IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 43 OF 2020 &
IA NO. 1006 OF 2019 & IA NO. 118 OF 2020.
APPEAL NO. 44 OF 2020 &
IA NO. 1018 OF 2019, IA NO. 1443 OF 2019 & IA NO. 119 OF 2020.
APPEAL NO. 45 OF 2020 &
IA NO. 1020 OF 2019, IA NO. 1476 OF 2019 & IA NO. 120 OF 2020.
APPEAL NO. 46 OF 2020 &
IA NO. 1031 OF 2019, IA NO. 1519 OF 2019 & IA NO. 121 OF 2020
AND
APPEAL NO. 47 OF 2020 &
IA NO. 1033 OF 2019, IA NO. 1604 OF 2019 & IA NO. 122 OF 2020

Dated : 6th August, 2021

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Technical Member

In the matter of:

1. **Uttar Pradesh Power Corporation Ltd.**
   Shakti Bhawan, 14, Ashok Marg,
   Lucknow – 226001
   though its Chief Engineer, PPA

2. **Paschimanchal Vidyut Nigam Ltd.**
   D.L.W. Bhikharipur, Varanasi – 221004
   through its Managing Director

3. **Poorvanchal Vidyut Vitran Nigam Ltd.**
   D.L.W. Bhikharipur, Varanasi – 221004
   through its Managing Director

4. **Madhyanchal Vidyut Vitran Nigam Ltd.**
   4-A, Gokhale Marg, Lucknow – 226001
   through its Managing Director

5. **Dakshinanchal Vidyut Vitran Nigam Ltd.**

Bhawan, 220KV U.P. Sansthan – 282007
Bypass Road, Agra,
through its Managing Director …. Appellant(s)

Vs.

1. Uttar Pradesh Electricity Regulatory Commission
Vidyut Niyamak Bhawan, Vibhuti Khand,
Gomti Nagar, Lucknow – 226010
through its Secretary

2. M/s. Bajaj Energy Limited
(Formerly known as M/s. Bajaj Energy Private Limited)
Having its registered office at B-10, Sector – 3,
Bajaj Bhawan, Jamnalal Bajaj Marg,
Noida – 201301
through its Managing Director ….Respondent(s)

Counsel for the Appellant (s) : Mr. Raghvendra Singh, Sr. Adv.
Mr. Sunil Kumar Rai
Mr. Md. Altaf Mansoor

Counsel for the Respondent(s) : Mr. C. K. Rai
Mr. Sachin Dubey for R-1

Mr. Amit Kapur
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Upendra Prasad
Mr. Akshat Jain
Mr. Sanjeev Kumar Singh
Mr. Utkarsh Singh
Mr. Brij Mohan
Mr. Rajpal Singh for R-2

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

1. The Appellants have filed the present Appeals challenging part of the final common order dated 03.01.2018 ("**Impugned Order**") passed by the Uttar Pradesh Electricity Regulatory Commission ("**the State Commission**") in Petition Nos. 1258 of 2017, 1262 of 2017, 1260 of 2017, 1261 of 2017 & 1259 of 2017. The Appellants are challenging partially the aforesaid order of the State Commission.

2. The present appeals have also been filed against the common order dated 08.03.2019 passed by UPERC in Review Petition nos. 1348 of 2018, 1344 of 2018, 1347 of 2018,1346 of 2018 &1345 of 2018 whereby the State Commission has declined to interfere in the Review Petition. Accordingly, the order dated 03.01.2018 merges with the order dated 08.03.2019.

3. That Appellant, UPPCL is the Apex body in the State of U.P. which is professionally managing, distribution and supply of electricity and also entrusted with the responsibility of making payment of bills raised for the supply of electrical energy.

4. The Appellant no. 2 to Appellant no. 5 are the Discoms and Distribution Licensees in the allocated area. The Discoms are incorporated under the Companies Act 1956.

5. The Respondent no.1 is the State Commission constituted under Electricity Act, 2003 to regulate and adjudicate the matter relating to the power sector in the state of Uttar Pradesh.

6. The Respondent no. 2 is a company within the meaning of Companies Act 2013, having its registered office at B-10 Sector – 3, Bajaj Bhawan, Jamna Lal Bajaj Marg, NOIDA – 201301. The respondent no. 2 was initially incorporated by the name of M/s Bajaj Energy Private Ltd. which was subsequently changed to M/s Bajaj Energy Ltd. consequent upon conversion to a Public Limited Company.

Facts of the Case(s):-

7. In the year 2009, State of U.P. had issued an Energy Policy 2009, considering the fact that reliable and affordable power was required and in order to facilitate the companies interested in setting up generation plants. In clause 5.2.2 of the Energy Policy, 2009, the State in order to facilitate the sugar plants/cogen plants to set up additional power generation capacity on conventional fuel such as coal or gas permitted co-generators to use their available surplus land for setting up a coal or gas based generating units. The power plants of a maximum of 100 MW were permitted to be set up and such generators were permitted to sell their energy under open access.

8. The State of U.P. had expressed the same sentiments while executing the Memorandum of Understanding dated 14.1.2010 and 22.4.2010 w.e.f. purchase of 80 MW and thereafter 90 MW power from the respondent no 2. Photocopy of the Memorandum of Understanding dated 14.1.2010 and 22.4.2010.

9. Subsequently, the installed capacity of the generating plant of the respondent no 2 was revised from 80 MW to 90 MW and accordingly a fresh MoU dated 22.4.2010 was entered into between the respondent no 2 and the State of U.P. on the same terms and conditions. The MoU was valid only for a period of 18 months. Subsequent to the setting up of the

generating projects, the necessary PPA was to be executed between the respondent no 2 as generating station and the Appellant distribution licensee through UPPCL.

10. On 11.06.2010, pursuant to Clause 12 of the aforesaid MoU dated 22.04.2010, Bajaj Hindustan Limited assigned the aforesaid projects to its subsidiary namely Bajaj Energy Private Limited and the same was duly approved by the Go UP vide G.O. No. 618.

11. On 10.12.2010, the Appellant in order to purchase power from the respondent no. 2 had entered into a PPA which was signed by UPPCL on behalf of the distribution licensee. The Power Purchase Agreement in respect of each of the five generating units of the respondent for purchase of 90% saleable energy from 2x45 MW Thermal Power Generating Plant for a period of 25 years.

12. On 11.01.2011, the Respondent no 2 offered to supply entire (100%) saleable energy on which the State of U.P. vide order No. 456 dated 26.05.2011 had accorded permission with the provision that 100% power will be purchased by the State nominated agency i.e. Appellant no. 1, UPPCL at the power purchase rate to be determined by the State Commission.

13. On 15.06.2011, the relevant clause of the PPA dated 10.12.2010 were suitably amended vide Supplementary PPA. It is pertinent to mention here that the PPA dated 10.12.2010 and amendment dated 15.06.2011 were approved by the Hon'ble Commission. Pursuant to the MoU as well as PPA dated 10.12.2010 and Supplementary PPA dated 15.06.2011, the Respondent No.2 has set up and, *inter alia*, operates the following generating stations:-

Location	Installed Capacity (MW)
Barkhera (Pilibhit)	90
Khambharkhera (LakhimpurKheri)	90
Maqsudapur (Shahjahanpur)	90
Kundarkhi (Gonda)	90
Utraula (Balrampur)	90

14. On 24.05.2017, the final tariff was determined by UPERC.

15. On 14.04.2017, a joint statement was issued by the Government of India and the Government of Uttar Pradesh announcing the program of "24x7 Power for All" and in the joint statement it is provided that the "24x7 Power for All" program will be implemented by the Government of Uttar Pradesh with active support of Government of India.

16. On 04.05.2017, UPPCL had requested to the Director of the Solar Energy Corporation of India for the allocation of 750 MW solar power under the NSM scheme to UPPCL at the discovered tariff through reverse auction, with an upper cap of Rs.3.50/unit as fixed tariff for the entire period of PPA and in this regard a letter dated 03.07.2017 was issued by the Secretary, Ministry of New and Renewable Energy by which the demand of the solar power made by the State of U.P. was confirmed.

17. On 30.06.2017, in order to achieve the object of the PFA a task force was constituted by UPPCL.

18. On 01.07.2017, the task force after deliberations had taken a decision that no scheduling of power should take place from projects whose variable cost is more than Rs. 3.46 per unit. Therefore, a cut-off

point was mentioned by the task force and all the power generation companies whose costs were above the cut-off rate were directed not to schedule power. In view of the decision of the task force, the Appellants immediately informed the state generators as well as to the Government of India, with respect to the projects of the Central sector.

19. On 8.7.2017, The Appellants had issued an exit notice to the respondent no. 2 from the Power Purchase Agreement dated 10.12.2010 entered into between M/s Bajaj Energy Private Limited and the Appellants due to high procurement cost as compared to the open market.

20. On 11.7.2017, the respondent no. 2 in reply to the exit notice had given an offer to the Appellants whereby the respondent no. 2 had placed certain irrational terms and conditions to be performed by the Appellants for bringing down the cost of electricity marginally rather than itself taking/adopting any cost reducing exercise.

21. On 15.7.2017, the Appellants rejected the aforesaid offer of the respondent no 2. Appellants had clearly pointed out that the Respondent No.2 had not availed the opportunity to bring the energy charges within the MOD stack which was keeping in view of the spirit of the order of the UPERC dated 21.6.2016.

22. The respondent no 2 challenged the Exit Notice dated 08.07.2017 as well as order dated 15.07.2017 by means of which the offer given by the respondent company was rejected by means of writ petitions before the Hon'ble Allahabad High Court, Lucknow Bench, Lucknow in Writ Petition No. 15734 of 2017 (M/B).

23. The negotiations took place between the Appellants and the respondent no. 2 in pursuance to the directions of Hon'ble High Court wherein the respondent no. 2 had made an offer to reduce the cost of power marginally by approximately 70 paisa per unit to Rs.5.46 /kwh. The offer of the respondent no. 2 was declined.

24. On 9.11.2017, Respondent no. 2 moved application for taking on record the corrected copy of the petition along with application for interim relief on record.

25. On 10.11.2017, the Appellant moved an application for rejection of the respondent's application for taking corrected copy of the petition on record.

26. On 14.11.2017, the Appellant moved a detailed objection to the respondent's application for interim relief. A query was raised by the State Commission as to whether the Appellants were willing to purchase electricity from the respondent or were averse to any transaction of sale of electricity with the respondent and were therefore, not interested in settling the matter. The Appellant in response to the query raised by the learned Commission fairly stated that the Appellant has no prejudice against any company or generator and is not averse to purchase of electricity from the respondent no. 2, in case the rates are lowered to an extent that it falls within the merit order dispatch so that the Appellants being the Government company and in pursuance to the policy of the Government of India of power to All is able to procure cheap and reasonable electricity so that policy of the Government of India is fulfilled.

27. On 15.11.2017, the respondent no. 2 moved an application for amendment of the petition whereby the order dated 15.07.17 which

confirmed the exit notice of the Appellant dated 08.07.2017 was also challenged.

28. On 20.11.2017, the Appellant submitted a proposal whereby the cost of procurement of electricity from the respondent no. 2 would be lowered without much detriment to the respondents and the Appellant would also be able to regularly schedule the electricity produced by the respondent no. 2.

29. On 12.12.2017, the aforesaid proposal as submitted by the Appellants in pursuance to the observations of the learned Commission was not accepted by the respondent no. 2 and therefore, the matter with regard to resolution of dispute did not proceed. Accordingly, a detailed counter affidavit was filed by the Appellant for contesting the matter on merits.

30. On 15.12.2017, after the filing of the counter affidavit by the Appellant the respondent no. 2 submitted another offer to the Appellant for settling the matter through negotiation vide their application dated 15.12.17, detailing the proposal with respect to reduction in various cost. The said offer as submitted by the respondent no. 2 to the Appellant was in complete variance to the offer of Appellant and accordingly, the same was not accepted.

31. On 26.12.2017, the Appellants placed the said proposal before the Board of Directors for decision of the Board. However, the Board of Directors of the Appellant, after considering the proposal submitted by the respondent, took a decision to revive the Power Purchase Agreement signed between Appellant and the respondent with the incorporated specific discounts and conditions as mentioned by the respondent company.

32. On 28.12.2017, the decision of the Board dated 26.12.2017 in pursuance to the respondent's proposal dated 18.12.17 was brought on record before the Commission by the Appellant.

33. On 01.01.2018, the respondent no. 2 filed a reply to the Appellant's affidavit dated 28.12.2017 with respect to bringing on record the approval of the Board of Directors.

34. On 03.01.2018, the State Commission accepted the condition of the respondent no. 2 in totality. The State Commission therefore did not respect the decision arrived at during the resolution process but by its decision dated 03.01.2018 imposed its own terms and conditions whereby the Appellants were not only compelled to adhere to its proposal but also to concede to the demand of the respondent no. 2. Such was never the intention or object of the Appellant who was coaxed into entering into the resolution process for amicably settling the matter.

35. On 15.01.2018, in pursuance to the order of the State Commission dated 3.1.2018 as well as the decision of the Board of Directors of UPPCL dated 26.12.2017 the scheduling of power from the respondent company was directed to be resumed w.e.f. 16.1.2018 regarding which necessary directions were issued by the Chief Engineer, PPA to the Director, SLDC.

36. On 3.7.2018, the Appellant filed the review along with an application for condonation of delay before the UPERC as there was a delay of 93 days as per the limitation prescribed under UPERC (Conduct of Business) Regulation 2004.

37. On 03.10.2018, the Appellant filed rejoinder affidavit to the objection of the respondent no. 2.

38. On 22.01.2018, the review petition was finally heard by State Commission.

39. On 08.03.2019, the review petition was decided by State Commission.

40. On 12.03.2019, the respondent no. 2 in view of the impugned orders dated 03.01.2018 and 8.03.2019 passed by UPERC has raised an invoice dated 12.03.2019 of Rs. 206 crores for the intervening period when no scheduling of electricity was taking place.

41. Hence, the present appeals.

Questions of Law:-

42. The Appellants have raised the following questions of law:-

A. Whether the State Commission has exceeded its jurisdiction in passing the impugned judgment and order dated 03.01.2018 whereby it has compelled the Appellant to pay fixed charges for the intervening period during which the Appellant had already repudiated the contract while deciding the matter on the basis of the conciliation process?

B. Whether the State Commission in exercise of the powers u/s 86(1)(f) had exceeded its jurisdiction and authority and exercised its power completely in an arbitrary and illegal manner in judging the merits of the repudiation of PPA when the matter was being decided on the basis of conciliation process having been initiated by the State Commissions itself?

C. Whether the exercise of adjudicatory powers by the State Commission in the matter of amicable settlement is in violation of the principles of natural justice?

D. Whether the State Commission could have exercised its adjudicatory powers against the Appellant when the matter was being considered only on the limited aspect of the proposal for resolving the dispute through conciliation process?

E. Whether the State Commission, during the conciliation process had given an impression that the State Commission was trying to amicably settle the matter through mutual settlement, could have unilaterally ignored the condition of non-payment of fixed charges of the intervening period and passed order whereby not only compelling the Appellant to accept the proposal of the respondent company but also holding that the Appellants have no powers to repudiate contract under the PPA, which amounts to modification and amendment in the terms and conditions of the contract for future?

F. Whether the State Commission has failed to exercise its jurisdiction and authority in not condoning the delay of filing the review petition?

G. Whether the State Commission while deciding the review petition has ignored the settled legal process of law when the matter is to be decided on merit and should not be dismissed on mere technicalities?

H. Whether the State Commission while passing the impugned judgment and order dated 3.1.2018 has put the Appellant in double jeopardy and therefore amounts to compelling the Appellant to accept the demand of the respondent company even when the same was not acceptable during the conciliation process?

I. Whether the State Commission has the jurisdiction and authority to first initiate the conciliation process and thereafter compel one party to compulsorily accept the terms and conditions of the proposal of the other party during the conciliation process and thereafter decided the matter on the merits as well against the Appellant?

J. Whether the State Commission while exercising its adjudicatory powers u/s 86 of the Electricity Act, 2003 is required to decide the dispute inter-se between the parties within the terms of PPA or is also empowered to re-write the terms and conditions of the PPA by completely nullifying the powers of repudiation of the Appellant?

K. Whether the State Commission while exercising its adjudicatory powers u/s. 86 in respect of the PPA entered into between Appellant and the respondent could have imposed its own terms and conditions whereby taking away completely the powers of repudiation of contract from the Appellant?

L. Whether the Commission can determine tariff beyond the terms and conditions of the UPERC Tariff Regulation, 2014 or any Regulation stated therein viz. Regulation 13 which permits

deviation of norms by mutual consent of generator and procurer?

M. Whether the State Commission while adjudicating the dispute between the parties under Section 86(1)(f) with respect to the contract entered into between the parties through PPA could vary the terms and conditions or is bound to decide the dispute within four corners of the PPA and in terms, conditions and consequences mentioned in the PPA for any breech or default which is to be determined by the State Commission itself.

N. Whether the State Commission while deciding the dispute under Section 86(1)(f) of the Electricity Act 2003 between the parties is bound by the terms and conditions of the PPA and consequences provided therein or could supplement or supplant PPA with its own conditions to the detriment of the Appellant on the ground of the tariff having been determined under the Electricity Act 2003.

43. Since, the appeals arise out of the same issues decided in the common order, therefore, we decide to adjudicate the batch of appeals by this common judgment.

44. Learned counsel, Mr. Altaf Mansoor appearing for the Appellants has filed following written submissions for our consideration:-

45. The relief claimed by the Appellants in the above captioned Appeal is as under:

"(a) Allow the appeal and set aside the impugned order dated 03.01.2018 passed by the Uttar Pradesh Electricity Regulatory Commission in Petition no 1258 of 2017 to the extent the State Commission declares that the appellant has no right to repudiate the PPA and therefore, the same is an event of default on the part of the appellant and also the direction to pay fixed charges to the Respondent no. 2 for the intervening period between 18.07.2017 to 15.01.2018."

46. Therefore, from the perusal of the same it is abundantly clear that the challenge in the present appeal is with regard to the finding of the State Commission that the Appellants have no right to repudiate the PPA and the direction for the payment of fixed charges for the intervening period. Reference in this regard may be made to the decision of the Hon'ble Supreme Court in the matter of *Bachhaj Nahar v. Nilima Mandal*, (2008) 17 SCC 491. The present Appeal is also being filed against the common order dated 08.03.2019 passed by UPERC in Review Petition No.1348 of 2018 whereby State Commission has dismissed the Review Petition of the appellant.

PPA BETWEEN UPPCL & BEL AND CONDITIONS OF EXIT:

47. On **10.12.2010**, the Appellant no.1 on behalf of the distribution licensees, entered into Power Purchase Agreement (PPA for purchase of 90% saleable energy from 2x45 MW Thermal Power Generating Plants for a period of 25 years).

48. The Clauses relevant for the present controversy in question are as under: -

2.2 Early Termination
This Agreement shall terminate before the Expiry Date:
if either all the Procurers (jointly) or Seller exercises a right to terminate, pursuant to Article 3.3, Article 4.5.3, Article 14.4.5 or Schedule 10 of this Agreement or any other provision of this Agreement;

14.2 Procurer Event of Default

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

14.4 Termination for Procurer Events of Default

14.4.5 (i) *After a period of seven (7) days following the expiry of the Consultation Period and unless the Parties shall have otherwise agreed to the contrary or the Procurer Event of Default giving rise to the Consultation Period shall have been remedied, the Seller shall be free to sell the then existing Allocated Contracted Capacity and associate Available Capacity of Procurer/s committing Procurer/s Event of Default to any third party of his choice. Provided such Procurer shall have the liability to make payments for Capacity Charges based on Normative Availability to the Seller for the period three (3) years from the eighth day after the expiry of the Consultation Period. Provided further that in such three year period, in case the Seller is able to sell electricity to any third party at a price which is in excess of the Energy Charges, then such excess realization will reduce the Capacity Charge payments due from such Procurer/s. For the avoidance of doubt, the above excess adjustment would be applied on a cumulative basis for the three year period. During such period, the Seller shall use its best effort to sell the Allocated Contracted Capacity and associated Available Capacity of such Procurer generated or capable of being generated to such third parties at the most reasonable terms available in the market at such time, having due regard to the circumstances at such time and the pricing of electricity in the market at such time. Provided further, the Seller shall ensure that sale of power to the shareholders of the Seller or any direct or indirect affiliate of the Seller/shareholders of the Seller, is not at a price less than the Tariff, without obtaining the prior written consent of such Procurer/s. Such request for consent would be responded to within a maximum period of 3 days failing which it would be deemed that the Procurer has given his consent.* ***Provided further that at the end of the three year period, this Agreement shall automatically terminate*** *but only with respect to such Procurer/s and thereafter, such Procurer/s shall have no further Capacity Charge liability towards the Seller. Provided further, the Seller shall have the right to terminate this Agreement with respect to such Procurer/s even before the expiry of such three year period provided on such termination, the future Capacity Charge liability of such Procurer/s shall cease immediately.*

49. Provisions of Energy Policy & Memorandum of Understandings dated 14.01.2010 and 22.04.2010. were expressly referred to in the PPA. The capacity changes made over a period of time at the instance of BEL generator is as under:

24x7 POWER FOR ALL PROGRAM/DOCUMENT

50. On **14.04.2017,**the Government of India and the Government of Uttar Pradesh jointly announced "24x7 Power for All" ("PFA") program.

51. In PFA, the **high cost of power purchase** is identified as the **key challenge** for the State Government and in this document it is mentioned as *"**CHALLENGE:** The cost of power purchase in U.P. is considerably high. As per data for FY17, Uttar Pradesh purchases substantial quantum of power at high variable cost from stations like Tanda, Rosa, Parichha, Dadri Thermal, Dadri Gas, **Bajaj**, Anta, Auriya etc. Higher Level of AT&C losses results in additional power purchase requirement and cost."*

52. The provisions of S.107 and S.108 of the Electricity Act, 2003 specifically provides that the respective Commissions will be guided by the policy decisions of the Central/State Governments.

Location of Power Plant of Respondent No.2	InstalledU/MOU 14.01.2010	Saleable	Installed Capacity (MW) U/MOU 22.04.2010	Saleable	Saleable under amended PPA
Barkhera (Pilibhit)	80MW	50%	90MW	90%	100%
Khambharkhera (Lakhimpur Kheri)	80MW	50%	90MW	90%	100%
Maqsoodapur (Shahjahanpur)	80MW	50%	90MW	90%	100%
Kundarkhi (Gonda)	80MW	50%	90MW	90%	100%
Utraula (Balrampur)	80MW	50%	90MW	90%	100%

Action of UPPCL to achieve the object of the PFA:

53. In view of the financial condition of the UPPCL where the gap of total revenue generation and total expenditure is to the tune of ₹ 10,000 Cr. (Ten Thousand Crores) per annum and therefore, it was impossible for UPPCL to achieve the target set in PFA unless it takes the drastic step of cost cutting.

54. UPPCL being an agency of the State Government is implementing the policy decision of the State Government and taking effective steps for successful implementation of the same and to cut the cost of power purchase is one of the most crucial step for attaining a financial health, which will enable it to supply affordable electricity to more than 1 crore rural consumers which are going to be covered by FY 2019 by UPPCL.

55. In order to achieve the object of the PFA and to reduce power procurement cost, UPPCL had done the following:

(i) July, 2017 for purchase of 439.9 MW wind power @ Rs.3.53 per unit

(ii) November, 2017 UPPCL signed an agreement with SECI for purchase of 200 MW wind power @ 2.72 per unit.

(iii) UPPCL had requested vide its letter dated 04.05.2017 to the Director of the Solar Energy Corporation of India for the allocation of 750 MW solar power under the NSM scheme to UPPCL at the discovered tariff through reverse auction, with an upper cap of Rs.3.50/unit

(iv) UPPCL constituted a **Task Force** on 30.06.2017 which had taken following decisions:

(a) No scheduling of power should take place from projects whose variable cost is more than ₹ 3.46 per unit after

considering the merit order stack for generating stations w.e.f. 08.06.2017**)** wherein the power was procured till variable cost of ₹ 3.459 (i.e. ₹ 3.46) by the said task force. Therefore, a cut-off rate of ₹ 3.46 was mentioned by the task force and all the power generation companies whose variable costs were above the cut-off rate were directed not to schedule power.

(b) It was also decided by the Task Force to explore the option of exit from PPAs of 5 power plants of the respondent Company as the variable cost is much more than cut off rate of 3.46.

EXIT NOTICE BY UPPCL i.e. APPELLANT

56. UPPCL issued an exit notice on 08.07.2017to exit from the Power Purchase Agreement dated 10.12.2010 entered into between M/s Bajaj Energy Private Limited and the Appellants due to high procurement cost as compared to the open market, predominantly in the public interest as well as in the interest of UPPCL.

57. In the Exit Notice dated 08.07.2017 it was specifically mentioned that *"…….. This may be treated as a notice of exit of UPPCL from PPA dated 10.12.2010. UPPCL shall be deemed to be exited out from aforesaid PPA after 10 days from the date of issuance to this notice."*

BEL CHALLENGE TO EXIT NOTICE:

58. The respondent no.2 challenged both the Exit Notice dated 08.07.2017 and the subsequent order rejecting the offer vide order dated 15.07.2017 by means of writ petitions before the Hon'ble Allahabad High Court, Lucknow Bench, Lucknow and subsequently in pursuance to the

order of the Hon'ble High Court before UPERC under Section 86(1)(f) of the Electricity Act 2003.

NEGOTIATIONS TO THE EXIT NOTICE

59. Immediately after issuance of the Exit Notice dated 08.07.2017 and during the proceedings before the Hon'ble High Court and also before the State Commission, negotiations between the parties took place to resolve at the instance of BEL. Negotiations between the parties started with the Respondent making various proposals to the Appellant.

EVENTS SUBSEQUENT TO FOURTH OFFER BY BEL

60. The Appellants in all fairness and considering the genuineness and bona fide of the respondent no. 2, placed the aforesaid proposal dated 18.12.2017 before its Board of Directors for decision of the Board on 26.12.2017.

61. The Board of Directors of the Appellant, after considering the proposal dated 18.12.2017 submitted by the respondent, took a decision to revive the Power Purchase Agreement signed with the incorporated specific discounts and conditions in the proposal dated 18.12.2017. However, the revival was made subject to be operational from the date of State Commission's order so that there is no liability on UPPCL for paying fixed charges w.e.f. 18.07.2017 till revival of the PPA.

62. Accordingly, the decision of the Board dated 26.12.2017 was brought on record before the State Commission by the Appellant's application dated 28.12.2017.

63. Thereafter, the respondent no.2 in reply to the aforesaid affidavit 28.12.2017 of the appellant filed its reply dated 01.01.2018 before the State Commission wherein they denied the proposal of the Board of Directors to the extent that the liability of payment of fixed charges was not to be fastened on the Appellant.

64. Thereafter, no opportunity of hearing was given to the Appellant to either withdraw its offer or to plead the case on merits. The aforesaid details clearly established the fact that the Appellant had substantial leeway to reduce the tariff, along with safeguarding their commercial interest, as the tariff was amongst the highest on the very face of it.

PASSING OF IMPUGNED ORDER DATED 03.01.2018 BY UPERC

65. After filing of aforesaid reply dated 01.01.2018, on 03.01.2018 the State Commission, without any further hearing and affording any opportunity to the Appellant for rebuttal, passed the impugned order dated 03.01.2018 **(Annexure No.29 of WS; @ Pg 545)** whereby holding *inter alia* as under:

(i) The exit notices dated 08.07.2017 and 15.07.2017 do not terminate the PPAs as there is no such provision in the bilateral contracts signed between the parties.

(ii) The exit notice virtually comes in the category of procurer event of default.

(iii) For curing the aforesaid procurer's event of default through mutual consultation, a solution has been found and now the procurer is ready to procure power at the reduced variable cost, therefore, the continuity of PPA is not affected.

(iv) BEL is entitled to fixed charges for the intervening period subject to certain minor deductions in O & M Expenses and Interest on Working Capital.

STATE COMMISSION's VIEW IN IMPUGNED ORDER DATED 03.01.2018 / FINDINGS:

66. Sub para 1 of Para 14:

"……..The Commission has gone through the PPAs dated 10.12.2010 but did not find any provision in the PPAs which allows unilateral exit from the obligations incorporated in the PPAs by either party. The PPAs have Article 14 which deals with the 'sellers event of default' and 'procurers event of default' and the conditions for termination of PPA on such occurrences……."

67. Sub para 7 of Para 14:

"From the views expressed by the Commission herein above, it is abundantly clear that the exit notices dated 8.7.17 and 15.7.17 do not terminate the PPAs as there is no such provision in the bilateral contracts signed between the parties. The exit notice virtually comes in the category of procurer event of default and for curing that, through mutual consultation, a solution has been found and now the procurer is ready to procure power at the reduced variable cost, therefore, the continuity of PPA is not affected but both the parties have wasted considerable time in resolving the dispute therefore both the parties should make some sacrifice on fixed charges……..."

68. For proper adjudication of the issue, the Appellant craves to bring into notice of the Tribunal the following 3 Clauses of the PPA along with its submission:

69. ***Clause 2.2 Early Termination -*** The State Commission completely ignored the Clause 2.2 (early Termination), an explicit clause while passing the impugned order which specifically provides for termination of contract at an early date i.e. before expiry of the term of contract by either of the party with the consequences to be followed as per the terms of the Power Purchase Agreement itself. It is the contention of the respondent

that in relying on Clause 2.2 of the PPA the appellant has relied on a clause that was not relied on by them in the pleadings.

70. In this regard it is submitted that it is a well settled principle of law that when any clause of a contract is being interpreted or analyzed the same has to be done in such a way that it is not in contradiction with any other clause of the contract. This legal position has been settled by the Hon'ble Supreme Court in a Catena of judgements, therefore applying the ratio of this well settled position of law would only lead to one conclusion i.e. when construing or analyzing clauses of the contract, the same cannot be done in isolation of the other clauses of the contract instead the contract has to be analysed and interpreted as a whole so as to ensure a harmonious interpretation of the clauses. Reference in this regard may be made to the decision of the Hon'ble Supreme Court in the matter of *Nabha Power Ltd. v. Punjab SPCL*, (2018) 11 SCC 508, Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission & Ors. 2019 SCC Online SC 813, Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd., AIR 1965 SC 1288 (Annexure No.32; @ Pg 625) &Polymat India (P) Ltd. v. National Insurance Co. Ltd., (2005) 9 SCC 174

71. ***Clause 14.2 - Procurer Event of Default*** – This Clause 14.2(ii) specifically provides that the Procurer has a right to repudiate the agreement i.e. PPA dated 10.12.2010. Therefore, under the then circumstances of high-power procurement cost from the power plant of the respondent generator, it was decided by the Task Force to explore the option of exit from PPAs of 5 power plants of the respondent Company, the appellant decided for non-continuation or exit from the PPA. Further, in terms of Clause 14.2 (ii), after issuance of Exit Notice dated 08.07.2017, the respondent before the actual date of exit (i.e. 10 days after 08.07.2017) came up with the proposal dated 11.07.2017 for

reduction in variable cost. Thus, it was the respondent itself who had never given a notice to the appellant in terms of provisions of Clause 14.2 (ii) of the PPA. The respondent generator in its Reply/CA admits the fact that PPA provides for termination of PPA unilaterally by the procurers which will constitute an event of default on the part of the procurer.

72. The respondent further admitted that PPA itself provides for a procedure for resolution of such dispute and accordingly consequences for failure to resolve the dispute within the prescribed period.
Therefore, admittedly the finding of the State Commission that PPA does not provide for termination of contract unilaterally is incorrect and wrong.

73. ***Clause 14.4.5.(i)*** **-** The State Commission although mentioned the said clause of the PPA in the impugned order dated 03.01.2018 which deals with the consequences in case of repudiation of contract by procurers the PPA provides for payment of fixed charges for three years and the petitioner is free to sell its power to third parties as per the terms of PPA and also that at the end of the three year period, this Agreement shall automatically terminate but the State Commission despite noticing the said Clause holds that there is no provision in the PPA with allow termination of the agreement.

74. It is relevant to mention here that the Energy Policy, 2009 of the Government of Uttar Pradesh has mandated that power would also be procured for the State through MoU Route and therefore, Clause 3.3.2.6 of the said Policy provides that broad guidelines would be based on Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensee under Case 2. The Draft PPA in the present matter was aligned to the said case 2 but with certain deviations. While most of the deviations are general in nature but some of the

deviation were specific which were duly dealt by the State Commission while approving the Draft PPA. One of such deviation with regard to ***"****Sale of Power in case of Procurer's inability to procure"* it was decided that in case of Procurer's inability to procure and then the developer resorts to sale to third party. It has been agreed by both the parties that in such a case whatever be the sale proceeds over and above the variable charges, it shall be first adjusted against the due fixed charges. Any amount left after adjusting the fixed charges shall remain with the developer but if the amount received over and above variable charges would be less than the fixed charges payable by the procurer then the procurer shall pay the shortfall to fulfil the fixed charge liability. The State Commission opined to keep the modified clause as agreed by the parties and thereafter, the draft PPA was approved by the State Commission vide order dated 18.11.2010. Therefore, in view of the above, Clause 14.4.5 (i) of PPA have been specifically incorporated with mutual consent of the parties and after approval of the State Commission.

75. The contention of the Respondent that the abovementioned ground is a new ground is wholly misplaced. The order dt.18.11.2010 was brought on record in the Counter Affidavit filed by the Respondents, which therefore becomes the part of the pleadings before the Tribunal. The Appellant has made submissions based on the material present on record and it is well within the rights of the Appellants to rely on the same. Further, relying on judicial pronouncement which the respondent themselves have brought on record and advancing an argument based on the same would not qualify as a new ground but merely an observation and argument based on the documents that are available on record before this Tribunal. Further, the essence of the order dated 18.11.2010 is already contained within clause 14.4.5 (i) of the PPA. Further, it would be relevant at this

juncture to mention that the appellant has taken a specific ground in the appeal with regards to the above captioned contention. Even otherwise, Section 56 of the Indian Evidence Act provides that facts which may be judicially noticed need not be proved. Therefore, any blatant abnormality in the proceedings before the State Commission would be noticed by the Tribunal and need not be proved by the Appellant.

76. It has always been the case of the appellant that consequences as per the terms of the PPA must follow as the PPA is sacrosanct between the parties and no deviation can be made by the State Commission by interpreting the clauses of the PPA in an arbitrary and unjust manner.

77. Further, the observation made by the State Commission in Sub Para 3 of Para 14 of the impugned order dated 03.01.2018itself is contrary as on one hand the State Commission holds that there is no specific provisions in PPA for exiting whereas on the other hand the State Commission, in the aforesaid sub para has further observed that issuance of Exit Notice by UPPCL is covered under Clause 14.2 (ii) which covers the repudiation of the agreement as a procurer's even of default.

78. Ref: Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission & Ors. 2019 SCC Online SC 813 - Similar clauses of contract were considered by the Hon'ble Supreme Court and the Termination by the Seller in the event of Seller's event of default was held to be valid.

DECISION POST HASTE BY THE SOLE MEMBER OF STATE COMMISSION:

79. It is relevant to state that the then learned Chairman who has passed the impugned order was at one point of time privy to the proceedings at the stage of approval of draft PPA, therefore, the decision was taken post haste without waiting the formation of the bench. This

issue is evident from the fact that Sri Suresh Kumar Agarwal, the then learned Chairman of the State Commission *(who has passed the impugned order singly)* also happened to be Director (Finance), UPPCL and had appeared and argued on behalf of the Appellants in the matter relating to approval of draft PPA to be entered into between the Appellants and BEL i.e. the PPA in question and the parties in the present matter. Therefore, the matter ought not to have been decided post haste without waiting for the formation of a bench.

80. It is the contention of the respondent that the arguments advanced on DECISION POST-HASTE BY THE SOLE MEMBER' are new arguments that have not been pleaded or mentioned before. During the course of the preparation of arguments for the instant matter, upon perusing the various documents that have been relied on by both the parties to this litigation, it came to the knowledge of the appellant that the sole member of the State Commission had actually appeared on behalf of UPPCL during the course of the approval of the draft PPA.

81. Further, a conjoint reading of Section 82 and Clause 2 of Section 92 makes it abundantly clear that the intention of the legislature is that the State Commission should function with more than one member especially when the State Commission itself has not provided for a quorum under the regulations as applicable at the relevant point of time. Further it is for these very reasons that the Hon'ble Supreme Court has observed in its decision in the matter of State of Gujarat Vs. Utility Users' Welfare Association; (2018) 6 SCC 21 that a judicial member should be present and no bench adjudicating a dispute can be formulated without a judicial member.

82. Further, the Appellant has taken a specific ground regarding the haste shown by the State Commission in the pleadings.

GROUNDS OF CHALLENGE

SUPERVENING PUBLIC INTEREST CONTRIBUTING TO EXIT

83. Since, the Exit Notice was issued in pursuance to the cut off variable cost rate of ₹ 3.46, (as decided by the Task Force) therefore, there was no arbitrary decision on the part of the Appellants with respect to the respondent no.2.

84. Considering the supervening public interest, it was a necessity to cancel the unviable PPAs. Therefore, the termination of PPA had taken place in larger public interest and, in exercise of the doctrine of necessity.

85. The effect of cancellation of PPA was that the respondent no. 2 was also set free to sell its power generated in open market. Therefore, there was no adverse impact of the cancellation of PPA on BEL. Further, with the advent of open access, the respondent has the freedom to sell power to consumers directly.

86. Vilification of the appellant by the respondent: During the course of the arguments the respondent has attempted to vilify the appellant and paint a picture before this Tribunal that the respondent has suffered huge losses and has been left high and dry by the appellant. These attempts on the part of the respondent is to mislead this Tribunal and keep it in the dark about the real situation in the instant matter. In reality, the respondent is not suffering any losses, further power is being scheduled from all 5 plants of the respondent as per the MOD stacking order**.** The fair and equitable conduct of the appellant is evident from the fact that immediately

after the variable cost of the plants of the respondent being lowered, the appellant has scheduled electricity from their plants. It may be relevant to further point out that immediately after the passing of the impugned order dated 03.01.2018 the appellant in all fairness had immediately started scheduling electricity from the respondent BEL's plants w.e.f. 00:00 hrs. on 16.01.2018 which is even before the signing of the Supplementary PPA dt. 31.05.2018 and its subsequent approval by the State Commission on 25.09.2018. It is a settled principle of law that private interest stands subordinated to public good and public interest must override any consideration of private loss or gain reference in this regard may be made to the decision of the Hon'ble Supreme Court in-

(i) *Friends Colony Development Committee v. State of Orissa (2004) 8 SCC 733* (Para 22)
(ii) *STO v. Shree Durga Oil Mills (1998) 1 SCC 572* (Para 21).

87. Further, there is no singling out of the respondent as has been averred by the respondent. The respondents while referring to the Minutes of Meeting of the Energy Task Force has submitted that the respondent plants have been singled out while deciding on reducing the power procurement cost for the State of UP. A bare perusal of the said MoM would go on to show that in reality, multiple other plants have also been mentioned in the discussion, and further three of the plants that have been mentioned in the discussion have already shut down.

88. The respondent in an attempt to mislead this Tribunal has levelled allegations that are not supported by any documents or material available on record. One such allegation is that it is the contention of the appellant that the State Government has a right to exit a PPA. The said allegation is not only completely misleading but an attempt at the vilification of the appellant, it is merely a baseless rhetoric that has been advanced by the

respondent. It is not the case of the appellant that the state government has a right to exit a PPA. On the contrary it is the case of the appellant that as per the terms and conditions of the PPA itself, the appellant has a right to exit/terminate the PPA as per the relevant clauses of the PPA which were mutually agreed between the parties as well.

IMPUGNED ORDER PASSED WITHOUT ANY OPPORTUNITY OF HEARING

89. Impugned order has been passed without affording opportunity of hearing to the appellant to rebut the contentions of BEL stated in reply dated 01.01.2018, therefore, bad in the eyes of law.

90. The State Commission in passing the Impugned Order has adopted a pedantic approach by ignoring the issues raised by the Appellant and hurriedly decided the matter on 03.01.2018 immediately after accepting the detailed counter offer of the respondent Company on 01.01.2018 without affording opportunity to the appellant to rebut the same. The appellants were, therefore, completely taken by surprise when the impugned order dated 03.01.2018 was passed by the State Commission.

91. In the proceedings before the State Commission, the State Commission vide its order dated 10.11.2017 has itself initiated the conciliation proceedings and therefore, question of deciding the matter on merit of exit notice by the State Commission neither arose nor was ever argued.

92. Once the respondent no. 2 had declined to accept the decision of the Board of Directors of the appellant then the matter ought to have been decided on the merits of the case holding the conciliation process having failed and the learned Commission ought to have ignored the conciliation

process and without being impressed or swayed by the offer and ought to have decided the matter on the merits of the case.

93. Just before the passing of the impugned order dated 03.01.2018 no hearing took place on merits as only process of resolution / negotiation was going on and in fact hearing was done only on proposal given by the respondent generator which also supported from the fact that the appellant had filed its detailed reply/counter affidavit but the respondent never filed its rejoinder.

94. A timeline of the events leading up to the impugned order is provided below so as to show there was no opportunity of hearing given to the Appellant.

18.12.2017	Fourth Proposal by Bajaj Energy Limited
26.12.2017	Proposal of respondent put before the board of directors of the appellant for decision.
28.12.2017	Decision of Board of directors of the appellant was brought on record before the Commission by means of an application. The board decided that the PPA may be revived subject to no liability on the appellant for being fixed charges w.e.f. 18.07.2017 till revival of PPA.
01.01.2018	Respondent filed its reply to the application of the appellant wherein they denied the proposal of the Board of Directors to the extent that the liability of payment of fixed charges was not to be fastened on the appellant.
02.01.2018	Matter was heard only on the proposal and affidavit filed by Respondent dt. 01.01.2018

03.01.2018	Impugned order was passed by the Commission without affording any hearing to the appellant.

95. Further in the impugned order dated 03.01.2018 no arguments advanced during the hearing have been recorded the same is further evidenced from para 13 of the impugned order.

96. It would be interesting to note that after recording the contentions of the appellant (respondent in the petition below) in para 13 the State Commission has directly gone into the analysis of the issue and decided the issue. This clearly evidences that no opportunity of hearing was provided to the appellant. Further the Appellants have taken a specific ground at in the memorandum of appeal with regards to the lack of opportunity of hearing.

97. It is submitted that the respondent for the lack of merit in the case, is clutching at straws and is attempting to exploit a mere typographical error to advance their argument. As is evident from the context of the above quoted text there is a typographical error in the last paragraph where in instead of respondent, appellant has been typed.

MISINTERPRETATION OF THE PROVISIONS OF THE CONTRACT

98. It is a settled provision of law that if a provision of a contract is to be interpreted, the same has to be done in the manner that has already been specified through the decisions of the Hon'ble Supreme Court.

99. It is a settled position of law that explicit terms of a contracts are to be given strict/literal interpretation/meaning and the Courts should ordinarily not imply terms into the same. In this regard, reliance is placed on,

(i) *Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission &Ors. 2019 SCC Online SC 813:- PARA 22*

(ii) Nabha Power Ltd. v. Punjab State Power Corporation Ltd.: (2018) 11 SCC 508 :- Para 49

(iii) Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd., AIR 1965 SC 1288 Para 12

(iv) Polymat India (P) Ltd. v. National Insurance Co. Ltd., (2005) 9 SCC 174Para 19

100. Thus, keeping in mind the abovementioned Decisions of the Hon'ble Supreme Court it can be concluded that, in the instant case, clauses of the contract could not be interpreted in such a way that they violate other provisions of the contract. Therefore, the Commission could not have interpreted the contract in such a way which would render the provisions of Clause 2.2 of the PPA as null, as Clause 2.2 provides an express right of early termination of the Power Purchase Agreement. Further, a contract is to always be harmoniously construed so as to give effect to all its clauses in the way the contracting parties intended.

CONTRADICTORY FINDINGS

101. Vide order dated 20.11.2017 in Para 11 while disallowing the application for interim relief filed by the Bajaj Energy Ltd., UPERC holds as under:

> *"11. ……. Prima facie it appears that in case of repudiation of contract by procurers the PPA provides for payment of fixed charges for three years and the petitioner is free to sell its power to third parties as per the terms of PPA. In view of this fact the petitioner's interest seems to be protected by the PPA itself. As such the application for interim relief s disallowed."*

102. Whereas in impugned order dated 03.01.2018, the State Commission in Para 14 (7) gave its findings as under:

> *14(7). From the views expressed by the Commission herein above, it is abundantly clear that the exit notices dated 8.7.17 and 15.7.17 do not terminate the PPAs as there is no such provision in the bilateral contracts signed between the parties. The exit notice virtually comes in the category of procurer event of default ……..”*

103. While hearing Petitions for approval of the Draft PPA to be signed by the parties, the Commission in Para 12 (c) of its order dated 18.11.2010 has specifically observed a under:

> *12 (c). Sale of Power in case of Procurer’s inability to procure:*
> *Sri S.K. Agarwal, Director (Finance), UPPCL averred that the clause has been modified by them after intense discussions with the developers in case of Procurer’s inability to procure and then the developer resorts to sale to third party. It has been agreed by both the parties that in such a case whatever be the sale proceeds over and above the variable charges, it shall be first adjusted against the due fixed charges. Any amount left after adjusting the fixed charges shall remain with the developer but if the amount received over and above variable charges would be less than the fixed charges payable by the procurer then the procurer shall pay the shortfall to fulfill the fixed charge liability. Sri Agarwal advocated that the Commission may allow the modification as envisaged by them.*
> *The Commission opines to keep the modified clause as agreed by the parties. However, the clause in the draft PPA regarding sale of power does not cover any such eventuality where, in case of procurer’s inability to procure the power, the developer sells it to its affiliate company at a lower cost. In this context, the Commission is of the opinion that such power shall not be sold at a tariff below that provided by the Commission under the PPA.*

104. Therefore, in view of the above, Clause 14.4.5 (i) of PPA have been specifically incorporated.

105. But the State Commission while passing the impugned order dated 03.01.2018 has gave finding that there is no provision for termination of contract and therefore, the action of the appellant in terminating the same is legally not justified and the Appellants was held liable for payment of fixed charges for the intervening period.

ERRONEOUS FINDINGS

106. Matter decided on merits during the conciliation proceedings which itself was initiated by the learned Commission and the proceedings were confined to conciliation/settlement through mutual consent only.

107. Manifest illegal in deciding the matter on the basis of offer given by respondent after recording the conditional consent of the appellant but at the same time holding condition as illegal.

108. Matter decided partly on merit and partly on the basis of conciliation - question of deciding the matter on merit of exit notice by the State Commission neither arose nor was ever argued.

109. Admission on the part of the respondent generator itself that termination clause exists in the PPA as *Referred in Para 4 (ii) of the reply dated 01.01.2018 of BEL*, the State Commission gravely erred in holding that there is no such provision in the bilateral contracts signed.

110. The Commission decided the matter by not only compelling the Appellants to accept the conditions of its proposal dated 28.12.2017 but also not to enforce its condition of non-payment of fixed charges during the intervening period.

111. Once the respondent no. 2 had declined to accept the decision of the Board of Directors of the appellant then the matter ought to have been decided on the merits of the case holding the conciliation process having failed.

112. Learned Commission has virtually decided the issue in terms of the application of the respondent no.2 dated 01.01.2018 which is contrary to the principles of amicable settlement and the process of conciliation.

IMPUGNED ORDER AMOUNTS TO RE-DRAWING THE TERMS AND CONDITIONS OF PPA

113. The State Commission has not only misinterpreted the terms and conditions of the PPA but also imposed its own conditions to the detriment of the appellant.

114. By holding that the appellant has no right to repudiate the PPA, the State Commission has exceeded in its jurisdiction and has virtually re-written the PPA and has put conditions which never existed in the PPA thereby compelling the appellant to purchase electricity from respondent no.2 even in case of default on part of the respondent no.2/BEL**.** Reference in this regard may be made to the decision of the Hon'ble Supreme Court in the case of –

> *Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) Pvt. Ltd.; (2017) 16 SCC 498* (Annexure No.35 of WS; @ Pg 653)-Para 65
>
> *Export Credit Guarantee Corporation Of India Limited v. Garg Sons International; (2014) 1 SCC 686, (Annexure No.36* of WS*; @ Pg 694)* – Para 13

115. The State Commission by passing the impugned order has inserted condition which is coercive in nature and deprives the appellant it's unfettered legal right to exit which renders the very PPA bad in law. By putting complete prohibition to exit by the order of UPERC is both prohibitive and without free consent and violative of the basic element of contract.

MERE APPROVAL OF PPA BY UPERC DOES NOT MAKE THE PPA A STATUTORY CONTRACT.

116. It is the contention of the respondent that the below mentioned argument by the appellant is a new argument introduced at the stage of final arguments,

> *(j) Similarly, determination of tariff by the State Commission does not create any statutory rights in favour of the parties in the PPA.*

117. The Respondents have relied on the decision of the Hon'ble Supreme Court in the matter of *India Thermal Power Ltd. v. State of M.P.*, (2000) 3 SCC 379, (Para 11). Wrongly relying on the same the Respondents have contended that the entire PPA is a Statutory Contract. Whereas a perusal of the relevant paragraphs of the Judgement would go on to show that the PPA is a Statutory contract only with regards to certain clauses in a PPA that are governed by the Electricity Act, 2003. The same is a legal plea and can be raised at any instance, further from the Judgement of the Hon'ble Supreme Court in *India Thermal* its abundantly clear that the extent of the statutory nature of the PPA is limited to Tariff Fixation and Requirements under Section 43A(2).

118. From a perusal of Para 11 (relied upon by the respondent) of the above-mentioned judgement, it is evident that a PPA is a statutory contract only to the extent of tariff fixation as well as the conditions as mentioned in Section 43A (2). Thus, the contention of the respondent no. 2 is not only misplaced but also incorrect. Further, the appellant is well within his rights to raise a legal argument at any stage of the proceedings. Further, the Appellant has taken a specific ground under the grounds to appeal whereby the appellant has contended that the State Commission while passing the impugned judgement and order dated 03.01.2018 has

converted the PPA into a judicial direction without considering that the PPA is the sacrosanct document between the contracting parties and no interpretation averse to the consensus ad idem can be given to the PPA.

IMPUGNED ORDER PREJUDICIAL TO APPELLANT & AGAINST PUBLIC INTEREST

119. The State Commission in the impugned order dated 03.01.2018 has specifically mentioned that *"……The Petitioner, in the public interest has allowed reduction in variable cost……..." (para 8)* thereby providing misplaced veil of public interest to BEL despite the fact that its actions were completely based on commercial principles. Such finding of a State Commission shows prejudice against the Appellant.

120. Further, even post settlement as recorded in the order dated 03.01.2018 UPPCL is still compelled to purchase power at an exorbitant high cost of Rs.5.170 per unit from the respondent no.2 at present. This purchase price too is much higher as compared to the APPC of Rs.3.60 for the year 2019-20 declared by CERC.

121. Here it may be relevant to state that even today the power procurement cost from the respondent generator is extremely high and exorbitant as the *average through rate* between January, 2018 to January, 2020 works out to Rs. 11.20 per unit which is evident from the Affidavit dated 20.03.2020 filed before the Hon'ble Supreme Court.

122. It is further, respectfully submitted that even at present also the running bills of the respondent no.2 are proportionately paid on regular basis.

123. However, since the Appellant is facing regular difficulty in scheduling of electricity and receipt of payment from the Appellant,

therefore, it is always open to the respondent generator to invoke the provisions of Article 14.2 of the PPA and to terminate the PPA in pursuance to Clause article 14.4.5 (i) the consequence of which would automatically follow and the respondent generator would be free to sell it it's electricity elsewhere.

124. It would also be relevant to mention at this juncture that even currently, the energy scheduled from Respondent No. 2 is at one of the highest rates as is evident from the recent Merit Order Dispatch.
Thus, from the above discussion it is evident that the decision of the Appellant was in supervision of the Public Interest and to reduce the overall fiscal burden on the consumers. Therefore, through the impugned order the State Commission has in turn failed to consider the interest of the public at large.

CONSEQUENCES OF REPUDIATION OF PPA TO BE JUDGED FROM THE TERMS OF CONTRACT

125. No one can be forced or compelled to perform the contract. In case of non-performance the other party may claim damages, which would be in terms of said contract and in absence of such terms it has to be decided by the Courts.

126. Clause 14.4.5 (i) of PPA has been incorporated in terms Para12(c) of the order dated 18.11.2010 in the matter of approval of Draft PPAs and it specifically provides repudiation of PPA which has to follow consequence as provided in the said Clause itself.

127. S. 74 Contract Act provides for compensation for breach of contract where penalty stipulated for, through a catena of judgements it has been settled that for a claim of the damages under Section 74, the actual loss

is to be proved by the party claiming the loss. Further a reading of Section 74 makes it abundantly clear that the damages awarded in the presence of an explicit provision cannot exceed the amount stipulated in the contract.

INAPPLICABILITY OF THE SPECIFIC RELIEF ACT, 1963

128. In the instant case the Specific Relief Act would have no applicability, the specific relief act provides and in detailed procedure for specific a performance of contract as well as exceptions wherein specific relief cannot be obtained. In case of a continuing contract such as a PPA, even the provisions of the Specific Relief Act would not be applicable, as is evident from Section 14 of the Specific Relief Act, 1963.

129. Further, a case for Specific relief cannot be brought before the Hon'ble Appellate Tribunal or the State Commission as the Specific Relief Act under Section 20B provides for establishment of Special Courts with local jurisdiction to try matters relating to Specific relief. Reliance is placed on *Her Highness Maharani Shantidevi P. Gaikwad Vs. Savjibhai Haribhai Patel*, (2001) 5 SCC 101 – Para 58 (Pg. 735 of Written Submission).

130. The respondent during the course of the arguments has relied heavily on the provisions of the Specific Relief Act, 1963 but has failed to address/inform the tribunal of specific provisions of the act that make it in applicable in the instant case. Clause (b) Section 14 of the Specific Relief Act, 1963 clearly provides that any person seeking the specific performance of a continuous duty which the court cannot supervise would not be covered under the Specific Relief Act. During the course of the arguments the respondent has conveniently submitted that they are not

seeking the performance of a continuous duty. It is surprising that as per the Respondent, the payment of cost for procurement of electricity from the plants of the respondent over a period of 25 years is not considered as a continuous duty by the Respondent. It is submitted that the duties under a PPA would clearly fall under performance as defined under Clause (b) of **Section 14.** Therefore, the instant case is a classic example of the kind of contract where the provisions of Specific Relief Act would not apply.

131. Further, even if the contention of the respondent is to be accepted, the Specific Relief Act under **Section 20 B** provides for Special Courts that would handle suits relating to specific relief, as such no specific relief could be granted by any other court apart from special courts as have been provided for under the act. Further for a prayer of specific relief, a suit has to be filed before the appropriate Court. Further, it would also be relevant to state at this juncture that the 2018 Amendment of the Specific Relief Act has added a schedule to the act which defines infrastructure projects under the Specific Relief Act.

132. The respondent has further relied on the decision in the case of *D. Santoshamma and Anr. Vs. D. Sarala & Anr; Civil Appeal No. 3574 of 2009*. Upon a perusal of the facts of the above referred case it is made abundantly clear that the subject matter of that case was with regards to a land and an agreement to sell. Further, in the above caption matter a suit for specific performance was instituted before the court of principal subordinate judge, Rangareddy District by the parties. Therefore, the instant case is neither factually nor legally in any manner similar to the present appeal. Thus, the same is irrelevant and inapplicable in the instant appeal.

INAPPLICABILITY OF ORDER 41 RULE 22 OF THE CODE OF CIVIL PROCEDURE, 1908

133. The Respondent has not filed any Cross-Objections in the instant appeal before the Tribunal. Further, there has been no specific averment with regards to Order 41 Rule 22 of the Code of Civil Procedure, 1908 in the Reply/CA. It was only during the course of the oral arguments, the respondent has heavily relied on the provisions of Order 41 Rule 22 and also placed reliance on the decision of the Hon'ble Supreme Court in the matter of, *Sundaram Industries Ltd. v. Employees Union, (2014) 2 SCC 600 - Para 20.*

134. A perusal of the above captioned provision and the decision of the Hon'ble Supreme Court in the matter of *Sundaram Industries Ltd. v. Employees Union* would go on to show, that cross objections with regards to an appeal cannot be filed if the decision impugned in the appeal is in favour of the objector and there is merely some finding is the objector seeks to defend.

135. At this juncture it would be relevant to mention that Section 120 of the Electricity Act, 2003 provides that provisions of the Civil Procedure Code applicable to the Tribunal only to the extent as provided under Section 120 of the Act. Reliance is placed on Haryana Bijli Vitran Nigam Ltd. & Ors. versus Central Electricity Regulatory Commission & Ors.; 2014 SCC OnLine APTEL 170 - *Paras 19 & 51 to 55;*

136. Aforesaid decision was taken judicial notice of in the decision of the Hon'ble Supreme Court in the matter of *Energy Watchdog v. CERC & Ors., (2017) 14 SCC* wherein the findings of this Tribunal were neither disputed no overruled by the Hon’ble Supreme Court.

137. Even otherwise, the Hon'ble court in the matter of *Jamshed Hormusji Wadia v. Port of Mumbai [(2004) 3 SCC 214* in reference to Order 41 Rule 22 has held - *Paras 35 - 37*

138. Therefore, in the garb of placing reliance on Order 41 Rule 22 of the Civil Procedure Code, 1908 the Respondent cannot be allowed to agitate any claims to the current/running bills or damages beyond the scope of the contract which was neither claimed before UPERC nor pleaded before UPERC.

UPERC EXCEEDED THE JURISDICTION IN PASSING THE IMPUGNED ORDER

139. State Commission exceeded its jurisdiction by accepting only the condition which were beneficial to BEL and simultaneously in compelling the appellant to abide by that part of the offer which was beneficial to the respondent company but was denied by the appellant, thereby accepting the condition of the respondent, BEL in totality, and thereby making it part of the judicial order impugned.

140. The Commission did not respect the decision arrived at during the resolution process but by its decision dated 03.01.2018 imposed its own terms and conditions whereby the Appellants were not only compelled to adhere to its proposal but also to concede to the demand of the respondent BEL. Such was never the intention or object of the appellant who was coaxed into entering into the resolution process for amicably settling the matter.

141. The State Commission instead of rejecting the application of the respondent no. 2 dated 01.01.2018 has virtually decided the issue in terms of the application of the respondent no.2 dated 01.01.2018 which is

contrary to the principles of amicable settlement and the process of conciliation.

142. The jurisdiction of the State Commission under Section 86 (1) (f) of the Electricity Act, 2003 is limited to a mere adjudication of disputes between licensees and generating companies and that is of an Arbitral Tribunal. Therefore, it can be said that while resolving a dispute under Section 86 (1) (f), the State Commission must exercise its powers within the four corners of the contract i.e. the State Commission cannot go over and beyond the scope of the contract or the liability as envisaged by the contract. Thus, it can be concluded that the extent of the powers of the State Commission under Section 86 (1) (f) is coextensive with the powers available to an Arbitral Tribunal under a contract.

143. Thus, it can be contended that, the State Commission while exercising its jurisdiction under Section 86(1)(f), instead of adjudicating the dispute, has delved into the sphere of interpreting the contract. This action of the Commission is manifestly arbitrary as well as devoid of jurisdiction under Section 86(1)(f). Reference in this regard may be made to the decision of the Appellate Tribunal of Electricity in the matter of M/s JSW Energy Ltd. v. MERC & Anr. in Appeal No. 355 of 2017, Para 2.17, 6.1 (vii), 7 (iv)

APPELLANT'S DECISION FAIR, JUST AND EQUITABLE

144. No arbitrariness or discrimination on the part of UPPCL /Appellants:

145. BEL in its Reply/CA dated 03.03.2020 has alleged that Appellants have acted in a discriminatory manner towards BEL and further tried

to justify their arbitrary actions in the garb of public/consumer interest.

146. In regard to the aforesaid it is submitted that it is incorrect to say that the action on the part of the appellant to exit from the PPA has any discriminatory impact. The document not only refers to BEL, but also other generators like Tanda, Anta, Auraiya, Rosa, Pasricha. it is submitted that in order to achieve the object of the PFA a task force was constituted on 30.06.2017 by UPPCL. The task force after deliberations had taken a decision that no scheduling of power should take place from projects whose variable cost is more than 3.46 per unit.

147. Therefore, a cut-off point was mentioned by the task force and all the power generation companies whose variable costs were above the cut off rate were directed not to schedule power.

148. In fact the fairness in the action of the appellant can be seen from the fact that the appellant in its affidavit dated 20.11.2017 filed before the State Commission, made a categorical statement that the appellant had no prejudice or bias against any particular company or Generator. It was also mentioned that the appellant was not averse to purchase of electricity from the respondent generator in case the respondent generator lowers the rate of electricity to the extent that its rate falls within the merit order dispatch stack.

149. It is the contention of the respondent that the 24X7 power for all document would not qualify as directions to the State Commission under Section 108 and 107 of the Electricity Act, 2003. It is submitted that there is no requirement of any separate notification or publication of the directions that may be given to the state Commission under Section 107

or Section 108 of the Electricity Act. In the instant case the 24X7 power for all document was prepared by the Central and State Government with the aim of ensuring public interest in the power sector. Therefore, the 24X7 Power For All document does qualify as a direction by the State Government to the State Commission under Section 108 of the Act. Thus, the Commission could not have ignored the 24X7 Power For All document and held that the bona fide actions of the appellant in furtherance to the said document were illegal. Ref:Friends Colony Development Committee v. State of Orissa (2004) 8 SCC 733 (Para 22) & STO v. Shree Durga Oil Mills (1998) 1 SCC 572 (Para 21).

REVIEW PETITIONS

150. In view of the fact that State Commission in its order dated 03.01.2018 had travelled beyond the terms of agreement/conciliation. Even after passing of the impugned order dated 03.01.2018 the question of payment of fixed charges for the intervening period was again put for further discussions and negotiation between the parties. For one and half month, a series of negotiations took place in the office of the Director Corporate Planning, UPPCL and Chief Engineer PPA, UPPCL for resolving the issue with respect to the intervening period through settlement.

151. The respondent no. 2 despite having participated in numerous meetings and negotiations having taken place with respect to the intervening period, ultimate backed out from resolving the matter with respect to the intervening charges and thereafter the Appellants decided to file the Review Petition before the State Commission which could be filed only on 04.07.2018.

152. The Appellant filed the review along with an application for condonation of delay on 03.07.2018 before the UPERC as there was a delay of 93 days as per the limitation prescribed under UPERC (Conduct of Business) Regulation 2004.

153. The review petition was finally heard by State Commission on 22.01.2019 and thereafter decided on 08.03.2019.

154. The State Commission while deciding the review has categorically held that the State Commission has the power to condone the delay in filing the review petition with respect to the period provided under the Regulations itself which have been framed by UPERC itself which are procedural in nature. However, despite the State Commission holding that it has power to condone delay, it went on to dismiss the petition of the appellant on the ground of delay itself.

155. The State Commission ought not to have dismissed the review on the grounds of delay/limitation. It is a settled principle of law that any delay on the part of government authorities or corporations have to be construed liberally. The Hon'ble Supreme Court in the case of *Collector Land Acquisition, Anantnag and Another Versus MstKatiji and Others (1987) 2 SCC 107*(Annexure No.44 of WS; @ Pg 818) and in *State of Nagaland Versus Lipok AO and Others (2005) 3 SCC 752*have clearly held that the delay on the part of government organisations have to be construed liberally considering the impersonal machinery and slow and encumbered process of pushing the files from table to table as a routine causing delay unintentionally due to governmental process.

PAYMENT OF FIXED CHARGES FOR INTERVENING PERIOD

156. The respondent no. 2 in view of the aforesaid impugned orders dated 03.01.2018 and 08.03.2019 passed by UPERC has raised an invoice for the intervening period when no scheduling of electricity was taking place. Accordingly, the appellants have been saddled with total of ₹ 206.36 crores as fixed charges for the intervening period. Plant-wise details are as under:

S. No.	Name of Unit	Fixed Charges for Intervening Period (in Crores)
1	Maqsoodapur	40.70
2	Utraula	42.33
3	Khambharkheda	41.36
4	Kundarkhi	41.11
5	Barkheda	40.86
	Total	**206.36**

157. It is submitted that for the aforesaid fixed charges for intervening period the appellant had neither consented nor agreed to during the conciliation proceedings. It may be further stated that since the matter was being finalized through terms of mutual settlement wherein there was a clear term on the part of the appellant of non-payment of intervening charges, therefore under this background no interpretation can be given or arrived at by giving misplaced interpretations on 'continuity of PPA' with respect to payment of intervening charges.

158. The reliance upon the judgment passed by this Tribunal *Maharashtra State Electricity Distribution Co. Ltd. vs. Central Electricity Regulatory Commission & Ors.:* Appeal No. 261 of 2013 by the respondent generator with respect to payment of fixed charges for the intervening period is highly misplaced and not applicable in the present

dispute. The payment of capacity charges in respect of procurer event of default is not in dispute in the matter at hand. It is settled principle of law that the matter was being decided in terms of mutual settlement thus, neither the question of legality or correctness of the exit notice would arise, nor any interpretation with respect to the effect of the exit notice being declared correct or wrong. Further, the said direction was above and beyond the jurisdiction of the Commission under section 86(1)(f) of the Electricity Act, 2003. Ref:M/s JSW Energy Ltd. v. MERC & Anr. in Appeal No. 355 of 2017

RESPONDENT'S ATTEMPT TO SHIFT THE FOCUS OF THE APPEAL FROM THE ISSUE OF INTERVENING CHARGES TO THE ISSUE OF TERMINATION OF PPA.

159. The respondent in an attempt to mislead and misguide this Tribunal are attempting to shift the focus of this appeal from the payment of intervening charges to the termination of PPA. The appellant while challenging the impugned order has limited the challenge to the extent of the direction to pay intervening charges and the finding that the appellant has no right to repudiate the PPA. The respondent so as to derail the process of justice, are attempting to shift the focus of the appeal to whether the termination was valid or not. The entire arguments advanced by the respondent beat around the bush but never address this contention of the appellant. There has been no argument advanced from the side of the respondent to counter or refute the contentions of the Appellant. Ref: Bachhaj Nahar v. Nilima Mandal, (2008) 17 SCC 491)

RUNNING/CURRENT

160. The question with respect to running bills is not part of the controversy in the present appeal.

161. Issue of payment of running bills, new claim of interest & compensation couldn't be raised in present dispute.

162. It is settled principle of law that an appeal is continuation of the original proceedings and therefore, has to be decided within the terms of challenge before the Appellate Court. Reference in this regard may be made to the decision of the Hon'ble Supreme Court in the matter of *Bachhaj Nahar v. Nilima Mandal*, (2008) 17 SCC 491 – Para 23.

163. The respondent BEL has not challenged the order dated 03.01.2018. The respondent generator has in fact accepted the order so passed in letter and spirit.

164. For deciding the scope of an Appeal, Section 111 (3) of the Electricity Act, 2003 is relevant.

165. Therefore, an appeal can't be decided beyond the relief claimed in the appeal and the issues raised in the appeal can be decided only. The Limited/Short Controversy as raised by the Appellants before this Tribunal for decision.

166. Thus, the subject matter of the present controversy does not cover the dispute regarding running/current bills of the generator. The scope of the present appeal cannot be enlarged at the instance of the respondent, moreover when the order impugned has not been challenged by the respondent.

167. In fact, the respondent generator had already filed separate proceedings with respect to the dispute relating to the payment current

charges before State Commission which fact was not informed to this Tribunal.

168. The respondent in order to misguide the Tribunal from the issue at hand mischievously created an impression as if no payment of current charges was being made by the appellant to the generator. It is categorically stated that the dispute with respect to payment of current charges is not the subject matter of dispute in the current proceedings and therefore, the respondents are estopped from raising the same. Accordingly, the appellants were constrained to challenge the order dated 02.12.2019 passed by this Tribunal in the matter before the Hon'ble Supreme Court in Civil Appeal No. 612 of 2020. The Hon'ble Supreme Court by interim order dated 07.02.2020 was pleased to stay the direction of payment of 75% of the claimed amount towards fixed charges payable to BEL for the intervening period. Since a statement was made by the counsel for BEL that the generator is not receiving any payment against running bills, therefore, the appellant was required to file an affidavit before the Hon'ble Supreme Court with respect to payment made against running bills.

169. Therefore, the challenge with respect to the direction of this Tribunal for payment of current charges is still pending consideration before the Hon'ble Supreme Court. In compliance of the order dated 07.02.2020 passed by the Hon’ble Supreme Court in Civil Appeal No.612 of 2020, the Appellants have already filed an affidavit dated 20.03.2020 showing payment of running bills of the respondents no.2. The Civil Appeal No. 612 of 2020 is still pending before the Hon'ble Supreme Court.

170. Thus, in view of the facts, circumstances, legal prepositions mentioned in the preceding paras as well as in the Appeal and the

Rejoinder Affidavit it can be concluded that the balance of convenience is favour of the Appellants and the contentions of the respondent generator are not only baseless but are also contrary to settled legal provisions and therefore, the present appeal deserves to be allowed.

171. Learned counsel Mr. Amit Kapur appearing for Respondent No.2 has filed following written submissions for our consideration:-

Conspectus of the Appeal

172. The core issue involved in the present Appeal is whether a party to a contract can choose to invoke grounds extraneous to the contract and seek to unilaterally terminate the contract at will when there is no provision in the contract for termination at will. The Appellant [Uttar Pradesh Power Corporation Ltd. ("*UPPCL*") and UP Discoms] have set up an untenable case in fact and law advancing a plea of Procurers' right to unilaterally exit a 25 year Power Purchase Agreement:-

173. By invoking a clause which expressly gives remedy and cause of action to the Supplier [Bajaj Energy Ltd. ("***BEL***")] against the Procurers for a Procurer's Event of Default.

174. When the PPA was actually approved by Ld. Uttar Pradesh Electricity Regulatory Commission ("***UP Commission***") on 18.11.2010 and 07.12.2010 in a Petition filed by the Appellant seeking such approval.

175. UPPCL and the UP Discoms entered into the PPA on 10.12.2010 and thereafter executed a Supplementary PPA on 15.06.2011.

176. UP Commission approved the PPA tariff under Section 62 of the Electricity Act, 2003 ("***Electricity Act***") through proceedings attended and

actively participated by UPPCL and the UP Discoms culminating in orders dated 22.12.2011 and 24.05.2017.

177. Neither UPPCL nor the UP Discoms have challenged any of the said orders approving of the PPA and determining the PPA tariff that have since attained finality and are binding on them.

178. During the hearing, much time and effort was expended by the Appellants to contend that the Impugned Order and the Review Order are contrary to the express provisions of the PPA, and that their actions fall within the express terms of the PPA. Yet when called upon to do so, the Appellants failed to show any provision of PPA to demonstrate that they have a right to unilaterally terminate the PPA when their conduct admittedly is covered within the Procurers Event of Default under the PPA.

179. A series of judgments were relied upon by the Appellants to aver that private interest must be subordinated to public interest to justify their reneging from their legal and contractual commitment to procure power in terms of the PPA and pay the applicable tariff. None of these judgments relate to the scheme of the Electricity Act in particular with respect to PPAs governed by Sections 61, 62 and 86 thereof - which statutorily provide for safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner, i.e., striking a balance between affordability of power supply and viability of investment in power sector.

180. It is submitted by BEL that PPAs are statutory contracts containing provisions regarding determination of tariff and performance of other statutory functions. Such PPAs are long term contracts (25 years in the present case) and substantial capital investment is involved in the setting up of power generating stations which cannot be subject to the whims and

fancies of the parties involved therein as held in *India Thermal Power Ltd. v. State of M.P. & Ors.*: (2000) 3 SCC 379.

181. While admitting that the PPA is sacrosanct, the Appellants' have argued that the provisions of the PPA have no meaning since UPPCL elected to terminate the PPAs at will *dehors* the provisions of the PPA. Should such a position were to be accepted, it would make a mockery of rule of law, jeopardizing the investment made by various generating companies in setting up their plants in consonance with the applicable regulatory framework under Section 62 of the Electricity Act.

182. The Appellants' action of unilaterally terminating the PPA amounts to a breach of its obligations under the PPA and BEL is entitled to relief contemplated in law and the PPA, i.e.:-

183. Compensation/damages on account of the loss suffered due to closure of the Plant as a consequence of non-scheduling of power by the Appellants.

Continued implementation of the PPA.

184. It is in this context that the present batch of Appeals are to be adjudicated by this Tribunal.

Background

185. The present Written Submissions are being filed on behalf of Respondent No. 2, BEL in compliance with the directions of this Tribunal in the Order dated 06.10.2020 passed in the present Appeal. The Appeal filed by UPPCL and the Distribution Licensees in the State of Uttar Pradesh ("*UP Discoms*") ("*Appellants*") challenge the following Orders passed by UP Commission:-

(a) Order dated 03.01.2018 ("*Impugned Order*") in Petition Nos. 1258, 1259, 1260, 1261 & 1262 of 2017; and

(b) Review Order dated 08.03.2019 ("*Review Order*")in Petition Nos. 1344, 1345, 1346, 1347 & 1348 of 2018.

186. BEL is a generating company under Section 2(28) of the Electricity Act. BEL was initially incorporated in the name of M/s Bajaj Energy Private Ltd. which was subsequently changed to Bajaj Energy Ltd. upon conversion to a Public Limited Company vide Order dated 16.10.2015 of the Ministry of Corporate Affairs, Kanpur. BEL has set up and, *inter alia*, operates the following generating stations:-

Location	**Installed Capacity (MW)**
Barkhera (Pilibhit)	90
Khambharkhera (LakhimpurKheri)	90
Maqsudapur (Shahjahanpur)	90
Kundarkhi (Gonda)	90
Utraula (Balrampur)	90

187. BEL has entered into PPA(s) dated 10.12.2010 read with Supplementary PPAs dated 15.06.2011 signed by UPPCL on behalf of UP Discoms in respect of each of the five generating stations for supply of 100% saleable energy for a period of 25 years. The present Appeal pertains to the thermal generating station (2 x 45 MW) set up by BEL at Maqsudpur (Shahjahanpur) ("*Plant*"). The present batch of Appeals raise identical legal issues in respect of each of the five Plants owned and operated by BEL. Accordingly, BEL craves leave of this Tribunal to rely

on the present Written Submissions for the batch Appeals, for the sake of convenience.

188. By the Impugned Order, UP Commission, *inter-alia*, held that:-

(a) There is no specific provision in the PPA for unilaterally exiting from the contract at will by either party except in case of default. The Appellants' action of unilaterally issuing Exit Notice ("*Exit Notice*") dated 08.07.2017, order/letter ("*Order*") dated 15.07.2017 and subsequent non-scheduling of power from BEL cannot be legally justified.

(b) Consequently, the PPA will be treated to have existed in continuity. [***Para 14. 7. @ Pg. 17-18 of the Impugned Order.***

(c) From the date of the Impugned Order, i.e., 03.01.2018 onwards, BEL will be entitled to variable cost as per BEL's offer dated 18.12.2017 and part of fixed charges which BEL has incurred despite closure of the Plant in the intervening period (i.e., from 08.07.2017 till 03.01.2018) as per the provisions of the PPA. [***Para 14. 7. @ Pg. 17-18 of the Impugned Order.***

(d) BEL and the Appellants were directed to enter into a Supplementary PPA for all five generating stations and obtain *post facto* approval from the UP Commission. The Appellants shall not wait for signing of the Supplementary PPA for permitting the operation of the generating stations. [*Para 16 @ Pg. 20 of the Impugned Order]*

(e) The Appellants shall resume the operation of the generating stations within 7 days of the receipt of the Impugned Order and the

other terms and conditions of the PPA will apply as they are. [*Para 17 @ Pg. 20 of the Impugned Order*

189. A Review Petition filed by the Appellants without any justification for the delay of 93 days beyond limitation period was dismissed by the Order dated 08.03.2019. UP Commission held that if the Appellants' request for condonation of delay in filing the review petition is allowed, it will not only set a bad precedent and will also result in a complete miscarriage of procedural sanctity. [*Para 11-12 @ Pg. 8-9 of the Review Order]*

190. The Appellants have filed the present Appeals challenging the Impugned Order and the Review Order, *inter-alia*, on the following grounds:-

(a) UP Commission has exercised its power under Section 86(1)(f) of the Electricity Act in an arbitrary, illegal and unjustified manner in so far as after initiating the conciliation process, UP Commission has directed the Appellants to unconditionally accept BEL's offer.

(b) UP Commission has failed to provide reasonable opportunity of hearing. The Impugned Order violates the principles of natural justice as the UP Commission hurriedly decided the matter after receiving the reply of BEL which in effect was BEL's final proposal of settlement.

(c) Impugned Order is in violation of Article 14 of the Constitution of India since the Impugned Order is arbitrary and is discriminatory. The Appellants not only felt compelled to accept the terms and conditions of BEL but have also been completely barred from terminating the agreement for all times to come.

(d) UP Commission has exceeded its jurisdiction in compelling the Appellants to purchase electricity from BEL without any power of repudiation even in case of default on part of BEL.

(e) UP Commission, by the Impugned Order has re-written the PPA incorporating conditions which never existed.

(f) UP Commission has converted the PPA into a judicial direction despite knowing that PPA is sacrosanct between the parties and the UP Commission could not have quoted its own interpretation which blindly binds one of the parties to the contract.

(g) UP Commission has completely overlooked its duty and responsibility provided under the Electricity Act, to ensure cheap and reasonable electricity to consumers since high cost of intervening period will add a burden on the consumers.

191. The Appeal was filed by the Appellants in May 2019 after a delay of nearly 451 days. Due to the delay in filing of the Appeal and non-payment of fixed charges and running bills of BEL, BEL objected to the condonation of delay being sought by the Appellants and accordingly filed detailed Reply/objections to the said application on 23.09.2019 wherein it was prayed by BEL that the Appellants may be directed to pay 75% of the fixed charges payable to BEL (during the intervening period), subject to the final outcome of the Appeal. It is pertinent to note that the principle amount of fixed charges withheld by UPPCL for all five plants of BEL for the intervening period from 19.07.2017 till 16.01.2018 is INR 206.36 Crores.

192. By Order dated 02.12.2019 ("*Interim Order*"), this Tribunal condoned the delay in filing/re-filing the Appeal and, *inter-alia*, directed the Appellants to:-

(a) Deposit INR 50,000 in the National Defence Fund as costs (which was deposited by the Appellants belatedly).

(b) Pay the admitted amount of running bills kept outstanding (from December, 2018 till September, 2019) amounting to INR 494.85 Crores within a period of 60 days.

(c) Pay 75% of the claimed amount (INR 206.26 Crore) towards fixed charges payable to BEL for the intervening period from 19.07.2017 till 16.01.2018 within a period of 60 days, subject to the outcome of the Appeal.

193. On 13.01.2020, the Appellants filed Civil Appeal No. 612 of 2020 before the Hon'ble Supreme Court challenging this Tribunal's Order dated 02.12.2019.

194. On 07.02.2020, the Hon'ble Supreme passed an Order in Civil Appeal No. 612 of 2020 and, *inter-alia*, directed:-

(a) Stay of the Order dated 02.12.2019 to the extent that the Appellant has been asked to pay 75% of the claimed amount (INR 206.36 Crore) towards fixed charges payable to BEL for the intervening period.

(b) The Appellants to file an affidavit showing the payment of running bills from January, 2018 till date. The Appellants' Affidavit dated 20.03.2020 was filed on 02.06.2020 as per the website of the Hon'ble Supreme Court. However, the same was served on BEL only on 10.08.2020.

No stay has been granted by the Hon'ble Supreme Court on the continuation of proceedings pending before this Tribunal.

Dilatory tactics of the Appellants and multiple filings

195. The Impugned Order was passed by UP Commission on 03.01.2018. The Review Petition was filed by the Appellants after a delay of 93 days beyond the prescribed time limit of 90 days in terms of the Conduct of Business Regulations and was accordingly rejected by UP Commission. It has been contended by the Appellants that BEL has consciously contributed to the delay in filing the Review Petition(s) on account of engaging in negotiations/discussions subsequent to the passing of the Impugned Order. This contention of the Appellants is baseless in fact, and liable to be rejected. There was no question of engaging in further negotiations/discussion by BEL once the Impugned Order was passed by UP Commission, *inter-alia*, holding that the Exit Notice issued by the Appellants was bad in law and that the Appellants are liable to pay fixed charges incurred by BEL despite closure of the Plant in the intervening period (i.e., from 08.07.2017 till 03.01.2018), as per the provisions of the PPA.

196. The Appellants filed the present Appeal in May, 2019, after a delay of nearly 451 days. Thereafter, defects were cured in the Appeal, after a delay of 60 days. After allowing the application for early listing of the present Appeal, this Tribunal directed the Appellants to file their Rejoinder which had been deliberately not filed since March, 2020 only to unlawfully withhold the payments to be made to BEL. The Appellants filed their Rejoinder only on 27.08.2020 whereas it was to be filed by 18.03.2020 (i.e., after a delay of 161 days).

197. It is submitted that throughout the course of final arguments, the Appellants have continued to adopt dilatory tactics with belated and

multiple filings, varying stands wand setting up a new case in rejoinder arguments, *viz*:-

(a) On 10.09.2020, this Tribunal passed an Order directing parties to file Written Submissions by 18.09.2020 (soft copy) and 20.09.2020 (hard copy). While BEL filed its Written Submissions on 18.09.2020 (both soft and hard copies), the Written Submissions on behalf of the Appellants were served on BEL only on 21.09.2020 at 10:30 p.m. (before the hearing at 11 a.m. on 22.09.2020).

(b) Again before the hearing on 01.10.2020, Appellants served Rejoinder Written Submissions on 30.09.2020 without seeking liberty of this Tribunal.

(c) The Appellants have introduced new grounds in the Written Submissions and Rejoinder Written Submissions which are at variance with the grounds raised in the Appeal. This was duly pointed out by BEL during the hearing on 22.09.2020.

198. It is a settled position of law as held by the Hon'ble Supreme Court in *Mohinder Singh Gill v. Chief Election Commr.*:(1978)1 SCC 405 [Para 8]:-

> "*8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji [Commr. of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16] :*
>
> > *"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and*

conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older…"

BEL's submissions

199. 6.21 BEL denies the averments set out in the Appeal, Rejoinder, Written Submissions and Rejoinder Written Submissions filed by the Appellants, which are contrary to or at variance with BEL's Reply, Written Submissions dated 18.09.2020 and the present Written Submissions.

200. Hon'ble Supreme Court in the Appellants' Civil Appeal 612 of 2020 is seized of the issue regarding payment of running bills from January, 2018 onwards. As such, this Tribunal is considering the issue of validity of termination of PPA by the Appellants and the payment of fixed charges claimed by BEL for the intervening period from 19.07.2017 to 16.01.2018. BEL's submissions are focussed on that aspect.

Unilateral termination of PPA by the Appellants is unsustainable

201. On 08.07.2017, UPPCL issued what was euphemistically called Exit Notice to BEL terminating the PPA in view of the allegedly high power procurement cost of INR 7.63/Unit from the Plant. UPPCL relied on "Power for All" document dated 14.04.2017 issued by the Government of India aimed at reducing the average power purchase cost in the State of Uttar Pradesh - to state that it does not wish to continue with the PPA dated 10.12.2010 and shall be "deemed to have exited" from the PPA after 10 days of issuance of the Exit Notice.

202. In this context, is pertinent to note that:-

(a) PPA was approved in Petition Nos. 662, 663, 664, 665, 666, 689 and 701 of 2010 filed by UPPCL by UP Commission's Orders dated on 18.11.2010 and 07.12.2010 (PPA for 90% saleable

energy) and 03.11.2014 (Supplementary PPA for 100% saleable energy from BEL's Plant). This PPA approval with the tariff clause was never challenged by UPCCL or the Discoms.

(b) The Appellants participated in the extensive tariff determination exercise undertaken by UP Commission. On 24.05.2017, by way of the Final Tariff Order, tariff for BEL's Plants was determined by the UP Commission under Section 62 of the Electricity Act, after giving the Appellants due opportunity of being heard. The Appellants did not challenge the said Tariff Order under Section 111 of the Electricity Act..

(c) On 08.07.2017, i.e. 45 days after the Final Tariff Order was passed, the Appellants issued Exit Notice to BEL terminating the PPA on account of the allegedly high tariff of BEL's Plant(s). Such actions of the Appellant demonstrate the intention of the Appellant to resile from the obligations under the PPA.

203. The Provisional Tariff Order dated 22.12.2011 and the Final Tariff Order dated 24.05.2017 passed by UP Commission, having not been challenged by the Appellants have attained finality and now bind the Appellants. The Appellants are seeking to resile from its commitments under the PPA to pay tariff, as approved by UP Commission. It is noteworthy that the Impugned Order dated 03.01.2018 has been accepted and implemented by the Appellants by:-

(a) The Appellants availing supply of power from BEL from 03.01.2018 onwards.

(b) On 31.05.2018, entering into a Supplementary PPA with BEL in terms of the directions of UP Commission. The said Supplementary PPA was placed before the UP Commission for

approval in Petition Nos. 1335, 1336, 1337, 1338 & 1339 of 2018, and was approved by Order dated 25.09.2018

204. It is noteworthy that the present Appeal came to be filed with 451 days delay in May 2019 – a clear afterthought to escape liability.

205. The Appellants have, *inter-alia*, sought the following relief:-

> "*21*…..(a) *allow the appeal and set aside the impugned order dated 03.01.2018 passed by the Uttar Pradesh Electricity Regulatory Commission in Petition No. 1258 of 2017 to the extent the State Commission declares that the appellant has no right to repudiate the PPA and therefore, the same is an event of default on part of the appellant….*"

206. The aforesaid prayer of the Appellants, if granted, amounts to re-writing the terms of the PPA - a concluded contract. UP Commission has confined itself to the legality of the Exit Notice dated 08.07.2017 and subsequent Order dated 15.07.2017 and held that the Exit Notice and Order issued by the Appellants are bad in law inasmuch as there is no provision in the PPA for such unilateral termination at will. There is no deliberation or finding on the right of the Appellants to unilaterally repudiate/terminate the PPA. The Appellants' submissions are based on a misreading/misinterpretation of the Impugned Order.

207. The Appellants' have admitted that PPA is sacrosanct between the parties and the present dispute being contractual in nature, UP Commission ought to have decided the issue in terms of the express provisions of the PPA. Yet, while relying on the PPA, the Appellants' have now argued that the provisions of the PPA have no meaning since UPPCL elected to terminate the PPAs "at will" *dehors* the provisions of the PPA. Such stance approbating and reprobating on a core issue is not permissible in law.

None of the provisions of the PPA relied upon by the Appellants get attracted in the present dispute.

208. The Appellants have relied on the following provisions of the PPA to contend that the PPA itself provides for unilateral termination at will or exit by the Appellants:-

(a) Article 2.2, i.e., "Early Termination".

(b) Article 14.4.5, i.e., "Termination for Procurer Events of Default".

209. The reliance placed on Article 2.2 is misplaced as Article 2.2 provides for right of either party to terminate the PPA pursuant to:-

(a) Article 3.3, i.e., "Consequences of on-fulfilment of conditions under Article 3.1" – Satisfaction of conditions subsequent by the Seller and the Procurers;

(b) Article 4.5.3, i.e., Extensions of time in respect of SCOD of the Plant;

(c) Article 14.4.5, i.e., "Termination for Procurer Events of Default"; or ; or

(d) Schedule 10, i.e., "Representation and Warranties" of the PPA.

210. It is submitted that BEL has duly satisfied all conditions subsequent specified in Article 3.1 of the PPA within the stipulated timeframe and there is no default on part of BEL. Admittedly, there is no dispute in respect of the SCOD of the Plant(s) and there is no breach of any Representations and Warranties by BEL which warrants termination of PPA by the Appellants.

211. Further, in terms of the express provisions of the PPA -

(a) The procedure set out in Article 14.4.5(i) of the PPA is triggered only in case of occurrence or continuation of a

Procurer Event of Default pursuant to Article 14.2(i). **[*Article 14.4.1*]**

(b) In such a scenario, BEL has the right to deliver to all Procurers a Seller Preliminary Default Notice, at its option.**[*Article 14.4.2*]**

(c) In case BEL chooses to exercise the aforesaid option, a Consultation Period of ninety (90) days shall apply. [***Article 14.4.3***]

(d) After a period of 7 days following the expiry of the said period, BEL shall be free to sell the then existing Allocated Contracted Capacity and associated Available Capacity of the Appellants/Procurer(s) committing "Procurer Event of Default" to any third party. [***Article 14.4.5(i)***]

(e) It is only at the end of a three-year period from the 8th day after the expiry of the Consultation Period, that the PPA shall stand automatically terminated. [***Article 14.4.5(i)***].

(f) Even during this three-year period, the Appellants are liable to pay Capacity Charges to BEL based on Normative Availability. [***Article 14.4.5(i)***]

212. Admittedly, in the present case BEL elected not to issue such Seller Preliminary Default Notice and consequently no such Consultation Period was observed. On the contrary, the PPA was unilaterally terminated by the Appellants by issuing Exit Notice dated 08.07.2017 to BEL. Even otherwise, the clause relied on by the Appellants [i.e., Article 14.4.5(i)] provides for BEL's right to terminate the PPA in respect of the defaulting Procurer(s) even before the expiry of the aforesaid three-year period. It is

due to this reason that the notices issued by the Appellants were termed as 'Exit' notices and not termination notices – since there was no right bestowed upon the Appellants for termination.

213. As stated above, there has been no default by BEL which would constitute a Seller Event of Default as per Article 14.1 of the PPA. In the absence of any Seller Event of Default, there was no occasion for the Appellants to issue the Exit Notice on 08.07.2017. Even otherwise, in case of default by BEL, the Appellants are bound to follow the procedure prescribed in Article 14.3 of the PPA which does not include the right of the Appellants to terminate the PPA. Consequently, Exit Notices issued by the Appellants are contrary to the provisions of the PPA and bad in law.

214. In fact, the Appellants' submission amounts to an admission on part of the Appellants that they were in default/breach of the PPA. The act of unilaterally terminating the PPA amounts to repudiation of the agreement by the Appellants [Article 14.2 (ii)] as was rightly held by the UP Commission in the Impugned Order [*Para 14. 3*]. In terms of Article 14.2(ii), if the Appellants repudiate the PPA and fail to rectify such breach within 30 days from a notice from BEL in this regard, the same shall constitute an event of default on part of the Appellants. However, even in such a case, it is BEL's option/right to choose termination of the PPA in terms of Article 14.4 of the PPA and in the present case, BEL has chosen not to do so.

215. The Appellants have placed extensive reliance on *Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission*: 2019 SCC OnLine SC 813 ("*Adani Judgement*"), to contend that Hon'ble Supreme Court has held that PPA termination by the party (Adani) was valid in view of its inability to supply power to the Procurers in terms of a clause of the

PPA which is *parimateria* to Article 14.4.5 of the PPA executed between BEL and the Appellants. The Appellants have glossed over the fundamental aspect in the Adani Judgment that Hon'ble Supreme Court had categorically considered a default by the procurers in view of which termination of PPA by the Supplier being the affected (not defaulting) party was held to be lawful. In the present case the Appellants are in default and seek to leverage own default to unilaterally resile from their commitments under the PPA when the Supplier (BEL) has chosen not to terminate the PPA. The Adani judgement actually justifies the case of BEL and destroys the case set up by the Appellants.

216. The Appellants have relied on a clause in the PPA re. "*Sale of Power in case of Procurer's inability to procure*" without referring to any specific Article/provision of the PPA. The Appellants reliance on Article 14.4.5 of the PPA has to be seen as a contractual choice vested in hand of the Supplier, in the case of an event of default committed by the Appellants. The Supplier chose to NOT terminate the PPA. Now the defaulting Procurers (Appellants) seek to exit for own default which is not permissible by the statutory PPA or law.

Strict interpretation of the terms of PPA

217. The Appellants entered into the PPA with open eyes and knowing fully well their rights and obligations in terms thereof, including the tariff payable to BEL. The Appellants' actions are contrary to *pacta sunt servanda*, which is a settled principle of common law and international law meaning 'contracts are to be kept' and the parties involved are to abide by what is agreed to [John R. Peden in '*The Law of Unjust Contracts*' published by Butterworths in 1982, at pages 28-29]. In effect, the Appellants' submissions seek to imply that contracts have no meaning/sanctity and can be terminated at the will of the parties or at the

behest of the Government. If such a position were to be accepted, it would destroy the foundation of all Commercial Contracts including investments in generation assets – exposing them to expropriation risk besides financial ruin violating Section 61 principles.

218. At this juncture, it is pertinent to note that in terms of the PPA Appellants/Procurers have agreed to hold BEL harmless against any or all losses actually suffered or incurred by BEL from claims arising by reason of a breach by Procurers of any of its obligations under the PPA and/or if any of the representations and warranties (Schedule 10) of the Procurers under the PPA are found to be untrue [***Article 15.1***]

219. It is a settled position of law that explicit terms of a contracts are to be given strict/literal interpretation/meaning and the Courts should ordinarily not imply terms into the same. In this regard, reliance is placed on:-

(a) *Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission & Ors.*: 2019 SCC OnLine SC 813 [Para 22].

(b) *Nabha Power Ltd. v. Punjab State Power Corporation Ltd.*:(2018) 11 SCC 508 [Para 49] ("*Nabha Judgment*").

220. In view of the above and in the absence of a specific provision in the PPA for unilateral termination of the PPA by either of the parties, it is submitted that the Appellants' action of unilaterally terminating/exiting the PPA and subsequent non-scheduling of power cannot be legally justified. In fact, the Appellants have themselves relied on the Nabha Judgment to contend that the terms of the PPA have to be harmoniously construed and the dispute has to be decided within the four corners of the PPA.

PPAs are statutory contracts

221. It is submitted that PPAs are statutory contracts in as much as they contain provisions regarding determination of tariff and performance of other statutory functions. Such PPAs are long term contracts (25 years in the present case) and substantial capital investment is involved in the setting up of power generating stations which subject to the whims and fancies of the parties involved therein. The Appellants ought not to have deviated from the terms of the PPA and disregard their obligations/liabilities under the PPA. In this regard, reliance is placed on *India Thermal Power Ltd. v. State of M.P. & Ors.*: (2000) 3 SCC 379 [Para 11, 14] **("***India Thermal Judgment*"**).**

222. The act of unilaterally terminating the PPA amounts to non-fulfilment of contractual obligations and is in effect an event of default on part of Appellants/UPPCL in terms of Article 14.2 of the PPA (i.e., Procurer Event of Default). Therefore, the Exit Notice issued by the Appellants is bad in law.

223. Since the Appellants have relied on the India Thermal Judgment to contend that PPA is a statutory contract only to the extent of tariff fixation related conditions (as mentioned in Section 43A (2) of the Electricity (Supply) Act, 1948 in that case which will be akin to Section 61 of Electricity Act 2003). India Thermal Judgment categorically holds that parties cannot go back on the terms and conditions of a concluded contract. Hence, the Appellants cannot lawfully seek to justify termination of PPA *de-hors* the PPA clause on account of allegedly high tariff determined by UP Commission.

Appellants' reliance on "Power for All" document dated 14.04.2017 issued by the Government of India is misplaced

224. It has been contended by the Appellants that the Government has a right in public interest to issue policy directive and such directive(s) will override all existing contracts. In this regard, it is submitted that:-

(a) "Power for All" document issued by the Government of India is merely a general guidance aimed at reducing the overall power purchase cost in the State of Uttar Pradesh. It does not have any statutory force behind it. It merely provides certain suggestions/recommendations *qua* reduction of the overall power purchase cost in the State of Uttar Pradesh which cannot be interpreted to widen the ambit of statutory language, i.e., the tariff determination principles enshrined in Section 61 of the Electricity Act so as to facilitate re-negotiation of tariff/PPAs or override a concluded contract (PPA). In this regard, reliance is placed on *M.P. v. G.S. Dall and Flour Mills*: 1992 Supp (1) SCC 150 [Para 18].

(b) The Appellants have placed selective reliance on directives contained in the "Power for All" document while ignoring other issues such as the inefficiency of UP Discoms and coal swapping for reducing the overall power purchase cost in the State [*Page 24 of the "Power for All" document*].

(c) One of the stated objectives of the Electricity Act, 2003 as contained in the Statement & Objects of the Electricity Act was to distance the regulatory responsibilities from the Governments to the Regulatory Commissions (Para 3). The Appellants conduct is in teeth of such objectives of the Electricity Act.

(d) Any claim of waiver of certain provisions of the PPA and if the same affects the tariff ultimately payable by the consumer, it would necessarily affect public interest and would have to pass muster of

the Regulatory Commission under Sections 61 to 63 of the Electricity Act. Therefore, it was well within the powers of UP Commission to pass the Impugned Order and decide the issue finally. In this regard, reliance is placed on *All India Power Engineer Federation & Ors. v. Sasan Power Ltd. & Ors.*: (2017) 1 SCC 487 [Para 31].

225. It is a settled position of law that Regulations framed by the competent authority under Sections 178 and 181 of the Electricity Act will have over-riding effect over the PPAs executed between the parties as held by the Hon'ble Supreme Court in *PTC India Limited v .CERC & Ors*.: (2010) 4 SCC 603. The "Power for All" document is merely a general guidance issued in public interest and has not been issued by legislative approval. The "Power for All" document does not confer the right on the Appellants to terminate the PPA citing general public interest and overall reduction in power purchase cost. Such averments are contrary to the principles of Section 61 of the Electricity Act, which provides that the Appropriate Commission shall be guided only by the principles in Section 61 which does not contemplate any such general directives issued by the Government.

226. Even otherwise, the Appellants' contention that in terms of Section 108 of the Electricity Act, the UP Commission was bound to follow the State Government's directions in terms of the Power For All Policy is completely misplaced. The Power For All document was not issued under Section 108 of the Electricity Act. It was not issued as a directive to UP Commission. Section 108 is extracted for ease of reference:-

> "*Section 108. (Directions by State Government): (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing…*"

227. In view of the above, it is submitted that the Appellants' reliance on Section 108 is yet another attempt to mislead this Tribunal to the detriment of BEL.

228. The Appellants have further submitted that in terms of Sections 107 and 108 of the Electricity Act, there is no statutory requirement for directions issued to UP Commission to be published or communicated by a specific method and any document published or prepared by the government which aims at public interest would qualify as a direction by the government under Section 107 and 108. In this regard, it is submitted that there is no legal basis for such averments since both Sections prescribe for a direction "in writing" to be issued to the State Commission (and NOT State Govt./Entity). A copy of one such direction issued by the Government of Uttar Pradesh to UP Commission under Section 108 (along with its English translation) is annexed hereto.

229. Section 61 of the Electricity Act provides for safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner. Therefore, a balance has to be maintained between public and private interest. In view of the above, it is evident that the Appellants reliance on the "Power for All" document to terminate the PPA dated 10.12.2010 citing supervening public interest and owing to allegedly high power procurement cost from the Plant is baseless and liable to be rejected.

BEL is entitled to seek specific performance of the PPA in addition to its claim for damages in the form of fixed charges incurred by it

230. It is submitted that in terms of Article 17.1 of the PPA, the PPA is subject to all applicable laws in India. Accordingly, in terms of the Specific Relief Act, 1963 ("***Specific Relief Act***"):-

(a) BEL is not barred from claiming relief in the form of specific performance of the PPA since:-

(i) BEL has chosen to not obtain substituted performance of the PPA by any third party. [***Section 16(a)***]

(ii) BEL is capable of performing its obligations in terms of the provisions of the PPA and has not violated any essential term thereof. [***Section 16(b)***]

(iii) BEL has demonstrated/proved by its conduct that it has performed and has always been willing to perform the essential terms of the PPA. [***Section 16(c)***]

(b) BEL is entitled to claim compensation for breach of contract by the Appellants in terms of the express provisions of the PPA and in addition to specific performance thereof. This is because UP Commission in the Impugned Order has held that the PPA shall be treated to have existed in continuity (i.e., specific performance ought to be granted) and that BEL is entitled to fixed/Capacity Charges incurred by it despite closure of the Plant(s) on account of non-scheduling of power by the Appellants. [***Section 21(3)***]

(c) BEL's claim for fixed charges during the intervening period does not act as a bar to seeking specific performance of the PPA as fixed charges are payable to BEL for securing performance of the contract/in case of default by the Appellants in terms of Article 14.4.5 of the PPA. [***Section 23***]

231. In view of the above and in terms of the express provisions of the PPA, which is a concluded contract, it is submitted that BEL is entitled to pursue to remedy of specific performance/continuity of the PPA, in addition to its claim for fixed charges. As *dominus litis*, i.e., having dominion over the case, BEL has elected for the said remedy in addition to its claim for fixed/Capacity Charges.

232. The Appellants have submitted that the Specific Relief Act is not applicable to the present dispute since:-

(a) Section 14(b) of the Specific Relief Act, 1963 bars enforcement of a contract which involves the performance of a continuous duty which cannot be supervised by the Court.

(b) Section 20B states that special courts shall be constituted and only such Courts can enforce specific performance of a contract. Therefore, the Act is inapplicable to proceedings before APTEL.

233. In this regard, it is submitted that relief of specific performance of a contract is no longer discretionary, after the amendment of 2018 [Judgment dated 18.09.2020 passed by the Hon'ble Supreme Court in Civil Appeal No. 3574 of 2009: *B. Santoshamma & Anr. v. D. Sarala & Anr*. (Para 70)]. Even otherwise, the Appellants admitted that a PPA for 25 years involves the performance of a continuous duty, yet they seek to terminate the same. Therefore, Appellants' submission has no basis either in facts or law and is based on misinterpretation and misplaced reliance on the Specific Relief Act itself.

<u>In terms of Order 41 Rule 22 of the Civil Procedure Code, 1908, BEL is entitled to support the findings in the Impugned Order</u>

234. The Appellants have themselves relied on various portions of the Impugned Order to contend that the Impugned Order was passed by UP Commission in favour of BEL, without hearing of the matter on merits and without affording an opportunity to the Appellants to argue the case on merits. The Appellants have further highlighted that the Impugned Order has not been challenged by BEL and accordingly BEL has accepted/acquiesced to the said grounds held against BEL.

235. In this regard, it is submitted that in terms of Order 41 Rule 22 of Civil Procedure Code, 1908, an order/judgment can be supported by party in whose favour the same as been delivered on grounds found in his favour. In this regard, reliance is placed on *Sundaram Industries Ltd. v. Employees Union*:(2014) 2 SCC 600 [Para 19, 20].

236. In view of the above, it is submitted that the contention of the Appellants in respect of BEL not having challenged the Impugned Order and consequently having accepted the grounds held against its favour, is baseless and liable to be rejected.

The Appellants are liable to pay fixed charges to BEL for the intervening period (i.e., 08.07.2017 to 03.01.2018)

237. The Appellants are liable to pay fixed charges to BEL for the intervening period when the Plant was available to dispatch power to the Appellants in terms of the PPA. In this regard, it is submitted that:-

(a) Article 14 of the PPA deals with “Seller Event of Default” and “Procurer Event of Default” and the conditions for termination of the PPA on such occurrences.

(b) The act of unilaterally terminating the PPA amounts to unlawful repudiation the agreement on part of the Appellants [Article

14.2 (ii)] as held by the Impugned Order [*Para 14. 3. @ Pg. 16 of the Impugned Order*].

(c) In terms of Article 14.2(ii), if the Appellants repudiate the PPA and fail to rectify such breach within 30 days from a notice from BEL in this regard, the same shall constitute an event of default on part of the Appellants.

(d) Article 14.4 specifies the conditions in case of termination for "Procurer Event of Default". Further, Article 14.4.5 (i) provides that after a period of 7 days following the expiry of the Consultation Period, BEL shall be free to sell the then existing Allocated Contracted Capacity and associated Available Capacity of the Appellants/Procurer(s) committing "Procurer Event of Default" to any third party.

(e) The defaulting Procurers are liable to make payments for Capacity Charges based on Normative Availability to the Seller for the period that the Plant was available but not dispatched.

238. Since, UP Commission has rightly held in the Impugned Order that the Exit Notice dated 08.07.2017 and subsequent Order dated 15.07.2017 are bad in law, this implies that the PPA was never terminated and never ceased to operate. Therefore, irrespective of whether the Appellants chose to of-take/schedule power from BEL's Plant, the Appellants are liable to pay the Fixed Charges/Capacity Charges corresponding to the Availability declared by BEL during the intervening period (i.e., 15.07.2017 onwards) when the power from the Plant was not scheduled, however capacity was declared.

239. In terms of the principles of tariff determination and tariff liability in the purchase of electricity, there is an obligation on the Distribution

Licensee (Appellants) to pay Capacity Charges irrespective of whether the Appellants schedule the capacity offered by the Generating Company (BEL) or not. Annual Fixed Charges are payable to BEL so long as BEL makes available the capacity by necessary declaration to the required Normative Annual Plant Availability Factor (NAPAF). In this regard, reliance is placed on the Judgment dated 22.04.2015 passed by the Hon'ble Appellate Tribunal for Electricity in *Maharashtra State Electricity Distribution Co. Ltd vs. Central Electricity Regulatory Commission &Ors.*: Appeal No. 261 of 2013 [Para 14] .

UP Commission has not exceeded its jurisdiction in adjudicating the dispute and directing the Appellants to unconditionally accept the offer of BEL.

240. UP Commission has correctly exercised its jurisdiction in adjudicating the dispute, passing a reasoned order after giving reasonable opportunity of being heard to both parties and a detailed deliberation on the rival contentions. Despite holding that the Exit Notice/termination of PPA by the Appellants is bad in law, UP Commission has accorded concessional/favourable treatment to the Appellants by making BEL compromise on its entitlement towards Fixed Charges incurred by it during the intervening period, i.e., when the Plant was closed.

241. It is categorically recorded in the Impugned Order that both parties were not consenting to a settlement anymore and were not *ad idem* in respect of the terms of settlement, indicating that a settlement was not possible. It was only after this finding of UP Commission that the Impugned Order was passed after hearing both the parties on the merits of the case. For the Appellant to content that an opportunity of being heard was not afforded to them is contrary to record as the submissions of the

Appellants on the merits of the case for the hearing held on 02.01.2018 are categorically recorded in Para 13 of the Impugned Order.

242. UPPCL has contended that the Impugned Order passed by the Commission is liable to be set aside as while directing a compromise/conciliation process to be carried out between the parties, the Commission passed the Impugned Order on the merits of the matter. In this regard, it is submitted that in terms of Order 23 Rule 3 of CPC, when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them. However, in the present case, the parties were not *ad idem* and there was no question of entering into a compromise. Therefore, the Commission rightly applied its judicial mind to examine the terms proposed by the parties and pass an order on the merits of the case, after giving both parties an opportunity of being heard as reflected in the Impugned Order. In this regard, reliance is placed on "*Banwari Lal v. Chando Devi*" **(1993) 1 SCC 581**:-

> "***10.*** *....The order on face of it purported to dismiss the suit of the plaintiff on basis of the terms and conditions mentioned in the petition of compromise. As such, the validity of that order has to be judged treating it to be an order deemed to have been passed in purported exercise of the power conferred on the Court by Rule 3 of Order 23 of the Code. The learned Subordinate Judge should not have accepted the said petition of compromise even if he had no knowledge of the fraud alleged to have been practised on the appellant by his counsel, because admittedly the petition of compromise had not been signed either by the respondent or his counsel. This fact should have been discovered by the Court. In the case of Gurpreet Singh v. Chatur Bhuj Goel [(1988) 1 SCC 270 : AIR 1988 SC 400] it has been said: (SCC p. 276, para 10)*
>
> *"Under Rule 3 as it now stands,* ***when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by***

> ***the parties and there must be a completed agreement between them. To constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree. When the parties enter into a compromise during the hearing of a suit or appeal, there is no reason why the requirement that the compromise should be reduced in writing in the form of an instrument signed by the parties should be dispensed with. <u>The court must therefore insist upon the parties to reduce the terms into writing</u>.***"
>
> *The requirement of the petition of compromise being signed by the parties concerned has been considered also in the case of Byram Pestonji Gariwala v. Union Bank of India [(1992) 1 SCC 31 : AIR 1991 SC 2234] . It appears the attention of learned Judges was not drawn to the aforesaid case of this Court in Gurpreet Singh v. Chatur Bhuj Goel [(1988) 1 SCC 270 : AIR 1988 SC 400].*
>
> ***11.** The present case depicts as to how on February 27, 1991 the court recorded the alleged agreement and compromise in a casual manner.* ***It need not be impressed that Rule 3 of Order 23 does not require just a seal of approval from the Court to an alleged agreement or compromise said to have been entered into between the parties. The statute requires the Court to be first satisfied that the agreement or compromise which has been entered into between the parties is lawful, before accepting the same. Court is expected to apply its judicial mind while examining the terms of the settlement before the suit is disposed of in terms of the agreement arrived at between the parties. It need not be pointed out that once such a petition of compromise is accepted, it becomes the order of the Court and acquires the sanctity of a judicial order.***"

243. It is submitted that Section 86(1)(f) of the Electricity Act is a special provision vesting jurisdiction for adjudication of disputes between the licensee and the generating companies - either in the State Commission or the person or persons to whom the State Commission refers for arbitration. The Appellants cannot appeal against this discretion exercised by the Commission to adjudicate the dispute by itself. In this

regard, reliance is placed on *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*:(2008) 4 SCC 755 [Para 26].

244. It is UPPCL's contention that it was not provided due opportunity of being heard. In this regard, the following extracts of the Impugned Order are noteworthy:-

> "*12. The Petitioner has mentioned that the aforesaid additional conditions are not as per the law and also in the proposal dated 18.12.2017 they have mentioned that in terms of article 14.2.(1(i) the exit notices dated 8.7.2017 and 15.07.2017 tantamount to procures event of default and upon happening of such an event the provisions of article 14.4.5 (i) become operative, which provides inter alia that the respondents are liable to make payments for capacity charges based on normative availability to the seller for a period of three years. They have further stated in their reply that the exit notices were issued on account of high variable cost for which the Petitioner has already given a proposal and has been accepted by the respondents and due to this reason the PPA cannot be terminated. Further the reading of para article 14.4.5(i) clearly indicates that termination will be applicable after a lapse of period of 3 years of payment of capacity charges as mentioned in that article. That the high variable cost is entirely tariff related matter which cannot be a ground for exit from for termination of PPA. Further they have stated that if the PPAs are revived with effect from the date of the order of the Commission it will create a gap in the PPAs which is not in accordance with law since the PPAs are continuous contracts for a period of 25 years and are not intermittent contracts. As per the petitioner the PPAs were never terminated because the respondents have issued the notice of exit dated 8.7.2017 and 15.7.2017 and which are precisely the matter for adjudication before the Commission. They have further mentioned that the board resolution passed in the 134th meeting of the Board of Directors of the respondents also does not mentioned that UPPCL is not liable for paying fixed charges for the intervening period. They have also given the reasons for allowing the fixed charges for the intervening period.*
>
> *13. The matter was heard on 2nd Jan 2018. The Advocate General, UP appearing on behalf of UPPCL stated that the PPAs have been*

terminated and now only fresh PPAs can be executed. He stated that UPPCL is ready to accept the reduction in variable cost but fixed charges for the intervening period i.e. from the date of exit notice to the date of the order of the Commission should not be allowed. He stated that if the Petitioner has suffered any loss he can be compensated only as per the provisions of the PPA but UPPCL cannot be compelled to procure power from the Petitioner.

The Respondent's counsel has cited three Supreme Court Cases in support of their action and to emphasize that the contract is to be interpreted strictly as per the terms of the contract and also that the Govt. has a right in public interest to issue the policy directive and such directive=s will override the contracts. These cases are dealt with as under:

Export Credit Guarantee Corporation of India Ltd. Vs. Garg Sons International (2014) Supreme Court Cases 686

In this case Hon'ble Supreme Court has quoted the settled legal position about the interpretation of the contracts. The Hon'ble court has said that construing the terms of a contract of insurance, the words used therein must be given paramount importance and it is not open for the court to add, delete or substitute any words. In the present case the Commission has followed this principle and has not deviated from the content of the contract.

Kasinka Trading and Another Vs. Union of India and other (1995 Supreme Court Cases 274)

This case relates to Doctrine of Promissory Estoppel. The Hon'ble Court has held that fundamental principles of Equity to by kept in mind by court and applicability of doctrine of promissory estoppel does not apply on actions of the Govt. when such an action is meant for interest of general public good. In this case the custom duty exemption was granted from basic import duty on certain goods and later the exemption was withdrawn. It was held that Govt. was satisfied about the public interest in withdrawing the exemption and no unequivocal representation or promise was extended by merely specifying the period of operation of the exemption notification so as to attract the doctrine of promissory estoppel. Regarding the findings in this case and its relevance to the present case it is well understood by the Commission that there was no promissory estoppel issue

involved therefore the findings in this case are not relevant to decide the issue at hand.

Dhampur Sugar (Kashipur) Ltd. Vs. State of Uttaranchal and Others ((2007- 8 Supreme Court Cases 418

In this case the Hon'ble Supreme Court has held that courts cannot annul a change in Govt. Policy only on the ground that the earlier policy had been altered or on the ground that the earlier policy was better and suited to the prevailing situation. In this case the Govt. of Uttaranchal made some changes in their sugar policy to allow grant of license to power driven crushers for manufacturing Rab from sugar cane. The appellant pleaded that this will affect the supply of cane to sugar mill but his contention was dismissed on the ground that the Govt. has power to frame and reframe, change and re-change adjust and re-adjust policy therefore the action of the Govt. cannot be declared illegal, arbitrary or ultra vires the provisions of the Constitution.

In the present case the Govt. has not issued any policy direction through legislative approval or within its own rights to issue a general directive that power from generators with cost above a certain level will not be purchased. Here the procurer is a Govt. Company who has exited from a PPA on the basis of higher rates. Therefore the action of the procurer cannot be covered in the garb of public interest. It is the Govt. which has the authority to issue the policy directions applicable uniformly on every body and it cannot be selective. Further public interest is to be proved more specifically. The Commission is of the view that there is a difference between the general policy of the Govt. on certain issue and the bilateral contracts. If bilateral contracts are allowed to be terminated at sweat will of the Govt. or the purchaser or seller the entire trade and industry structure will collapse. If such an uncertainty is allowed to prevail nobody would come for investment in industry. Further this will jeopardize the position of lenders also who sometime use the public money to fund these projects.

14. Commission's View

….3. Since there is no specific provision in the PPAs for exiting from the contract by either party except in case of default, the Respondents action cannot be legally justified. They have unilaterally issued the exit notice and have stopped taking power from the Petitioner's

plants. This situation is covered by section 14.2(ii) of PPA which covers the repudiation of the agreement as a procurer's event of default if not rectified within a period of 30 days from the notice from the seller in this regard. Clause 14.4.5(i) specified that after a period of 7 days following the expiry of consultation period and in the absence of an agreement to the contrary, the seller shall be free to sell the allocated contracted capacity to any third party of his choice provided such procurer shall have the liability to make payment for capacity charge based on normative availability to the seller for the period of 3 years from the 8th day after the expiry of the consultation period. This clause contains other provisions also regarding adjustment of capacity charges etc. and states that at the end of three years period the agreement shall automatically terminate and no further capacity charge liability will be there.

….7. From the views expressed by the Commission herein above, it is abundantly clear that the exit notices dated 8.7.17 and 15.7.17 do not terminate the PPAs as there is no such provision in the bilateral contracts signed between the parties. The exit notice virtually comes in the category of procurer event of default and for curing that, through mutual consultation, a solution has been found and now the procurer is ready to procure power at the reduced variable cost, therefore, the continuity of PPA is not affected but both the parties have wasted considerable time in resolving the dispute therefore both the parties should make some sacrifice on fixed charges. Since the plants have remained idle after 8.7.2017 and no power has been taken by the procurer therefore the petitioner can at best claim only that part of fixed charges which they have incurred despite closure of plants. The Commission is of the view that return on equity included in fixed charges should not be admissible for this period as it is not an operational expense. Operation and maintenance expenses are such expenses, a part of which is incurred when the plants are running and some expenses even when the plant do not run. The Petitioner in the hope of resolution of the dispute has retained the man power which was kept while the plant was running. Similarly insurance charges and other expenditure of fixed nature have also been incurred. Only the lubricants and other inputs which are used while plant is running have not been used.

….16. The petitioner and the respondents shall enter into a supplementary power purchase agreement for all the five power plants to incorporate the above directions of the Commission and

obtain a post facto approval on the supplementary agreements from the Commission but the respondents shall not wait for signing of the supplementary agreements for permitting the operation of aforesaid plants. The Petitioner will not be entitled for return of equity for the period from the date of exit notice to the date of order of the Commission. Further the respondents will be entitled to deduct the fixed charges for the intervening period as above.

17. The Respondents are directed to resume the operation of the plants within 7 days of the receipt of this order and the Commission's order regarding merit order dispatch will be applicable. The other terms and conditions of the existing PPA will apply as they are."

245. From the above, it is evident that:-

(a) PPA termination by UPPCL is dehors the provisions of the PPA inasmuch as there is no provision in the PPA for termination at will by either party. Therefore, UPPCL's actions of unilaterally terminating the PPA cannot be legally justified.

(b) The clause relied on by UPPCL to contend that the PPA itself provides for unilateral termination *viz*. Article 14.2(ii) pertains to a procurer event of default in which case, BEL is at the liberty to terminate the PPA, being the affected and not the defaulting party (UPPCL).

(c) UPPCL was given adequate opportunity of being heard on 02.01.2018 as recorded in Para 13 of the Impugned Order.

(d) A series of judgments were relied upon by UPPCL to justify their reneging from their legal and contractual commitment to procure power in terms of the PPA and pay the applicable tariff. However, none of these judgments relate to the scheme of the Electricity Act in particular with respect to PPAs governed by Sections 61, 62 and 86 thereof - which statutorily

provide for striking a balance between public and private interest, affordability of power supply and viability of investment in power sector. The judgments relied upon by UPPCL as recorded in Para 13 of the Impugned Order are distinguishable as under:-

(i) ***Export Credit Guarantee Corporation of India Ltd. v. Garg Sons International***: **(2014) 1 SCC 686** – The judgment pertains to strict interpretation of insurance contracts to aver that the terms of the PPA must be given paramount importance and it is not open for the court to add, delete or substitute any words. However, in the present case, the said principle of strict interpretation has been followed and the Impugned Order has been passed strictly on the basis of the explicit terms of the PPA executed between BEL and UPPCL.

(ii) ***Kasinka Trading & Anr. v. Union of India & Ors.***:**(1995) 1 SCC 274** – The judgment holds that the doctrine of promissory estoppel does not apply on actions of the Govt. when such an action is meant for interest of general public good. In the present case, there was no promissory estoppel issue involved as rightly held by Ld. UP Commission in the Impugned Order. Further, UPPCL is a government entity and not the State Government itself as contended by UPPCL. Even otherwise, Sections 61, 62 and 86 of the Electricity Act statutorily provide for safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner, i.e., there needs to be a balance between public and

private interest and UPPCL's actions cannot be justified in the garb of public interest.

(iii) ***Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal & Ors.*: (2007) 8 SCC 418** – The judgment holds that courts cannot annul a change in Govt. Policy only on the ground that the earlier policy had been altered or on the ground that the earlier policy was better and suited to the prevailing situation. UPPCL has averred that the "Power for All" document is a policy decision of the Government which mandates UPPCL to terminate BEL's PPAs owing to the allegedly high tariff of BEL's plants. However, in the present case, the Government has not issued any policy direction through legislative approval or within its own rights to issue a general directive that power from generators with cost above a certain level will not be purchased. Instead, UPPCL, which is a government entity and not the State Government. has terminated the PPA owing higher tariff. As rightly held by Ld. UP Commission in the Impugned Order, public interest is to be proved/pleaded more specifically and if bilateral contracts are allowed to be terminated at will of the Government or the procurer/ purchaser or seller, the entire trade and industry structure will collapse.

Appellants' contention in respect of the Impugned Order being passed by a Single Member bench of UP Commission

246. The Appellants have sought to challenge the Impugned Order on the ground that the same was passed by a Single Member bench of UP Commission who had actually appeared on behalf of UPPCL during the course of approval of PPA. The Appellants have relied on Sections 82 and 92 of the Electricity Act to contend that intention of the legislature is that UP Commission should be manned by a judicial member at all times. In support, the Appellants have relied on *State of Gujarat v. Utility Users' Welfare Association*: (2018) 6 SCC 21 ("*State of Gujarat Judgement*") to submit that a judicial member should be present and no bench adjudicating a dispute can be without a judicial member.

247. In this regard, it is submitted that:-

(a) This issue has been raised for the first time in the Written Submissions at the appellate stage without any pleadings or basis in fact. It was UPPCL's bounden duty to point this out at the inception. Appellants have chosen to cast serious aspersions on the conduct of UP Commission without any basis in fact or law. In expert bodies like Central Commission and UP Commission invariably technical members are drawn from Public Sector Undertakings and unless the parties raise an issue of conflict or request for reversal, the Commission adjudicates upon such dispute.

(b) There is no requirement of quorum under the Electricity Act. Section 93 of the Electricity Act provides that "No act or proceedings of the Appropriate Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission."

(c) Regulation 12 of the UPERC Conduct of Business Regulations, 2019 provides that vacancies in the constitution of the Commission shall not invalidate proceedings/ orders passed by the Commission.

(d) The Impugned Order was passed on 03.01.2018. State of Gujarat Judgement was passed by Hon'ble Supreme Court on 12.04.2018. The Supreme Court judgment expressly holds that it will apply prospectively and would not affect the orders already passed by the State Commissions from time to time in the following terms:-

> "***125.5*** *Our judgment will apply prospectively and would not affect the orders already passed by the Commission from time to time.*"

(e) This Tribunal vide its Judgment dated 02.12.2013 passed in O.P. No. 1 of 2011: *(Tariff Revision (Suo-Moto action on the letter received from Ministry of Power)* [Para 11], *inter-alia*, held that since the quorum of the State Commission depends upon the number of members in the office, even a Single Member (including the Chairperson) can conduct the proceedings of the appropriate/State Commission.

BEL is entitled to interest (LPS)/carrying cost on the amounts due and payable by UPPCL on account of delayed payments

248. It is submitted that BEL's Plant(s), being project(s) wherein the tariff has been determined by the UP Commission in terms of Section 62 of the Electricity Act, is entitled to interest/carrying cost/LPS on account of delayed payments by the Appellants, as per the Regulations framed by UP Commission. The PPA [*Article 11.3.4 of the PPA*] provides for

payment of Late Payment Surcharge ("*LPS*") as per the regulations framed by UP Commission. In this regard:-

249. Regulation 30 of the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2014 provides that in case the payment of bills of Capacity Charges and energy charges by the Procurers/Appellants is delayed beyond a period of 60 days from the date of billing, a LPS@ 1.25% per month shall be levied by the generating company/BEL (for the bills raised by BEL for the period till 31.03.2019).

250. Regulation 38 of the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2019 provides for payment of LPS@ 1.50% per month beyond a period of 45 days from the date of billing (for the bills raised by BEL from 01.04.2019 onwards)

251. Pursuant to the Impugned Order passed on 03.01.2018, BEL had raised five invoices for supply of power to the Appellants on 05.01.2018. The said invoices were received by the Appellants on 08.01.2018. However, the Appellants returned the invoices to BEL vide their letter dated 16.03.2018. In terms of Article 11.6.1 of the PPA, if a party does not dispute a Monthly Bill, Provisional Bill or a Supplementary Bill raised by the other party within thirty (30) days of receiving it (i.e., 08.01.2018), such bill shall be taken as conclusive. Admittedly, the Appellants returned the invoice dated 05.01.2018 only on 16.03.2018, i.e., beyond the period prescribed in the PPA. Therefore, the Appellants have accepted the bills as conclusive in terms of Article 11.6.1 of the PPA and cannot renege from the payment obligation.

252. Despite the above, the Appellants continued to delay making payment of the legitimate dues of BEL on the pretext of filing a petition seeking review of the Impugned Order dated 03.01.2018 and thereafter

the present Appeal. Further, the Appellants have been involved in belated filings and intentionally delaying the adjudication of the present Appeal. On account of delayed payments by the Appellants, BEL has been facing severe financial hardship which is adversely affecting the sustainable operations of BEL's Plant(s). In view of the above, BEL ought to be compensated for the loss suffered on account of not having the use of money at the time when it was due and payable by the Appellants, for the power already procured by them. In view of the above established principle and provisions of law, BEL is entitled for interest/carrying cost for the period from 08.07.2017 to 08.01.2018 and LPS thereafter till the date of actual payment of due amount.

253. The payment of LPS/carrying cost on the amounts due and payable by the Appellants is based on the established principle of restitution/time value of money, as compensation for money denied at the appropriate time. In this regard, reliance is placed on:-

(a) *T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd.***:**(2014) 11 SCC 53 [Para 73, 74, 75]

(b) *Ferro Alloys Corpn. Ltd. v. A.P. State Electricity Board*: 1993 Supp (4) SCC 136 [Para 129, 130]

(c) Judgement dated 20.12.2012 passed by the Tribunal in *SLS Power Ltd. v. APERC*: Appeal No. 150 of 2011(Batch) [Para 35.5]

254. In view of the foregoing submissions and settled position of law, it is respectfully submitted that that the present Appeal filed by the Appellants is devoid of merit and as such, is liable to be dismissed with directions for payment of fixed charges for the intervening period along with carrying cost.

255. We have heard Mr. Raghvendra Singh, learned Advocate General appearing for the Appellant, Mr. C.K. Rai, Learned Counsel

appearing for the Respondent No. 1 and Mr. Amit Kapur, Learned Counsel appearing for the Respondent No. 2 at considerable length. We have also gone through the written submissions given by them. Perused the relevant material including the citations available on record during the proceedings. The following principal issues emerge in the instant Appeal for our consideration:-:

> **Issue No.1:** Whether the PPAs of R.2 were terminated as contended by the Appellant in the light of the facts and circumstances put forth by the Appellant or they continued to exist as put forth by Respondent No. 2.
>
> **Issue No.2:** If the answer to the first issue is held against the Appellants on the ground that the Appellants did not have right to terminate the PPAs, whether Respondent No. 2 is entitled to the fixed charges for the intervening period as claimed by R.2.
>
> **Issue No.3**: What would be the impact of the Bills dated 05.01.2018 submitted by R2 on 08.01.2018 for the period 16.07.2017 till 03.01.2018 and the unpaid amount of bills for the period 04.01.2018 till 15.01.2018 as well as those submitted by R2 on 12.03.2019?

OUR ANALYSIS AND FINDINGS:

Issue No. 1:

256. The genesis for the dispute between the Appellant and R.2 is Notice dated 08.07.2017 for non-continuation or exit from the Power Purchase Agreement (PPA) PPA dated 10.12.2010 issued by the Appellant to the R2. The said notice states:

> *"By signing "Power For All" document (PFA document) Government of India and Government of Uttar Pradesh have placed themselves under agreement to provide 24x7 affordable power to all consumers. To make power affordable, key action point*

under the PFA document is to bring down the power purchase cost of Uttar Pradesh, which constitutes approximately around 80% of the overall cost to UPPCL and its distribution licensees.

On scrutiny of power purchased during FY 2016-17 from different sources to meet the electricity demand of the state, it has been observed that a total of 381.68 MU power has been procured from your "Maqsoodpur, Barkhera, Khambarkhera, Kundarkhi, and Utraula" plant during FY 2016-17 at an average rate of Rs. 7.63/ Unit, which is among the highest and around 100.79% higher as compared to Average Power Procurement Cost of Rs. 3.80 per kWh, as approved by Hon'ble UPERC for the FY 2016-17.

In this background, UPPCL does not wish to continue with the PPA dated 10.12.2010, entered into between UP Power Corporation Limited and M/s Bajaj Energy Private Limited in respect of 90 MW Thermal Power Plant at Maqsoodpur (Shahjahanpur), in view of its high procurement cost. This may be treated as a notice for exit of UPPCL from PPA dated 10.12.2020. UPPCL shall be deemed to be exited out from aforesaid PPA after 10 days from the date of issuance of this notice."

257. Similar letters were issued by the Appellant for other four plants of R-2. Thereafter processes of negotiations and litigations went on between the parties before Lucknow Bench of Allahabad High Court and UPERC. Thereafter, the Appellants have preferred the current appeal.

258. The learned senior counsel for the Appellant has stated that the State Commission has completely ignored the Article 2.2 of the PPA, and opined in the impugned order that it did not find any provision in the PPAs which allows unilateral exit from the obligations in the PPA by either party (Para 14(1)) of the impugned order. He further stated that in Para 14(7) of the impugned order, the State Commission further stated that:

"From the views expressed by the Commission herein above, it is abundantly clear that the exit notices dated 8.7.17 and 15.7.17 do not terminate the PPAs as there is no such provision in the bilateral contracts signed between the parties. The exit notice virtually comes in the category of procurer event of default and for curing that, through mutual consultation, a solution has been found and now the procurer is ready to procure power at the reduced variable cost, therefore, the continuity of PPA is not affected but both the parties have wasted considerable time in resolving the dispute therefore both the parties should make some sacrifice on fixed charges……..."

259. For proper adjudication of the matter, Articles 2.2, 14.2 and 14.4.5(i) of the PPA are relevant. These Articles read as under:

> ***"2.2 Early Termination***
>
> *This Agreement shall terminate before the Expiry Date:*
>
> *i. if either all the Procurers (jointly) or Seller exercises a right to terminate, pursuant to Article 3.3, Article 4.5.3, Article 14.4.5 or Schedule 10 of this Agreement or any other provision of this Agreement; or*
>
> ***ii.*** *in such other circumstances as the Seller and all the Procurers (jointly) may agree, in writing."*

> ***"14.2 Procurer Event of Default***
>
> *The occurrence and the continuation of any of the following events, unless any such event occurs as a result of a Force Majeure Event or a breach by the Seller of its obligations under this Agreement, shall constitute the Event of Default on the part of defaulting Procurer:*
> ***i)*** *A defaulting Procurer fails to pay (with respect to a Monthly Bill or a Supplementary Bill) an amount exceeding fifteen (15%) of the undisputed part of the most recent Monthly/Supplementary Bill for a period of ninety. (90) days after the Due Date and the Seller is unable to recover the amount outstanding to the. Seller through the Collateral Arrangement and Letter of Credit; or*
>
> ***ii)*** *The defaulting* ***Procurer repudiates this Agreement*** *and does not rectify such breach even within a period of thirty (30) days from* ***a notice from the Seller*** *in this regard; or*
>
> ***iii)*** *Except where due to any Seller's failure to comply with its obligations, the defaulting Procurer(s) is in material breach of any of its obligations pursuant to this Agreement and such material breach is not rectified by the defaulting Procurer within thirty (30) days of receipt of notice in this regard from the Seller to all the Procurers; or*
>
> ***iv)*** *Any representation and warranties made by any of the Procurer in Schedule 10 of this Agreement. being found to be untrue or inaccurate. Provided however, prior to considering any event specified under this sub-article to be an Event of Default, the Seller shall give a-notice to the concerned Procurer in writing of at least thirty (30) days; or*

v) *If (a) any Procurer becomes voluntarily or involuntarily the subject of any bankruptcy or insolvency or winding up proceedings and such proceedings remain uncontested for a period of thirty (30) days, or (b) any winding up or bankruptcy or insolvency order is passed against the Procurer, or (c) the Procurer goes into liquidation or dissolution or has a receiver or any similar officer appointed over all or substantially all of its assets or official liquidator is appointed to manage its affairs, pursuant to Law, except where such dissolution or liquidation of such Procurer is for the purpose of a merger, consolidation or reorganization and where the resulting entity has the financial standing to perform its obligations under this Agreement and has creditworthiness similar to such Procurer and expressly assumes all obligations of such Procurer under this Agreement and is in a position to perform them; or;*

vi) *Occurrence of any other event which is specified in this Agreement to be a material breach or default of the Procurers.*

…

14.4 Termination for Procurer Events of Default

14.4.1 *Upon the occurrence and continuation of any Procurer Event of Default pursuant to Article14.2(i), the Sellers hall follow the remedies provided under Articles 11.5.2.*

14.4.2 *Without in any manner affecting the rights of the Seller under Article 14.4.1, on the Occurrence of any Procurer Event of Default specified in Article 14.2 the Seller shall have the right to deliver to all the Procurers a Seller Preliminary Default Notice, which notice shall specify in reasonable detail the circumstances giving rise to its issue.*

14.4.3 *Following the issue of a Seller Preliminary Default Notice, the Consultation Period of ninety (90) days or such longer period as the Parties may agree, shall apply.*

14.4.4 *During the Consultation Period, the Parties shall continue to perform their respective obligations under this Agreement,*

14.4.5 (i) *After a period of seven (7) days following the expiry of the Consultation Period and unless the Parties shall have otherwise agreed to the contrary or the Procurer Event of Default giving rise to the Consultation Period shall have been remedied, the Seller shall be free to sell the then existing Allocated Contracted Capacity and associate Available Capacity of Procurer/s committing Procurer/s Event of Default to any third party of his choice. Provided such Procurer shall have the liability to make payments for Capacity Charges based on Normative Availability to the Seller for the period three (3) years from the eighth day after the expiry of the Consultation Period. Provided further that in such three year period, in case the Seller is able*

> *to sell electricity to any third party at a price which is in excess of the Energy Charges, then such excess realization will reduce the Capacity Charge payments due from such Procurer/s. For the avoidance of doubt, the above excess adjustment would be applied on a cumulative basis for the three year period. During such period, the Seller shall use its best effort to sell the Allocated Contracted Capacity and associated Available Capacity of such Procurer generated or capable of being generated to such third parties at the most reasonable terms available in the market at such time, having due regard to the circumstances at such time and the pricing of electricity in the market at such time. Provided further, the Seller shall ensure that sale of power to the shareholders of the Seller or any direct or indirect affiliate of the Seller/shareholders of the Seller, is not at a price less than the Tariff, without obtaining the prior written consent of such Procurer/s. Such request for consent would be responded to within a maximum period of 3 days failing which it would be deemed that the Procurer has given his consent.* ***Provided further that at the end of the three year period, this Agreement shall automatically terminate*** *but only with respect to such Procurer/s and thereafter, such Procurer/s shall have no further Capacity Charge liability towards the Seller. Provided further, the Seller shall have the right to terminate this Agreement with respect to such Procurer/s even before the expiry of such three year period provided on such termination, the future Capacity Charge liability of such Procurer/s shall cease immediately."*

260. We have carefully gone through the contents of Article 2.2 of the PPA and other Articles, which are reproduced above, we find no mentioning in any of the clauses that the PPA can be terminated unilaterally. Further, the impugned order dated 03.01.2018 passed by the State Commission specifically records as under;

> *"14(1)….The Commission has gone through the PPAs dated 10.12.2010 but did not find any provision in the PPAs which allows unilateral exit from the obligations incorporated in the PPAs by either party. ….."*
> *"14(4) In this case the main reason for issuing the exit notice was the higher variable cost of as compared to other projects from where the power is being procured and also the national average power purchase cost. The Respondents nowhere took a ground they are entitled to terminate the contract under any provisions of the PPA rather throughout the hearing of the case they have been pleading that under the Power for All Scheme they ro*

> *reduce the power purchase cost so as to make it affordable …….”*
> *14(7) from the views expressed by the Commission herein above, it is abundantly clear that the exit notices 08.07.17 and 25.07.17 do not terminate the PPAs as there is no such provision in the bilateral contracts signed between the parties. The exit notice virtually comes in the category of procurer event of default and for curing that, through mutual consultation, a solution has been found….”*

261. We also observe that Article 2.2 of the PPA contains two sub-clauses, 2.2(i): Sub-Article (i) provides for termination of PPA for fault of the seller. It provides as under;

a. provides exercise of right under Article 3.3 for non-fulfilment of conditions under Article 3.1, which relates to fulfilment of conditions subsequent, which is not the case here;
b. Article 4.5.3 relates to extension of time with respect to the Seller having been prevented from performing its obligations stated in Article 4.5.1(a);
c. Article 4.5.1(a) relates to the Seller having been prevented from performing its obligations under Article 4.1.1(b);
d. Article 4.1.1(b) provides for inability of the Seller to execute the project in a timely manner, which is not the case in the present Appeal;
e. Article 14.4.5 provides for the consequences of procurer’s event of default. It states that after a period of 7 days following expiry of consultation period, and unless the Parties shall have otherwise agreed to the contrary or the Procurer event of default giving rise to the consultation period shall have been remedied, the Seller shall be free to sell the existing Allocated Contracted Capacity to a third party of his choice, however, the defaulting procurer shall have liability to make payments for capacity

charges based on Normative availability to the Seller for the period of 3 years from the eighth day after the expiry of the consultation period. It further provides for adjustment of excess capacity charge recovered by the Seller on third party sale to the account of the procurer which is liable to pay the said capacity charges.

f. Article 14.4.5 takes us to the events leading to procurer event of default, which are stated in Article 14.2. They are as under;

> ***"14.2 Procurer Event of Default***
> *The occurrence and the continuation of any of the following events, unless any such event occurs as a result of a Force Majeure Event or a breach by the Seller of its obligations under this Agreement, shall constitute the Event of Default on the part of defaulting Procurer:*
> ***i)*** *……..; or*
>
> ***ii)*** *The defaulting* ***Procurer repudiates this Agreement*** *and does not rectify such breach even within a period of thirty (30) days from* ***a notice from the Seller*** *in this regard; or*
> ***……."***

262. Article 2.2(ii) of the PPA further states that early termination was possible in case the Seller and Procurers jointly agree, which however, is subject to such terms and conditions as they may agree in writing. The instant case not being a case of termination through joint consultation, the provisions of Article 2.2(ii) are not applicable.

263. Learned senior counsel for the Appellant further stated that after serving the exit notice, R2 was open to sell its power in the open market after following procedure prescribed under the PPA.

264. Therefore, as per the averments of the learned senior counsel for the Appellant, its case is that since it has repudiated the PPA under Article 14.2 (ii) of the PPA, it has committed a Procurer Event of Default within the meaning of said Article. R-2 was required to serve on it a notice and

in case the said breach was not remedied by it within a period of 30 days next, a consultation period of 90 days would have started and by virtue of Article 14.4.5, upon expiry of seven days of the said consultation period, Procurer's liability to pay capacity charges would have arisen. The Appellant by pleading this apparently intended to state that in all eventualities, R2 must have served upon it a preliminary default notice as envisaged in Article 14.2(ii), however, we find that R2 did not do so and instead preferred batch of writ petitions MISB 15734 of 2017, 15737 of 2017, 15739 of 2017, 15742 of 2017 and 15744 of 2017 before the Lucknow Bench of Allahabad High Court, but no notice was ever served by R2 within the meaning of Article 14.4.2 of the PPA. Thus, instead of taking recourse to the resolution process provided under the PPA, R2 chose to take the legal remedy. High Court vide order dated 26.10.2017 directed R2 to approach the State Commission and directed it to resolve the matter within a period of two months from the date of filing the Petition by R2.

265. It is clear from the action taken by R2 post issue of the exit notice dated 08.07.2017 that it did not agree to the issue of the said notice because it was prima-facie, illegal and thus, R2 had no choice but to seek an immediate remedy by challenging the same before High Court and subsequently as per the directions of the High Court, preferred the Petition Nos. 1258 -1262 of 2017 before the State Commission in which the impugned order dated 03.01.2018 was passed by it.

266. Mr. Amit Kapur, the learned Counsel for R2 categorically stated that since this was a procurer event of default, R2 being an innocent party was entitled to choose its own remedy out of the various remedies available to it. Accordingly, R2 chose to continue with the PPA because the fault was not on the part of R2. Mr. Kapur categorically stated that on the principle

of “pacta sunt servanda” or “contracts are to be kept” means that parties involved are to abide by what was agreed to [John R. Peden in ‘*The Law of Unjust Contracts*’ published by Butterworths in 1982, at pages 28-29].

267. Learned counsel for R2 further stated that in terms of the PPA:

a. the Appellant has agreed to hold it harmless against any or all losses actually suffered or incurred by R2 from claims arising by reason of a breach by Procurers of any of its obligations under the PPA and/or if any of the representations and warranties (Schedule 10) of the Procurers under the PPA are found to be untrue;

b. In terms of Article 18.13 of the PPA, Appellants/Procurers have duly acknowledged that a breach of any of the obligations in terms of the PPA would result in injuries and that the amount of liquidated damages specified in the PPA is a genuine and reasonable pre-estimate of the damages that may be suffered by R2/non-defaulting party.

c. Appellants/Procurers have represented and warranted that the PPA is enforceable against the Procurers in accordance with its term (Schedule 10).

268. What we opine after hearing the above arguments of the parties that the mere fact that R2 challenged the said exit notices before High Court, is in itself sufficient proof that R2 did not agree to the same and took legal recourse, which was available to it. Therefore, the arguments advanced by the Appellant that R2 was free to sell power after following the proper procedure envisaged under PPA, does not convince us. We are of further opinion that it was open to R2 to choose a remedy of its own choice out of several remedies

open to it under the terms of the PPA as well as under the general laws. We further observe that the PPAs do not bar R2 from taking any other recourse available to it and thus R2 was at liberty to challenge the exit notice by preferring a Writ Petition.

269. So far as the averment of the Specific Relief within the meaning of Specific Relief Act, 1963 ("Specific Relief Act") by R2, it is submitted that in terms of Article 17.1 of the PPA, the PPA is subject to all applicable laws in India. Accordingly, R2 is not barred from claiming specific performance of contract because

(i) R2 has chosen to not obtain substituted performance of the PPA by any third party. [***Section 16(a) of the*** Specific Relief Act]

(ii) R2 is capable of performing its obligations in terms of the provisions of the PPA and has not violated any essential term thereof. [***Section 16(b) f the*** Specific Relief Act]

(iii) R2 has demonstrated/proved by its conduct that it has performed and has always been willing to perform the essential terms of the PPA. [***Section 16(c) of the*** Specific Relief Act]

270. The learned counsel for R2 further stated that R2 is entitled to claim compensation for breach of contract by the Appellants in terms of the express provisions of the PPA and in addition to specific performance thereof. This is because the State Commission in the Impugned Order opines that the PPA shall be treated to have existed in continuity and that R2 is entitled to fixed/Capacity Charges incurred by it despite closure of

the Plant(s) on account of non-scheduling of power by the Appellants. [Section 21(3) of the Specific Relief Act].

271. Mr. Kapur further stated that R2's claim for fixed charges during the intervening period does not act as a bar to seeking specific performance of the PPA as fixed charges are payable to R2 for securing performance of the contract/in case of default by the Appellants in terms of Article 14.4.5 of the PPA. [Section 23 of the Specific Relief Act]. He further added that in view of the above and in terms of the express provisions of the PPA, which is a concluded contract, it is submitted that R2 is entitled to pursue to remedy of specific performance/continuity of the PPA, in addition to its claim for fixed charges. As 'dominus litis' is in favour of R2, it has elected for the said remedy in addition to its claim for fixed/Capacity Charges.

272. The Learned counsel for the Appellant however averred that:

(a) Section 14(b) of the Specific Relief Act, 1963 bars enforcement of a contract which involves the performance of a continuous duty which cannot be supervised by the Court.

(b) Section 20B states that special courts shall be constituted and only such Courts can enforce specific performance of a contract. Therefore, the Act is inapplicable to proceedings before APTEL.

273. Replying to above, learned counsel for R2 argued that relief of specific performance of a contract is no longer discretionary, after the amendment of 2018 [Judgment dated 18.09.2020 passed by the Hon'ble Supreme Court in Civil Appeal No. 3574 of 2009: B. Santoshamma & Anr. v. D. Sarala & Anr. (Para 70)]. Even otherwise, the Appellants admitted

that a PPA for 25 years involves the performance of a continuous duty, yet they seek to terminate the same. Therefore, Appellants' submission has no basis either in facts or law and is based on misinterpretation and misplaced reliance on the Specific Relief Act itself.

274. It is relevant to note that in the said Civil Appeal No. 3574 of 2009, the Hon'ble Supreme Court observed:

> *"69 .After amendment with affect from 1.10.2018, Section 10 of the S.R.A. provides:10.Specific performance in respect of contracts.-The Specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16.*
> *70.After the amendment of Section 10 of the S.R.A., the words "specific performance of any contract may, in the discretion of the Court, be enforced" have been substituted with the words "specific performance of a contract shall be enforced subject to ...". The Court is, now obliged to enforce the specific performance of a contract, subject to the provisions of sub-section (2) of Section 11, Section 14and Section 16 of the S.R.A. Relief of specific performance of a contract is no longer discretionary, after the amendment."*

275. We hold that R2 is entitled to Specific Performance of the PPA. We observe that even though the Specific Performance of contract was not specifically pleaded by the parties during the initial stages of pleadings, the same have been pleaded by them now.

276. Learned senior counsel for the Appellant in its Rejoinder Written Submissions, has pleaded that once the matter was being settled through the medium of conciliation as adopted by the State Commission, there was no occasion for the Commission to decide on the question whether the termination in pursuance to the Larger public interest, was a default or not on the part of the procurer. This is further evidenced from the fact that as the conciliation process was going on, even the pleadings in the matter were not completed, as is evident from the record, the respondent herein has not even filed a rejoinder to deny the claims of the appellant herein in

the Counter Affidavit, before the State Commission. Even otherwise, in case there was a default on the part of the procurer, the commission is to decide the said default within the four corners of the PPA i.e. consequences of such default are to be as per the terms and conditions of the PPA in terms of clause 14.4.5(i).

277. In this connection, we refer to the observations of the State Commission in Para 14.1 of the impugned order has stated that"

> *"14. Commission's View*
> *After going through the facts of the case, the arguments and the counter arguments of both the parties and the contracts signed between both the parties……*

278. The State Commission again recorded in Para 13 of the said impugned order that:

> *"13. The matter was heard on 2nd Jan 2018. The Advocate General, UP appearing on behalf of UPPCL stated that the PPAs have been terminated now only fresh PPAs can be executed. He stated that ……."*

279. The State Commission further proceeded to record submissions of the Appellant in the order including the cases cited by them. This clearly indicates that the Appellant was duly heard by the State Commission. Further, the plea now raised that R2 did not file rejoinder therein holds no good because, rejoinder is a right given to any petitioner or appellant, that is optional to exercise. In the instant case, the points raised by the Appellant were duly heard by the State Commission and therefore it cannot be said that the State Commission did not hear the Appellant. Further, the hearing dated 02.01.2018 were made after R2 filed its Affidavit dated 01.01.2018 and duly served the same to the Appellant on the same day. We are therefore of the opinion that the State Commission duly heard the matter and decided within the legal framework as has been discussed elsewhere also herein. Matter relating to there being no default

on the part of the Appellant as pleaded in its Rejoinder Written Submissions have been discussed separately.

280. Let us now examine the Appellant's averments as to rules of interpretations. The Appellant's counsel stated that the State Commission completely ignored Article 2.2 (early Termination), which provides for pre-mature termination of contract by either of the party, with consequences to be followed as per the terms of the PPA. The Appellant further stated that the rules of interpretation demand that when a clause of a contract is being interpreted or analysed, the same has to be done in a way that it is not in contradiction with any other clause of the contract. The Appellant further submits that explicit terms of a contract are to be given strict/ literal interpretation/meaning and the Courts should ordinarily not imply/import terms into the same. The Learned Sr. Advocate for the Appellant cited the following cases:

> **(i) *Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission & Ors. 2019 SCC Online SC 813:-***
>
> *"22. It could thus be seen that it is more than well settled that the clauses in the agreement ought to be given the plain, literal and grammatical meaning of the expression used in the same. No doubt, that the courts will also try to gather as to what intention the parties wanted to give them. As has been held by Ranjan Gogoi, J. (as His Lordship then was) the principle of business efficacy could be invoked only if by a plain literal interpretation of the term in the agreement or the contract, it is not possible* to *achieve the result or the consequence intended by the parties acting as prudent businessmen. This test requires that a term can only be implied, if it is necessary to give business efficacy to the contract, to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. If the contract makes business sense without the term, the courts will not imply the same. It is amply clear that courts can imply a clause only if it is found that the plain and literal meaning given to the expression used in the terms is not in a position* to *make out the intention of the parties. Reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract. It*

is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. It must have been a term that went without saying, a term necessary to *give business efficacy to the contract, a term which, although tacit, forms part of the contract. As held in the case of Nabha Power Ltd. (supra), for invoking the business efficacy test and carving out an implied condition, not expressly found in the language of the contract, the following five conditions will have to be satisfied:*

(1) Reasonable and equitable;
(2) Necessary to give business efficacy to the contract;
(3) It goes without saying i.e. the Officious Bystander Test;
(4)Capable of clear expression; and
(5)Must not contradict any express term of the contract."

(ii) Nabha Power Ltd. v. Punjab State Power Corporation Ltd.: (2018) 11 SCC 508 :-

"49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in
commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock [The Moorcock, {1889} LR 14 PD 64 {CA)] test of giving "business efficacy" to the transaction, as must have been intended at all events by both business parties. The development of law saw the 'Jive condition test" for an implied condition to be read into the contract including the "business efficacy" test. It also sought to incorporate "the Officious Bystander Test" [Shirlaw v. Southern Foundries {1926} Ltd. {Shirlawv.Southern Foundries {1926} Ltd., {1939} 2 KB 206: {1939} 2All ER 113 {CA}]]. This test has been set out in B.P.Refinery {Westernport) Proprietary Ltd. v. Shire of
Hastings [B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings, 1977 UKPC 13 : {1977} 180 CLR 266 (Aus)] requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; {3} it goes without saying i.e. the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in Investors Compensation Scheme Ltd. v. West
Bromwich Building Society {Investors Compensation Scheme Ltd. v. West Bromwich Building Society, {1998} 1 WLR 896 : {1998} 1 All ER 98 (HL}j and Attorney General of Belize v. Belize Telecom Ltd. [Attorney General of Belize v. Belize Telecom Ltd., {2009} 1 WLR 1988 (PC)]. Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. ***The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be***

understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract."

(iii) Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd., AIR 1965 SC 1288

"12. We are besides of opinion that there is nothing capricious or unreasonable in clause 10. The insurer was free at the beginning to decide whether he would agree to indemnify the assured against the risk or not, and if he decided to indemnify, for how long he would indemnity, if the assured cannot compel an insurer to take up a risk, he cannot complain of unreasonableness, caprice or even abuse of power if the insurer is prepared to take it up only on a condition that he would be free at any time to change his mind as to the future. Furthermore clause 10 gives the assured the same liberty to terminate the policy. Besides a term in the form contained in clause 10 is a common term in policies and must, therefore, have been accepted as reasonable; See MacGillivray on Insurance Law, 5th Edn. Vol. 2 p. 963. The Privy Council in the Sun Fire Office v. Hart [(1889) 14 AC 98] held of a clause similar to clause 10 in the present case that it gave an insurer the right to terminate the contract at will and that there was nothing absurd in such a term. Learned counsel for the appellant sought to distinguish this case from the present on the ground that there previous fires had occurred and anonymous letters had been written threatening continuance of the incendiarism and this made it reasonable for the insurer to terminate the policy. This attempted distinction however is wholly beside the point. The question before the Judicial Committee was not whether a particular termination of a policy was reasonable but of the interpretation of a clause in it. For that question only we have referred to that decision and on it we find that the view taken by us receives full support from the decision of the Judicial Committee. In that respect the two cases are indistinguishable."

(iv) Polymat India (P) Ltd. v. National Insurance Co. Ltd., (2005) 9 SCC 174

"19. In this connection, a reference may be made to a series of decisions of this Court wherein it has been held that it is the duty of the court to interpret the document of contract as was understood between the parties. In the case of General Assurance Society Ltd. v. Chandumull Jain [(1966) 3 SCR 500 : AIR 1966 SC 1644] , SCR at p. 510 A-B it was observed as under:

> *'In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract,*

however reasonable, if the parties have not made it themselves.'"

281. Thus, the learned senior counsel for the Appellant, on the basis of above cases, stated that the State Commission could not have interpreted the contract in such a way which would render the provisions of Article 2.2 of the PPA as null and void, because Article 2.2 of the PPA provides an express right of early termination of the Power Purchase Agreement. He further stated that a contract has always to be read harmoniously so as to give effect to all its clauses in the way the contracting parties intended.

282. There is no substance in the Appellant's stand that the rules of interpretation have been violated in the instant case. We are of the opinion that plain, literal and grammatical interpretation as quoted from the Adani Power's case supra, have been given to the provisions of Articles 14.2 and 14.4.5 of the PPA, which form part of Article 2.2 (i) of the PPA. We are of the opinion that since there was no "mutual agreement" between the Parties, Article 2.2(ii) of the PPA was not applicable We further observe that Articles 3.3 and 4.5.3 of the PPA, relate, respectively to consequences of non-fulfilment of conditions subsequent as stated in Article 3.1 and non-extension of original scheduled commercial operations date of any unit or the original scheduled commercial date of the power station as a whole by more than two years, and thus are not applicable in the instant case.

283. We therefore, find nothing in the impugned order dated 03.01.2018 which would render Article 2.2 of the PPA as null and void as claimed by the Appellant. After careful consideration of arguments put forth, we find that basic rules of interpretation have not been ignored by the State

Commission and plain, literal and grammatical meaning of the provisions of the PPA have been assigned to them.

284. Learned senior counsel for the Appellant pleaded for the termination of the PPA in the supervening public interest and whether the said PFA document can be said to be direction under section 108 of the Electricity Act, 2003 by the State Government to the State Commission. The Appellant stated that the PFA (Power for All) document dated 14.04.2017 signed between the Government of UP and Central Government announce "24x7 Power for All" in which cost effectiveness was a major element. The Appellant further stated that provisions of sections 107 and 108 of the Electricity Act, 2003 provided that directions to the Central/ State Commission shall be guided by directions of the Central/ State Government. Provisions of Section 108(2) of the Electricity Act, 2003 were specifically brought to our notice which provide as under:

> *"(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final."*

285. Apparently, the recourse to section 108(2) of the Act was obviously taken by the Appellant to impress that the PFA document was not merely a general document, but, Appellant could not demonstrate that the said PFA document contains any direction by the State Government to the State Commission in a particular manner.

286. Perusal of the said PFA document annexed by the Appellant along with the Appeal makes clear the following:

> "***Executive Summary:***
>
> ……..
>
> ***Generation Capacity:***
>
> ……

> *Further, to bring in more efficiency along with reduction of the overall power procurement costs, the Government of India and State of UP may explore:*
>
> - *Coal swapping for Parichha (2x110 MW + 2 x 210 MW), Parichha (2x250 MW), Harduaganj TPS (2 x250 MW), Rosa TPP (4 x 300 MW), Bajaj TPP (5 x 90 MW).*
> - *Aggregation of linkage for different stations so as to save payment of additional charges on account of*
>   - *Commitment charges for lower offtake of coal due to lower operational performance of old stations*
>   - *Incentive on account of higher procurement of coal for super critical stations*
>   - *Accelerating development of coal block allotted to UPRVUNL*"

287. Further, the said PFA document in Part 5, Generation Plan, under the head "Action Points for the States" under the sub-head "Power Purchase Planning" provides as under:

> "***CHALLENGE:*** *The cost of power purchase in UP is considerably high. As per data for FY17, Uttar Pradesh purchases substantial quantum of power at high variable cost from stations like Tanda, Rosa, Parichha, Dadri Thermal, Dadri Gas,* ***Bajaj****, Anta, Auriya, etc.). Higher level of AT&C losses results in additional power purchase requirement and cost*."

288. The said PFA document recommends further that the coal swapping be considered for Bajaj TPP (5x90MW) to NCL under the sub-head "Coal Swapping" at page 24. Apart from that the said PFA document mentions nothing. We observe that the said document says nothing with respect to the so called "Exit" from any PPAs. Apart from the above provisions, the said PFA provides nothing in it, which is specific to R2. In fact, it nowhere recommends that the Appellant or even the Government may exit from any PPA, specifically, in the manner in which R2 was treated by the Appellant.

289. Therefore, we are of the opinion that firstly the said PFA cannot be considered to be a directive by the State Government to the Appellant

under section 108 of the Electricity Act, 2003 and even if it is presumed that it has some element of directive into it, it merely concentrates on reducing the variable cost by way of "coal swapping" in the case of R2, which has in fact been proposed by R2 in its proposal dated 18.12.2017 filed before the State Commission, and duly recorded in para 15(b)(v) of the impugned order dated 03.01.2018 and does not provide anything about "exit" or "termination" of any PPAs.

290. Learned senior counsel for the Appellants vehemently pleaded and argued in support of the exit notices on the ground of supervening public interest, however, in support of its argument, merely stated that since the power procurement cost of R2 exceeded the cut off rate of Rs. 3.46, the action taken on the basis of recommendation dated 01.07.2017 of the said Energy Task Force was justified. Exercise of doctrine of necessity was also pleaded by the Appellant in support of the exit notices. The Appellant further stated that the decision to exit was fair and equitable and R2 has attempted to vilify the Appellant that due to the conduct of the Appellant R2 sustained huge losses. Arguing further the learned Counsel for the Appellant further submits that private interest must yield to public good. Therefore, public interest must override any consideration of private loss or gain and places reliance on following decisions:

(i) ***Friends Colony Development Committee v. State of Orissa (2004) 8 SCC 733*** **(Para 22)**

"22. In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalization of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot

> *be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the state. The exercise of such governmental power is justified on account of its being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable inter-meddling with the private ownership of the property may not be justified."*

291. On perusal of the above case, we find that the above observations were made by the Hon'ble Apex Court in a matter where illegal construction of a building was under question. In the instant case, no illegality has been committed by R2 and hence we find it difficult to accept the contention of the Appellant that the findings are all relevant in the present matter.

(ii) ***STO v. Shree Durga Oil Mills (1998) 1 SCC 572*** **(Para 21)**

> "*21. Moreover withdrawal of notification was done in public interest. The Court will not interfere with any action taken by the Government in public interest. Public interest must override any consideration of private loss or gain*."

292. On a perusal of this matter also, it is clear that it relates to withdrawal of a tax exemption. The entire philosophy of taxation is based on the public interest and state always exercises its rights of taxation in public interest and therefore, any withdrawal of benefit of tax exemption is always deemed to be in public interest.

293. Recently, Hon'ble Supreme Court in a Batch of CIVIL APPEAL NOS. 2256-2263 OF 2020 (Arising out of S.L.P.(C) Nos. 28194-28201/2010) where in the question of promissory estoppel versus supervening public interest arose, held as under on 22.04.2020;

> *"15.In view of the above and for the reasons stated above and once it is held that the subsequent notifications/industrial policies which were impugned before the respective High Courts are clarificatory in nature and are issued in public interest and in the interest of the*

> *Revenue and they seek to achieve the original object and purpose of giving incentive/exemption while inviting the persons to make investment on establishing the new undertakings and they do not take away any vested rights conferred under the earlier notifications/industrial policies and therefore cannot be said to be hit by the doctrine of promissory estoppel, the same is to be applied retrospectively and they cannot be said to be irrational and/or arbitrary."*

294. In this matter it is also clear that the matters relate to notifications related to exemptions under the industrial policies and thus the element of public interest was presumed.

295. Distinguishing the above cases from the current matter, we find that the Appellant and R2 have a contract (PPA) and the Appellant wanted to terminate the said PPA on the guise of a PFA document, which did not even envisage about getting rid of the contractual obligations by the Appellant. The Appellant therefore, is not justified to terminate a PPA by taking recourse to supervening public interest, which does not authorise it to exit out of its contractual obligations. The said PFA does not authorise the Appellant in any manner. It has merely investigated into the issues related to the power system of the State of UP and recommended certain measures. We observe that none of these measures even hint towards terminating or exiting from any of the PPAs by Appellant.

296. Further R2 has pleaded that the said exit notice was arbitrary and discriminatory qua it. It has stated that the so called "Energy Task Force", which was constituted by the Appellant on 30.06.2017 and immediately in its first meeting, held on 01.07.2017, that is, on the very next day of its constitution, it observed and recommended in its Para 2:

> *"It was assessed that with a schedule of 8100 MW (Corresponding to ATC limits) for inter-state and with expected intra-state generation of 9500-10000 MW, adequate power corresponding to*

supply schedule for Rural and Urban areas should be available. ***The committee considered the Merit Order Stack of Generating Stations w.e.f. 08.06.2017****. After the gas based projects, which have been dealt with in above para, the committee recommended that zero scheduling be done against following 8 projects which head the MoD list with variable charges in descending order:-*

a. *BEPL Barkhera -82 MW*
b. *Harduaganj-94 MW*
c. *BEPL Khambarkhera-82 MW*
d. *BEPL Maqsoodpur-82 MW*
e. *Paricha-198 MW*
f. *BEPL Utraula-82 MW*
g. *Panki-189 MW*
h. *BEPL Kundarkhi-82 MW*

If the demand scenario necessitates then on such occasions above power quantum can be offset through purchase of power from energy exchange.

It was also decided that the option of exit from the above 5 PPAs of Bajaj Energy Pvt. Ltd. be immediately explored and accordingly proposal be put up for the consideration of the Committee*."*

297. In the Written submissions by the Appellant it is stated that pursuant to the aforesaid decision taken by the Task Force, exit notice dated 08.07.2017 was issued to R2. We note that task force had merely recommended to explore the option to exit and put a proposal of exit before it. The Appellant, instead of putting the said option before the said Committee, seems to have issued the said Exit Notice dated 08.07.2017 to R2. The Appellant has not placed any material to show that any proposal for "Exit" from the five PPAs of R2 was ever placed before the said Committee.

298. The Appellant pleads in its Appeal that cancellation of PPA was in consonance and in spirit with the directions of the State Commission in terms of order dated 04.09.2017 in the matter of DVVNL, PuVNNL, KESCO and UPPTCL Annual Revenue Requirement and Tariff Petitions MYT ARR/ Tariff Petitions for MYT 1st Control Period (FY 2017-18 to FY

2019-20) & True Up for FY 2014-15 in WP no. 1203-1207/2017, 1169 and 1170/2017, wherein the State Commission directed the petitioner, i.e. UPPCL/ state Discoms to rework/ re-visit the projected power purchase cost for MYT control period and bring it down to reasonable limits, i.e. prevailing market prices by devising a strategy wherein they could buy cheaper power, does not hold good and is incorrect on the face of it because, the said order on which the Appellant relies, is dated 04.09.2017, which is about two month prior to the date of the said order, whereas the exit notices dated 08.07.2017 are about two months prior to the said order by the State Commission. ***How a later order cannot form basis of a prior action taken by the Appellant?***

299. It is seen that the said Committee has only considered MoD stack of generating stations with effect from 08.06.2017 and formed its opinion for not scheduling the power plants of R2 merely on the basis of the said MOD, further based on the single MOD stack stated that the option of exit be explored from the above PPAs.

300. Learned counsel for R2 submits so far as the discriminatory action of the Appellant towards it as follows: firstly the PFA document did not envisage re-negotiating/re-writing PPAs nor did it state that power form generators with a cost above certain level will not be purchased, secondly, R2 stated that as per Appellant's letter No. 1205/CE/PPA dated 20.12.2017 submitted to its Board of Directors power was scheduled by UPPCL from generation projects having Variable Charges up to INR 4.87/unit in 2016-17 to 2017-18. As per UPPCL's verification letter 07.09.2017 for the period from 01.07.2017 till 18.07.2017, i.e., before the PPA was arbitrarily terminated by the Appellants, the Variable Charges for the Plant works out to INR 4.21/unit (Actual Variable

Charges/Scheduled Generation (as verified by UPPCL). Despite the same, the Appellants arbitrarily terminated the PPA and stopped scheduling power from the Plant.

301. We observe that these averments of R2 have not been challenged by the Appellant and hence, the action of the Appellant qua R2 is proved arbitrary and discriminatory both.

302. We therefore opine that there was high degree of Arbitrariness in the action of "Exit" taken by the Appellant. We also observe that the actions of the Appellant were discriminatory towards R2.

303. We have to examine the impugned order in light of the averments made by the parties. Appellant has pleaded that the impugned order has been passed without affording opportunity of hearing to the appellant to rebut the contentions of R2, therefore it is bad in law. The Appellant has further stated that the said order has accorded contradictory and erroneous findings therefore it amounts to re-drawing the terms and conditions of the PPA. The Appellant has further pleaded that the impugned order is prejudicial to it and is also against the public interest. Finally, the Appellant has pleaded that the State Commission has exceeded the jurisdiction in passing the impugned order.

304. With respect to its averment that the impugned order was passed without affording any opportunity of hearing to the Appellant, the Appellant has further stated that it was not given a chance to rebut the contentions of R2 stated in reply dated 01.01.2018, and hence, it was bad in law. The Appellant further stated that vide order dated 10.11.2017, the State Commission itself initiated the process of conciliation, in response to which R2 filed a proposal to the Appellant and the proceedings

subsequent to that were aimed at conciliation process. The Appellant further stated that just before passing of the impugned order dated 03.01.2018, no hearing took place on merits as only process of resolution/ negotiation was going on and in fact hearing was done only on proposal given by the R2 which is also supported by from the fact that the Appellant had filed its reply before the State Commission but the R2 never filed its rejoinder. Here it is pertinent to record findings in the impugned order dated 03.01.2018 passed by the State Commission:

> *"13. The matter was heard on 2nd Jan. 2018. The advocate General, UP appearing on behalf of UPPCL stated that the PPAs have been terminated and now only fresh PPAs can be executed. He stated that UPPCL is ready to accept the reduction in variable cost but fixed charges for the intervening period i.e. from the date of exit notice to the date of order of the Commission should not be allowed. He stated that if the Petitioner has suffered any loss, he can be compensated only as per the provisions of the PPA but UPPCL cannot be compelled to procure power from the Petitioner.*
>
> *The Respondent's counsel has cited three Supreme Court Cases in support of their action and to emphasize that the contract is to be interpreted strictly as per the terms of the contract and also that the Govt. has a right in public interest to issue the policy directive and such directives will override the contracts. These cases are dealt with as under."*

305. It is difficult to believe that the State Commission did not hear the Appellant. Rather, there is explicit recoding of the contentions of the Appellant in the impugned order. The issue of interpretation and public interest, which have also been raised by the Appellant in the impugned order have also been addressed by them in the instant Appeal. It is rather clear that R2 had objected to the matter of non-payment of charges for the intervening period before the Commission, which was duly considered by the State Commission. The affidavit filed by R2 on 01.01.2018 was given by the R2 on the instructions of the State Commission and the same was also duly served on the Appellant. In fact, a hearing also took place before the State Commission on 02.01.2018, wherein the Sr. Advocate of

the Appellant was also present. The State Commission did not record any findings as to the Appellant having prayed or having even objected to the said affidavit dated 01.01.2018 filed by R2. The State Commission further observed as under;

> *"14. Commission's View*
> 1. *After going through the facts of the case, the arguments and counter arguments of both the parties and contracts signed between both the parties, the Commission finds that ….."*

306. Therefore, it is clear from the impugned order that the State Commission duly considered the arguments and counter arguments of both the parties, In fact in para 6 of the impugned order dated 03.01.2018, the State Commission categorically records as under;

> *"6. UPPCL filed the detailed counter affidavit on 13.12.2017. in their counter affidavit, the respondents have reiterated the arguments which they had earlier filed. They have submitted that exit form PPAs cannot be described as an event of default and is only a consequence of introduction of new policy decision by the Government of India and the State Government as described in Power for All scheme to which this Hon'ble Commission is also sensitive in view of Section 108 of Electricity Act, 2003. They have further stated that the exit from PPA or its termination not adversely impacting the petitioner since the petitioner is set free to sell its electricity in the open market or in the exchange. Further, merely because the tariff is determined by the Commission under section 61 and 62 of the electricity Act, 2003, the same does not restrict or defeat the right of either of the parties to exit from the PPA. The PPA is mere a contract executed between the parties and the parties are bound by the terms and conditions and consequences as mentioned in the agreement are to follow in case any breach or default is determined by a judicial forum. In the counter affidavit the respondents have also mentioned that if the commission so desires, it can direct the petitioner to supply electricity to the respondents in pursuance to the formula communicated to the petitioner vide letter dated 03.10.2017. in the Counter Affidavit the respondents have not quoted any provision of the PPA which entitles them to terminate the PPA or exit from the PPA as per the contractual provisions. Repeated they have tried to justify the exit notice non the ground of higher variable cost."*

307. It is pertinent to note that the grounds raised in the said counter-affidavit are the same as have been raised by the Appellant in the present Appeal. These points have now been duly argued and contested by the parties. Therefore, in our view, even if the said counter-affidavit of the Appellant filed before the State Commission was not argued, despite the fact that we note that the main issues of public interest, PFA being considered a directive under section 108 of Electricity Act, 2003, right of termination, PPA being merely a contract, etc., have now been thoroughly pleaded and argued upon by the Appellant in this Appeal. Therefore, the grievance of the Appellant that it was not heard on merits of the matter and the State Commission merely concentrated on the proposal submitted by R2 vide its affidavit dated 18.12.2017 now stands settled.

308. We now proceed to examine the proposal dated 18.12.2017 given by R2, its acceptance dated 26.12.2017 by the Appellant and the Affidavit dated 01.01.2018 submitted by R2, and the State Commission's response thereto. R2 submitted a proposal dated 18.12.2017, which was placed before the Board of Directors of the Appellant in its 134th Board Meeting held on 26.12.2017. The said Board Meeting no. 134, passed the following Resolution:

Sl. No.	Agenda Item	Decision Taken
134(38)	In respect of thermal power plants (5x90 MW) set up under the private sector by Bajaj Energy Limited at Barkhera, Maqsoodpur, Khambarkhera,	Approval granted by the Board of Directors to the cost reduction proposal presented by M/s BEL which is mentioned at point no. 14 in light of the facts mentioned at point nos. 16 and 17. Simultaneously, the Board of Directors also directed that that the said proposal mentioned at point no. 14 be accepted with this restriction that in case Hon'ble Regulatory Commission decides to revive the earlier terminated five power purchase agreements than these five power purchase agreements shall be revived subject to the restrictions mentioned in the said

	Kundarkhi, and Utraula.	point no. 14 with effect from the date of the order of Hon'ble Regulatory Commission and in this respect the supplementary power purchase agreement may be executed and approval of the Hon'ble Regulatory Commission thereon shall be taken later.

309. On a plain and simple reading of above leads to a conclusion that the Board of Directors of the Appellant all through took that firstly, the PPAs were terminated, and these needed to be revived. The entire decision of the Board related to the self- styled understanding of the PPAs having being terminated, which was not the case. As has been discussed in the preceding paragraphs, R2 immediately upon being served the exit notices filed a batch of writ petitions before the Lucknow Bench of Allahabad High Court seeking quashing of the said exit notices. The High Court vide its order dated 26.10.2017 relegated the matter to the State Commission and directed the State Commission to decide the matter within a period of two months from the date of filing the same. Therefore, the original matter before the State Commission related to quashing of the said exit notices. We further note that R2 filed the petition in accordance with directions of the High Court before the State Commission on 03.11.2017 wherein it prayed, inter-alia:

> *"(i) Quash and or set aside the impugned notice dated 08.07.2017 issued by the Respondent No. 1 as contained in Annexure No. 1"*

310. It is therefore clear that the main matter still remained to quash the said exit notice. The State Commission vide its order dated 14.12.2017 while taking on record the reply of the Appellant to the petitions filed by R2, agreed to the proposal made by it they want to submit a proposal regarding reduction in variable charges and for that they (R2) require 3 days time. The said order further records that the Advocate General (the Counsel of Appellant before the State Commission) did not object to it.

311. A mere reading of this order makes it clear that the Appellant welcomed the proposal of cost reduction by R2, thus nullifying the exit notices by its own action. The dispute of exit from the PPAs was therefore reduced down to the proposal for reduction in variable cost with mutual consent of parties.

312. It is therefore clear that the Appellant was aware that the Petition filed by R2 before the State Commission was for quashing the notice of exit, which R2 had immediately disputed by filing writ petitions and the matter was remanded back to the State Commission. During the hearing, R2 made a proposal which the Appellant accepted, however with riders. In legal terms, a proposal made if accepted conditionally, tantamount to a counter offer, which the other party may or may not accept. R2 accepted the same partially, which resulted in immediate resolution of the grievance of the Appellant of high variable cost. In fact, the Appellant after having accepted the said proposal perused the impugned order dated 03.01.2018 and only thereafter allowed the plants of R2 to run.

313. It is seen that nowhere in the entire proceedings did the Appellant dispute the fixed charges payable to R2, which had been fixed by the State Commission. The matter was heard by the State Commission, on 28.12.2017, wherein R2 was directed by the State Commission to file its written reply. At this juncture, it is interesting to note that the Appellant did not object to the same and did not seek leave to file its own reply.

314. In fact, R2 filed its reply on 01.01.2018, after duly serving the same to the Appellant. The Appellant did not object to the same. In the hearing that followed after submission of the Affidavit dated 01.01.2018 by R2, the

Appellant was duly represented and apparently, elaborate arguments and submissions were made.

315. It is noteworthy that during the entire proceedings before the State Commission post proposal dated 18.12.2017, the Appellant kept talking about "intervening period". Apparently, the Appellant was submitting that the exit notices had terminated the PPAs, and that a fresh PPA was required or a reinstatement of PPA was required.

316. It was apparently with this foundation that the Appellant pleaded before the State Commission that its Board of Directors had decided that in case PPAs of R2 are reinstated, the fixed charges for the intervening period that is during the period starting exit notice and to the date of order of State Commission not to be allowed. It is observed that it is these intervening charges, which are the subject matter of the dispute.

317. However, the State Commission, by its order dated 03.01.2018 stated:

> *"15. In view of the above, the Commission directs as under:*
> *a. The power purchase agreements related to five different plants will be treated to have existed on continuity.*
> *b. From the date of this order the Petitioner will be entitled to variable cost as per their offer dated 18.12.2017……"*

318. The State Commission therefore made an order that PPAs existed in continuity. We are of the opinion that in case PPAs were in continuity, R2 was entitled for full fixed charges for the intervening period in accordance with the capacity declared by it. However, still, the State Commission made certain deductions, thereby providing certain concessions to the Appellant in the fixed charges during the intervening period.

319. We now move to examine whether the Appellant had a right to repudiate the PPAs in light of the facts and circumstances of the matter. We have already observed that the decision to exit taken by the Appellant was against the provisions of law and the PPA. However, we have to examine, whether the right to repudiate the PPA under the Indian Contract Act, 1872 are available to it, and whether such rights supersede the process and procedure provided under the PPAs.

320. In the entire PPA, there is only passing reference to the term "repudiation" in Article 14.2.2, which reads as under:

> *"14.2 Procurer Event of Default*
>
> *The Occurrence and continuation of any of the following events, unless any such event occurs as a result of a Force Majeure Event or breach by the Seller of its obligations under this Agreement, shall constitute the Event of Default on the part of defaulting procurer:*
>
> *…….*
>
> *ii) The* ***defaulting Procurer repudiates this Agreement*** *and does not rectify such breach even within a period of thirty (30) days from a notice from the Seller in this regard.*
>
> *……..."*

321. Therefore, there are two conditions (i) the defaulting procurer repudiates the contract, (ii) the Seller gives a notice, and (iii) the defaulting procurer does not rectify the breach within a period of 30 days from the receipt of the said notice. It is further observed that such repudiation will merely constitute an event of default on the part of Procurer (Appellant herein)

322. Common meaning of repudiation is a show of inability or unwillingness to perform its obligations under a contract. It is also well settled that in the event of repudiation of contract, the innocent party is

entitled to either terminate the contract or go for the remedies available to it.

323. We have already discussed in the preceding paragraphs that R2 chose to go for other remedies available to it by filing writ petition against the said exit notices. Therefore, we are of the opinion that although the Appellant has a right to repudiate the contract, under specific circumstances, it cannot be done by it in the manner and circumstances it has chosen to do in the present case. In fact, there is no evidence put forth by the Appellant that it was either unable or unwilling to continue the contract. In fact, as recorded by the State Commission in the Para 14(3) of the impugned order dated 03.01.2018:

> *"14(3) Since there is no specific provision in the PPAs for exiting from the contract by either party except in case of default, the Respondents action cannot be legally justified……"*

324. We agree with the observations of the State Commission and hold that although there is a vague reference of repudiation in the PPA by the procurer, the said repudiation cannot be exercised/applied in the manner the Appellant has done by issuing exit notice. This is so because the Appellant has neither put up any case for its inability to perform nor have stated its unwillingness to perform its obligations under the PPAs. The reason quoted by the Appellant is high cost of power, which is no reason for repudiation within the meaning of Article 14.2(ii) of the PPA as read along with the settled principles of law relating to repudiation of contracts.

325. We are of the opinion that the order of the State Commission maintains the continuity of the PPAs of R2 and there is no element of "reinstatement" involved into it. In case there was no reinstatement, the question of non-payment charges for the so-called intervening period does not arise because there was no intervening period. The order dated

03.01.2018 passed by the State Commission, in fact has the effect of quashing the said "exit notices" dated 08.07.2017 and 15.07.2017 as had been prayed for by R2. Therefore, we hold that PPAs were never terminated and R2 is entitled for the fixed charges continuously for the entire period it declared capacity in accordance with Regulations and PPA. We further hold that the Appellant has no right to repudiate the PPAs in the manner they have done in the instant case, that is by issuing "exit notices".

Issue No. 2: Whether R2 is entitled to the fixed charges as claimed by it for the so-called intervening period?

326. Since the answer to the issue no. 1 is that **P**PAs of R2 were not terminated and they existed in continuity and the Appellant did not have right to terminate the PPAs, we hold that R2 is entitled to the fixed charges claimed by it. Still this issue requires further discussions in view of the Additional/ Rejoinder Submissions made by the Appellant.

327. The Appellant in its Additional/ Rejoinder submissions has pleaded that:

> *"It pertinent to state at the very outset, that the respondent during the course of oral arguments or in the written submissions has not advanced any argument with regards to the payment of fixed charges for the intervening period, instead the respondent has mostly argued on specific performance of the contract which was never pleaded before the State Commission. The fact that the respondent has advanced no arguments with regards to the payment of fixed charges in itself makes it abundantly clear that the respondent has no concrete or substantial submission to defend the direction of the State Commission for payment of fixed charges during the intervening period. Therefore, the respondent has 'given up' their claim over fixed charges for the intervening period.*
>
> *Therefore, it is clear that the respondent has conveniently evaded the real issue raised by the appellant in the instant appeal and has*

attempted to merely misguide and misdirect the court so as to keep the tribunal in the dark with regards to the actual facts of the case."

328. We are however unable to agree with the contention of the Appellant that R2 has 'given up' its claim for two reasons: firstly that this is the appeal by the Appellant and the Appellant is required to prove that R2 is 'not entitled' to fixed charges and in no case can it be interpreted to mean that R2 has given up its claim and secondly that it is the respondent, which included in its prayer to examine its right to repudiate the PPA and thus its obligation to pay fixed charges. The onus of proof therefore lies on the Appellant to prove that.

329. In terms of its prayer, the words used by the Appellant are as under:

*"Allow the Appeal and set aside the impugned order dated 03.01.2018 passed by the Uttar Pradesh Electricity Regulatory Commission in Petition No. 1258 of 2017 (since this order is for five petitions taken together, this may be taken as 1258-1262 of 2017) to the extent the State Commission declares that the **appellant has no right to repudiate the PPA** and therefore, the same is an event of default on the part of the appellant and also the **direction to pay fixed charges to the respondent no. 2** for the intervening period between 18.07.2017 to 15.01.2018"*

330. After carefully going through, we are of the opinion that the onus was on the Appellant to prove why R2 is not entitled to the said fixed charges. The Appellant concentrated on its right to terminate the PPAs and to justify the exit notice, apparently, because in case there is continuity of PPA, R2 is entitled to fixed charges.

331. The Appellant having failed to prove that it was entitled to terminate the PPAs by issuing the so called 'exit notices' and therefore, as observed earlier, the Appellant had no right to terminate the PPAs in the manner it did.

332. Having established that PPAs were not terminated by issuing exit notice, the said PPAs existed in continuity and therefore, the right of R2 to receive fixed charges existed in continuity. In fact, the so called intervening period never existed. Even if, it is presumed that there was any intervening period, it in fact was the period during which plant was not scheduled by the Appellant rather than the PPAs not being in operation.

333. We therefore decide the Issue No. 2 in favour of R2 and against the Appellant and hold that R2 is entitled to claim fixed charges as claimed by it.

Issue No.3 **: What would be the impact of the Bills dated 05.01.2018 submitted by R2 on 08.01.2018 for the period 16.07.2017 till 03.01.2018 and the unpaid amount of bills for the period 04.01.2018 till 15.01.2018 as well as those submitted by R2 on 12.03.2019?**

334. The issues and disputes in the current Appeal will not be settled until this issue is decided. Parties have pleaded about raising two bills but never argued on the same. We are of the opinion that we need to decide the same so that further disputes in this matter are fully resolved.

335. The Appellant along with its appeal has attached copies of the bills dated 12.03.2019 submitted by R2, thereby acknowledging that R2 has duly submitted bills for the period starting issue of exit notices till the date of restarting the plant. On the other hand, R2 submitted its bills dated 05.01.2018 along with its reply dated 23.09.2019 against IA filed by the Appellant for condonation of delay. R2 specifically stated in its reply that it raised bills dated 05.01.2018 for the period starting from exit notice till the date of restart. The Appellant however returned the same after a

period of more than 30 days, vide its letter dated 16.03.2018. R2 further drew our attention to Article 11.6.1 of the PPAs, which reads as under:

> "*11.6 Disputed Bill*
> *11.6.1 If a Party does not dispute a Monthly Bill, Provisional Bill or a Supplementary Bill raised by the other Party with thirty (30) days of receiving it, such bill shall be taken as conclusive*."

336. After the review Petitions nos. 1344-1348 of 2018 were disposed of against the Appellant by order of the State Commission dated 08.03.2019, R2 filed another set of bills dated 12.03.2019, which have neither been accepted nor returned by the Appellant.

337. An invoice is a claim of the agreed consideration for the goods or services provided by one party to another. R2 in fact provided services to the Appellant, for which it raised two sets of invoices, first time on 05.01.2018 and second time on 12.03.2019. Whereas the first set of invoices were returned by the Appellant. After they became conclusive in terms of PPA, R2 never tried to re-submit the same when the review petition filed by the Appellant was rejected by the State Commission. Instead, R2 submitted fresh set of invoices, meaning that the first set of invoices dated 05.03.2018 had been impliedly taken back by R2. The second set of invoices dated 12.03.2019 have not been returned by the Appellant, rather, these have been attached by it along with its Appeal, thereby giving authenticity to the claim of R2.

338. We therefore hold that the Appellant has accepted the invoices dated 12.03.2019 by its actions and accordingly, R2 will be entitled for late payment surcharge in accordance with the UPERC Tariff Regulations, 2014 and the PPAs with respect to invoices dated 12.03.2019.

339. Another related issue in this regard is with respect to the carrying cost. The generators, whose tariffs are determined by the Central/ State

Commissions under Section 62 are determined are statutorily entitled for or liable for interest or carrying on the under or over recovered amount of tariff. The relevant UPERC Tariff Regulation provide interest at the applicable bank rates as on 1st day of April of the relevant year. We further observe that lots of judicial time is spent by the generators and judicial authorities on discussing the carrying cost in about 62 cases of generators, whereas the cardinal principle that arises is that where there is an under or over recovery of tariff, an interest payable or receivable, which being a statutory right, need not be prayed for and pleaded for.

340. Therefore, we hold that R2 will be entitled for carrying cost till the Appellant had received the second bill dated 12.03.2019 and thereafter Late Payment Surcharge shall be payable in accordance with the provisions of PPA and UPERC Tariff Regulations as applicable from time to time.

341. PPA is a sacrosanct document since it is approved by a regulatory authority created under a statute after parties sign and submit the same for approval. Therefore, even a slightest change or modification to it (PPA) cannot be done without Commissions approval, hence it cannot be terminated without the prior approval of the State Commission.

342. We express our deep concern and dissatisfaction over the manner in which the learned senior counsel for the Appellant has raised question on the constitution of the State Commission and made allegations on the sole Member who then occupied office of UPERC. It is cardinal principle that jurisdictional issues, if at all raised, are required to be made at the first instance, which was not done in the instant case. Now it cannot be raised before the Appellate Forum.

343. Having regard to the detailed discussion and reasoning stated supra, the issues raised in the instant Appeals filed by the Appellant being Appeal nos. 43, 44, 45, 46 and 47 of 2020 do not have merits. Hence Appeals are to be dismissed. The impugned order dated 03.01.2018 passed by Uttar Pradesh Electricity Regulatory Commission in Petition Nos. 1258/2017, 1259/2017, 1260/2017, 1261/2017 & 1262/2017 is hereby upheld and we pass the following order.

i) We hold that PPAs of R2 were never terminated and PPAs existed in continuity. We further hold that the Appellant has no right to repudiate the PPAs on the basis of the facts and circumstances of the instant case.

ii) We hold that R2 is entitled to the fixed charges as claimed and denied by the Appellant for the so-called intervening period.

iii) We hold that the energy bills dated 12.03.2019 have been validly submitted by R2 to the Appellant, and thus, R2 will be entitled for carrying cost till the Appellant had received the second bill dated 12.03.2019 and thereafter Late Payment Surcharge shall be payable in accordance with the provisions of PPA and UPERC Tariff Regulations as applicable from time to time.

iv) We uphold the impugned order. Accordingly appeals are dismissed.

344. Needless to say the Appellant shall comply with our directions as stated above

345. Pending IAs, if any, shall stand disposed of. No order as to costs.

346. Pronounced in the Virtual Court on this the **6th day of August, 2021.**

(Ravindra Kumar Verma)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

ts/mk