCL since the aggregate capacity charge revenue now required to be paid is for higher number of units. Therefore, the Commission was not justified in attributing fixed discount of Rs.0.08 on capacity charges. The Commission failed to see that on account of better operating practices, the Appellant is confident of achieving more than normative availability. This does not lead to discount on the capacity charges because higher number of units would be available at same capacity charges.

117. Coming to untied sale of 10% of power, the Commission again proceeded on the wrong premise that 10% of un-availed/untied under PPA would certainly get more revenue to the generator. The sale of 10% merchant power was offered to UPPCL under PPA tariff for five years, this would actually benefit UPPCL since it reduces average procurement cost from other higher cost PPAs. For reasons best known to UPPCL, the said offer made by the Appellant was declined. Therefore, the Respondent-Commission was not justified in opining that the Appellant would derive fixed profits from sale of 10% of merchant

power when there is no contract for the said 10% untied power as on today.

118. Similarly, with regard to savings in net SHR proposed by the Appellant was wrongly considered by the Respondent-Commission. The current norms prescribed by the CERC itself led to a higher net SHR figure than what is permitted under the PPA. Therefore, there was no basis or reason how the Commission could arrive at Rs.0.07/kWh fixed discount by taking into consideration much lower SHR figure. In this process, the Commission lost sight that this means additional cost to the Appellant in case said net SHR figure does not materialise. Again pertaining to net station heat rate, the computation made by the Commission was totally contrary to the regulations applicable for the control period 2020-24. The net SHR works out to Rs.2353 kCal /Kwh which is much higher than the quoted net SHR of Rs. 2350 kCal / Kwh. The figures pertaining to gross SHR of the plant with auxiliary power consumption as promoted under PPA is totally lost sight by the Respondent-Commission. Based on the above reasoning or process adopted by the Respondent-Commission which was in detail pointed out by the Appellant as well as the 2nd Respondent-SBI, the Respondent-Commission has based its opinion taking into consideration wrong figures and arrived at wrong conclusions.

119. The argument raised by the Appellant is that the 1st Respondent-Commission acted beyond its scope/jurisdiction by reviewing a tariff which was already adopted and the same amounts to modifying/revising/reviewing a tariff. For this proposition the Appellant was justified in placing reliance on Section 61 and 63 of the Act and also judgment of this Tribunal in the matter of **Madhya Pradesh Power Trading Company Ltd. vs. MPERC & Ors.** in Appeal No. 44 of 2019 dated 06.05.2010 to contend how Section 63 has to be appreciated and adopted, which reads as under:

> *"69. As indicated above, the State Commission has to verify merely whether the bid process has been done in a transparent manner and in accordance with the guidelines framed by the Central Government and if that is complied with, the State Commission shall give approval and adopt the tariff recommended by the Evaluation Committee.*
>
> *70. As indicated above, the wordings contained in section 63 of the Electricity Act, 2003 would make it clear that the power of scrutiny by the State Commission is so limited.*
>
> *To put it shortly, the Commission as per section 63 of the Electricity Act, 2003 having only limited jurisdiction has to satisfy with reference to the compliance of the requirement of Section 63*
>
> *In other words, the State Commission should act within the ambit of Section 63 of the Act and should not go beyond that as it is neither an Enquiry Commission nor a Vigilance Commission."*

120. The Appellant has rightly placed reliance in the case of **Official Trustee v Sachindra Nath** *[reported in AIR 1969 SC 823]* to contend that if a court has jurisdiction to decide a particular matter, it should have power to hear and decide the questions at issue and decide the controversy which has arisen between the parties. The Appellant rightly referred to the case of **JagmittarSain Bhagat & Ors. v. Director, Health Services, Haryana and Others** *[reported in (2013) 10 SCC 136]* to contend that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court; therefore, if an order/decree is passed by a court which has no jurisdiction, it would amount to nullity since it goes to the root of the cause.

121. The change in the PPA tariff, which being the fundamental basis for arriving at the bid amount by the bidders, any subsequent reduction in the PPA tariff, post conclusion of the bid process by lenders of the project, would amount to change in the fundamental basis of the bid. This is well settled law laid down by the Hon'ble Supreme Court in several cases.

122. The Appellant was justified in contending that the facts of ***Energy Watchdog****'s* case cannot be compared with the present case for the following reasons.

"(a) The above referred order of the Hon'ble Supreme Court was passed in a totally different factual background and cannot be applied to the facts of the present case;

(b) The Hon'ble Supreme Court passed the said order on the premise that a High-Powered Committee had given a report suggesting changes in the PPA relatable to the said case. The recommendations of the High-Powered Committee were reflected / partially accepted by the Government of Gujarat in form of a policy consequently resulting in amendments of the PPA;

(c) The case before the Hon'ble Supreme Court was that the parties were agreeable to change in tariff and terms of PPA and had approached the Hon'ble Supreme Court to seek clarification for approaching the Central Electricity Regulatory Commission for approval of amendments in the PPA;

(d) Hence the reliance on the aforesaid order of the Hon'ble Supreme Court is erroneous and misplaced since in the case before the Ld. Commission none of the parties had agreed to any reduction in tariff under the PPA;

(e) Findings and observations made by the Hon'ble Supreme Court in the of Energy Watchdog vs. Central Electricity Regulatory Commission and Others lays down no general proposition that Ld. Commission has the power to revise and re-determine tariff in public interest."

123. So also learned senior counsel for the Appellant was justified in saying that the opinion of the Apex Court in **All India Power Engineer's** case is out of context and inapplicable to the facts and circumstances of the case in hand for the following reasons:

"(a) Hon'ble Supreme Court through the said judgment has held that if a waiver granted by a party results in increase of the tariff under the power purchase agreement then the said waiver has to be approved by the Appropriate Commission;

(b) In the present case the waiver as was being sought, was not resulting in any increase of the PPA Tariff but on the contrary, the situation for seeking the waiver was arrived after conducting an exercise which was premised on PPA Tariff remaining untouched;

(c) Ld. Commission failed to draw a distinction between the said case and the matter at hand. The Hon'ble Supreme Court's findings in the said case are relevant only when a proposed waiver affects tariff that are ultimately payable by the consumer.

(d) In the instant case, the waiver/relaxation from restriction on change in shareholding sought by SBI would not have any impact on the tariff payable by the consumers of the State of UP."

124. The 1st Respondent-Commission sought from the Appellant seeking information pertaining to Cash Flow. The Appellant furnished the same which is as under:

"(i) The revenue line was based on the capacity charges under the PPA under which 90% capacity is tied up and revenue from 10% untied capacity would be additional cashflow that would have been available to absorb part of the operating and financing costs indicated in the table as well as generate returns on the additional investment made by the Appellant and its parent. However, there cannot be any guarantee on what this additional revenue would be since it is not contracted and energy units which would be sold, corresponding tariff levels and coal availability / costs, open

access availability and charges etc for this additional sale would fluctuate on almost daily basis.

(ii) The variable operating costs of secondary fuel oil and GCV under-recovery pertain to the contracted capacity under the PPA, which is 90% of the capacity of the plant, and not for the entire plant.

(iii) Under the PPA terms, secondary fuel oil is not reimbursed under the variable tariff (which is entirely based on coal costs) and it is an additional cost burden in the operations of the plant which is absorbed as part of capacity charges.

(iv) As per the PPA, variable tariff is based on "As Received GCV" of coal and not "As Fired GCV" which even as per the current Central Electricity Regulatory Commission (hereinafter "CERC") norms is 85 Kcal / Kg lower than the "As Received GCV". Since this GCV gap is not reimbursed under the variable tariff, it is an additional cost burden in the operations of the plant.

(v) CSR expenses which is stipulated by the Ministry of Environment and Forest and Climate Change as a conditionality for granting environmental clearance is required to be incurred on an ongoing basis as a recurring expense.

(vi) All these costs (i.e. under recovery of secondary fuel cost, under recovery of in-plant GCV loss of coal and CSR expenditure) result in additional cash outgo which are not covered by the energy charges and hence will have to be met out of capacity charges."

125. In pursuance of financial documents, lenders led by SBI invoked terms of pledge for sale/transfer of pledged shares of PPGCL and said document is not only recognised but a legal document under PPA. Through this process, lenders intended to bring a new entity that too

adopting transparent competitive bid process, therefore, it may not be out of place to opine that the Appellant had legitimate expectation to the effect that bid would be awarded to it in terms of said bidding process especially once the Appellant was found successful in the bid process and letter of intent being issued to them. In the absence of said bidding process not contemplating any change in the terms of existing PPA (like reduction in tariff) neither the Appellant nor any person who participated in the bid could anticipate such reduction in the tariff already adopted. On the other hand, the adopted tariff envisaged in the PPA would be the basis to formulate their economics to quote the price in the bid.

126. Apparently, the Commission did not consider the effects of reduction in PPA tariff in post facto scenario since there was certainty in the bid condition with reference to PPA tariff and associated revenue stream which was the basic input for inviting the bids in question.

127. It is also pertinent to note that the bid process adopted by the 2nd Respondent-SBI was to recover their dues and salvage the project. This right accrued to lenders under the financing documents. The acceptance of the bid by the lenders was to find an appropriate debt resolution by bringing a strong sponsor/promoter who is capable of promoting the project in question with sustainability since they had world class practice to run such project. The interference of the Respondent-

Commission by reducing the adopted tariff indirectly interferes with the security rights available to the lenders in terms of financial documents entered into between lenders and the borrowers.

128. The Respondent Commission in the impugned order opined that the proposed transaction of transfer of 75.01% equity shareholding of the 3rd Respondent would wipe off entire debt, burden of PPGCL and thereby it would go off the books of lenders. It further opined that with '0'debt, the element of interest on loan which is part of fixed cost would become '0'. This opinion of the Respondent-Commission seems to be erroneous because the proposed transaction does not wipe off entire debt burden of the 3rd Respondent to go out of books and it only ensures that the project would run smoothly. It would also mean that the project would be sustainable for future thereby lenders would be able to recover best value of the outstanding debts. The process adopted ensures best possible solution for realisation of outstanding debt, simultaneously which would minimise further sacrifice or loss that would be suffered by the lenders. The project lenders received the offer from the Appellant which is optimal and market discovered commercial offer. That apart it was much better than the independent valuation received from CIRIL. In these circumstances, the lenders of the project proceeded to accept the

best offer received so far to recover the best value for the pledged shares.

129. One has to see what would happen if the present offer is not materialised. With the present adopted tariff and the huge debt of the 3rd Respondent amounting to Rs.11,900 crores it may not be possible for the borrowers to repay the dues of lenders of the project. Day by day the financial burden would become so severe and may even result in shutting down the project itself. In such circumstances the only way which could alleviate the financial stress would be to revise the tariff which may be a tariff shock to the consumers. If the Respondent Commission thinks that the tariff of Rs.3.020 per unit is not fair in the present circumstance, the possibility of increase in the tariff looks bleak.

130. In the circumstances if the proposal of the Appellant is accepted, the hair-cut of Rs.5000 crores or so as stated by the Respondent Commission would not benefit the Appellant in any manner since it has to start running the project with financial liability of Rs.8223 crores. On the other hand, if anyone has suffered financial loss, it is State Bank of India whose outstanding dues of Rs.11900 crores has been reduced to Rs.6000 crores. The Appellant has to invest not only this Rs.6000 crores but additional Rs.2223 crores as stated above.

131. The Respondent-Commission is aware of the fact that fresh loans were availed by the Appellant. However, it totally went in wrong saying Appellant did not disclose rate of interest for the repayment of loan amount. In the response of Appellant filed on 18.03.2019, the calculations clearly indicate loan repayment over eighteen (18) years with an interest rate at 11% p.a. (much lower than the existing applicable rate so also on par with benchmark rates, credit rating and payment security mechanism).

132. If the power project as it is not able to pay the debts of the lenders of the project, the dues payable to the lenders would increase day by day and ultimately the plant may have to be shut down. This would mean a huge national asset being wasted. The lead Bank in terms of loan papers and agreements between the lenders and the debtors has adopted a procedure which is transparent and the maximum/best offer has come from the Appellant so far. As stated above, no one has brought or has come forward with better offer than the Appellant till date.

133. If the adopted tariff under PPA was able to service the debts availed by PPGCL, its account would not have become NPA. In that event question of enforcing right of sale/transfer of shares pledged would not have arisen.

134. As indicated by SBI, approximately 40 GW of Thermal Power assets are facing financial stress with project cost of Rs.2.91 lakh crores. If debt resolution by adopting accepted and admitted debt resolution mechanism is not allowed in time it would definitely lead to disastrous situation on account of road blocks and obstacles of this nature.

135. The relief sought in the Petition in question was not for revision/review of tariff. It is pertinent to note that if the transfer of shareholding was two years after COD, there was no need even to approach the Commission. If such were to be the situation, question of reducing the PPA tariff would not arise. The reduction of tariff in this case amounts to revisiting the tariff adoption process which was concluded and had reached finality. The exercise undertaken by the Respondent-Commission in doing so is beyond the scope of its jurisdiction.

136. If we see the tariff adopted in 2010 for the project in question which is at Rs.3.020 per unit, it is much less than the National Average Power Purchase Cost fixed by CERC for FY 2018-19 which is at Rs. 3.60 per unit. Therefore, on this count also, there was no justification warranting reduction of tariff by the Respondent Commission.

137. It is pertinent to mention that the Respondent-Commission has no grievance so far as the waiver/relaxation of restriction to transfer/sell

75.01% shareholding of PPGCL, and it has wrongly presumed that the SPA results in windfall to the Appellant the successful bidder. As a matter of fact, the adopted tariff does not change by virtue of this SPA. It continues to be at Rs.3.02 per unit. The haircut if at all causing any prejudice or loss on account of accepting the offer of Rs.8223 crores as offered by the Appellant, it is the 2nd Respondent-Bank who is unable to recover its full debt. This does not affect the right or privilege enjoyed either by the DISCOMs or by consumers who would continue to get supply of power at Rs.3.02 per unit from the project in question. If this SPA is not allowed to be proceeded with, the result would be the 3rd Respondent would not be in a position to repay the loan amount to the lenders of the project and it would further be unable to salvage the project. This would rather cause difficulty and would rather be detrimental to the interest of the 3rd Respondent, DISCOMs, and the consumers of Uttar Pradesh in general, since the tariff adopted for this project seems to be one of the cheaper cost at which power is supplied.

138. It is the duty of the Authorities concerned to see that there is possible viability of running the project and at the same time lenders must be able to receive best value for the pledged shares. If at all, anyone has grievance about this, it is the lenders of the project, as they were unsuccessful to recover the entire debt payable to them. Since

maximum offer was from the Appellant, the 2nd Respondent-SBI representing all the lenders has agreed to proceed with the offer made by the Appellant. The 2nd Respondent as a lead Bank having a consortium of 18 banks and financial institutions, it is the largest lender to the 3rd Respondent. The credit facility offered by the lenders was secured by clearing of equity shares and preference shares of 3rd Respondent.

139. In the light of the above discussion and reasoning, we are of the opinion that the finding of the 1st Respondent-Commission so far as reduction of adopted tariff by Rs. 0.14 per unit warrants interference. Accordingly, we uphold the approval/waiver/relaxation granted by the 1st Respondent-Commission for SPA dated 14.11.2018, but without any reduction of adopted tariff. Accordingly the Appeal is allowed.

140. Pending IAs, if any, shall stand disposed of. No Order as to costs.

141. Pronounced in the Open Court on this 27th day of September, 2019.

(S. D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE/NON-REPORTABLE

ts/tpd