IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 232 OF 2016
& IA Nos. 496 & 530 OF 2016

Dated: 24th August 2021

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

JAIPRAKASH POWER VENTURES LIMITED
Sector 128, Noida-201304,
[Uttar Pradesh] **… Appellant**

VERSUS

1. **MADHYA PRADESH POWER MANAGEMENT COMPANY LIMITED**
(Erstwhile Madhya Pradesh Power Trading Company Limited),
Shakti Bhawan, Vidyut Nagar,
Rampur, Jabalpur – 482008
[Madhya Pradesh]

2. **MADHYA PRADESH POORV KSHETRA VIDYUT VITRAN COMPANY LIMITED, JABALPUR**
Shakti Bhawan, Vidyut Nagar,
Rampur, Jabalpur – 482008
[Madhya Pradesh]

3. **MADHYA PRADESH MADHYA KSHETRA VIDYUT VITRAN COMPANY LIMITED, BHOPAL**,
Bijli Nagar Colony,
Nishtha Parisar,
Govindpura, Bhopal- 462023
[Madhya Pradesh]

4. **MADHYA PRADESH PASCHIM KSHETRA VIDYUT VITRAN COMPANY LIMITED, INDORE**
Indore GPH Campus,

Polo Ground, Indore- 452003
[Madhya Pradesh]

5. STATE LOAD DESPATCH CENTRE
Nayagaon, Rampur,
Jabalpur-182008
[Madhya Pradesh]

6. MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION, BHOPAL
5th Floor, Metro Plaza,
Bittan Market, Bhopal- 462016
[Madhya Pradesh] **… Respondents**

Counsel for the Appellant (s)	:	**Mr. Sanjay Sen, Sr. Adv.** Mr. Sakya Singha Chaudhuri Ms. Nameeta Singh
Counsel for the Respondent (s)	:	Mr. Alok Shankar Ms. Divya Anand for R-2 to 4 Mr. Ashish Anand Bernard, Dy. AG Mr. Paramhans Sahani for R-5 Ms. Mandakini Ghosh Ms. Ritika Singhal for R-6

J U D G M E N T

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

1. The appellant thermal power generator has been denied capacity charges in respect of a backed down unit of its power station under *Reserve Shut Down* on the reasoning that it is not correct to claim Declared Capacity or Availability of an "Off-Bar" unit even though it has been in readiness to supply the contracted capacity under the *power purchase agreement* (PPA) with the State *distribution licensees* (Procurer), the insistence being that it is liable to generate the Contracted Capacity simultaneously from both the units of the Power Station. The appellant *M/s. Jaiprakash Power Ventures Ltd.* ("JPVL" or "the Appellant") is the generator aggrieved by the order dated 08.07.2016 passed to the above effect by the sixth respondent *Madhya Pradesh Electricity Regulatory Commission* ("MPERC" or "the State

Commission") in Petition (no. 64 of 2015) filed by the appellant raising the dispute seeking adjudication.

2. The appellant had set up a 2 x 660 MW Jaypee Nigrie Super Thermal Power Plant ("Power Station") at *Village Nigrie, Tehsil Deosar, District Sidhi in the State of Madhya Pradesh*. The Power Station consists of two units of 660 MW each, each of which had achieved Commercial Operation Date ("COD") and was, therefore, fully operational at the relevant point of time. The appellant had entered into a Power Purchase Agreement dated 05.01.2011 ("PPA") with first respondent *Madhya Pradesh Power Management Company Limited* ("MPPMCL" or "the first respondent"), in terms of which the appellant is required to supply 30% of the Installed Capacity *of the Power Station* to MPPMCL i.e. 30% of 1320 MW ("Contracted Capacity").

3. It is admitted position on all sides that the fifth respondent *Madhya Pradesh State Load Despatch Centre* ("MPSLDC' or "the Load Desptcher") is constituted under Section 31 of Electricity Act 2003, its functions having been defined under Section 32, the subject of compliance of directions being covered under Section 33. There is no quarrel with the proposition that the SLDC is responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in the State.

4. The control area demarcation of Load Despatch Centres is defined under Regulation 6.4 of *CERC (Indian Electricity Grid Code) Regulations 2010* ("the Grid Code"). The power station of the appellant is connected to the Interstate Transmission System (ISTS) and as per Regulation 6.4(2)(c)(i), this Generating Station falls within the area of *Western Region Load Despatch Centre* (WRLDC). The generator would declare its day-ahead capacity as well as real time revisions indicating the entitlement of the procurer to WRLDC and simultaneously convey the same to MPSLDC and,

after receiving the requisition from the procurer, the MPSLDC would send the same to WRLDC whereupon the latter (WRLDC) would issue the injection schedule to the generating Station of the appellant.

5. Statedly in order to operate the Power Station in an optimum and economically viable manner, the appellant sought to schedule the entire Contracted Capacity under the PPA from one of the units. It is the case of the appellant that when the need so arises, or situation so allows, it is permissible to do so under the PPA, the position being akin to a reserve shut down.

6. It appears that the appellant had, after the commissioning of Unit II, initially proceeded to schedule the Contracted Capacity from one of the units to avoid operations under the technical minimum level, backing down the other unit, which was otherwise capable of operation. But this was disallowed by the fifth respondent MPSLDC on the ground that the PPA provides for supply of 30% of Installed Capacity from each of the units. The MPPMCL did not pay the Capacity Charges of the backed down unit. According to the appellant, it had achieved the *Plant Availability Factor for the Month* ("PAFM") for both units, whereas, according to MPPMCL, the PAFM had to be worked out on the basis of the operating unit and not for the backed down unit. The appellant states that it had declared its availability as per the Indian Electricity Grid Code, 2010 ("IEGC") at all relevant times for both its units. However, the same were not certified by the WRLDC as per the requirements of law and as per PPA. In the absence of such clarification of availability, MPPMCL did not allow to the appellant Capacity Charges for the unit under Reserve Shut Down ("RSD").

7. A dispute arose against the above backdrop between the appellant and the respondents, the appellant having filed Petition (no. 64 of 2015) before MPERC praying, *inter alia*, for declaration that it is entitled under the PPA signed with MPPMCL to supply the Contracted Capacity from any single unit,

both units or combination thereof of its Power Station to the second to fourth respondents, they being the *Distribution Licensees in Madhya Pradesh* ("Procurers"), the first respondent MPPMCL being their holding Company, also seeking relief in the nature of a direction against the Procurers/MPPMCL to procure the Contracted Capacity from the Petitioner's Power Station whether from any single unit, both units or combination thereof. It is stated that the appellant also prayed before the State Commission that the procurers be directed to pay the arrears that had accrued in the invoices raised, along with the delayed payment surcharge and further that the Letter No. 07-05/CR dated 29.05.2015 issued fay SLDC Jabalpur informing WRLDC that power from the power station should be scheduled on a unit-wise basis be quashed.

8. By the impugned order, the State Commission held that the appellant is liable to generate the Contracted Capacity simultaneously from both the units of the Power Station, such result founded primarily on the premise that the dispute had been raised due to deficient understanding of the Declared Capacity and Availability in the absence of Regional Energy Accounts ("REA") by the WRLDC/Western Regional Power Committee ("WRPC"), the definition of "Contracted Capacity" required to be construed having regard to the other terms of the PPA, it being not correct to claim Declared Capacity or Availability of an "Off-Bar" unit.

9. The relevant part of the impugned decision reads thus:

> "Commission's Findings:
>
> *xxx*
>
> *23. It is observed that the PPA provides that the "Contracted Capacity" shall mean the capacity equivalent to 30% of the power station's installed capacity contracted with the procurer as per "terms of agreement" (Emphasis supplied). Therefore, the first part of the definition of "Contracted*

Capacity" cannot be read in isolation for its correct interpretation. It needs to be read with the other part also i.e, "as per the terms of agreement" to understand and apply the correct meaning and spirit of this definition. The "terms of agreement" provide adequate field for correct interpretation of the Contracted Capacity.

24. Further, it is very important to go through the definition of "Declared Capacity" which plays a crucial role to understand and resolve the issue under dispute. The definition prescribed that a unit should have the capability to deliver ex-bus electricity in MW in any time block of the day. As defined in the PPA, "Declared Capacity" in relation to a unit or power stations at any time means the energy capacity of Unit or Power Station at the relevant time. It means that if any of the units of petitioner's power plant is "off-bar" as contended by the petitioner, then the capacity of such unit cannot be considered as Declared available at any time during the TimeBlocks of the day because the off-bar unit will take atleast 8-12 hours for cold start. Therefore, the off-bar unit cannot be considered as Declared and available at any time in terms of the meaning of Declared Capacity in the PPA. The "Declared Capacity" is the base term for the other definitions like Available Capacity and Scheduled Energy in the PPA. Accordingly, the capacity of off-bar unit cannot be considered as available in terms of meaning of Available Capacity in the PPA.

25. Article 4.3.7 of PPA as quoted by the petitioner in support of its contention to make available the contracted capacity from one unit or from both the units is found misplaced because the provisions under this Article are applicable for exigencies particularly for inability of the Generator to make available the contracted capacity from the power station and to mitigate the damages payable by the generator to the procurer on account of its inability to make available the contracted capacity from the power station. The generator is free to make available the contracted capacity from an alternative generation source. The provisions of this Article are not applicable for the operational scenario in the instant matter.

26. Article 4.5 of the PPA is for the Liquidated Damages payable by the Generating Company to the procurer for

delay in Commission of any unit of the power station by the scheduled COD or the revised scheduled COD as the case may be. This provision is applicable for each unit and upto COD of units whereas the issue in the subject petition pertains to post CoD of each generating unit of petitioner's generating station.

27. Regarding Availability, Scheduling and Despatch, Article 6.1 of the PPA provides that the Generating Company shall comply with the provisions of the applicable Law regarding Availability, scheduling and Despatch. Article 6.1.2 further provides that "In the event of Declared Capacity being less than the Power Station's Net Capacity, the Available Capacity to the Procurer for despatch out of the Contracted Capacity shall be reduced in the same proportion as the Declared Capacity is reduced in proportion to the Power Station's Net Capacity.(Emphasis Supplied). In view of the aforesaid provision in PPA, the Availability (PAFM) of the petitioner's generating station is required to be worked out in terms of appropriate provisions under applicable MPERC (Terms and Conditions for determination of Generation Tariff) Regulations and also considering the contracted capacity in terms of provisions under Article 6.1.2 of PPA in case of supplying contracted capacity from one generating unit only and keeping other unit "off bar" on account shut-down for economic reasons as mentioned by the petitioner. Such generating unit cannot be declared as available and capacity charge thereof are payable accordingly.

28. The generation tariff for both the units of petitioner's power plant was provisionally determined by the Commission in accordance with amended Regulation 8.2 of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations'2012 notified on 13th December'2013. Neither the aforesaid Regulation nor the contents in the order passed by the Commission for determination of provisional tariff for the petitioner's power plant support/provide for recovery of Capacity Charges for the generating unit whose Capacity is not declared being its "off-bar status.

29. Further, in terms of Article 7.1.1 of the PPA, the petitioner is made responsible at its own expenses to ensuring the operation of power station in an efficient, coordinated and

economical manner so as to meet its obligation under the PPA and also to avoid any adverse effect on the grid operation. Any unscheduled available capacity within the contracted capacity is compensated by way of fixed cost/capacity charges paid by the Respondent No.2 in terms of PPA. Therefore, the contention of the petitioner that "the requirement to schedule the Contracted Capacity under the PPA from any one unit becomes necessary in view of technical constraints of running the Power Station below the technical minimum" has no merit in light of Article 7.1.1 read with Article 4.3.3 of the PPA. The Commission has already decided this issue regarding Technical Minimum in Petition No. 54 of 2015 filed by the petitioner in respect of other power plant.

30. Clause 7(3) of M.P. Electricity Balancing and Settlement Code, 2015 provides that the Respondent No. 1 (MPPMCL) shall pay to the petitioner Capacity (fixed) charges corresponding to Plant Availability and Energy Charges for the Scheduled Despatch as per relevant notification and orders of MPERC. Accordingly, the Capacity (fixed) Charges are payable corresponding to the Plant Availability which depends on the average Declared Capacity and Installed Capacity of the generating station. There is no dispute in the Installed Capacity of petitioner's generating station. The other parameter in the formula specified for PAFM in MPERC (Terms and Conditions of Generation Tariff) Regulations is "Declared Capacity" which shall be for only one unit in the event when the other unit of the petitioners generating station is "off bar". The arguments placed by the petitioner for considering "Declared Capacity" for calculating Availability of its plant when its one unit is 'off bar' and supplying contracted capacity from its one unit only are arbitrary and misplaced in terms of the provisions under PPA, Grid Code, M.P. Electricity Balancing and Settlement Code and the applicable MPERC (Terms and Conditions for determination of generation tariff) Regulations, 2012 and its subsequent amendments/revisions.

31. In view of the observations and findings of the Commission in the preceding paragraphs, the subject petition being devoid of merits is dismissed and disposed of. The petitioner and Respondent No. 1 are directed to resolve the issue regarding certification of Declared Capacity by the

competent authority as per the provisions of applicable Laws/Regulations and to ensure billing and payment in accordance with the provisions of PPA and the applicable Code / Regulations notified by the appropriate Commission."
(Emphasis supplied)

10. It may be mentioned here that the process of certification of availability by WRLDC was formalized by the Central Electricity Regulatory Commission ("CERC") by its order dated 20.03.2019 in petition no. 192/MP/2016. Based on instructions issued by the CERC, the availability declared by the Appellant for both the units from the date of commissioning has since been certified by WRLDC.

11. The PPA declares that the expression *"Power Station*" in context of which the parties had entered into the contractual arrangement "*shall mean the coal based Jaypee Nigrie Super Thermal Power Station having the proposed capacity of (2 x 660) 1320 MW, to be established in Village Nigri, Tehsil Deosar, District Sidhi in the State of Madhya Pradesh;"*

12. Some relevant expressions have been defined by the PPA as under:

"Aggregate Capacity" shall mean, in relation to a Unit the proposed nameplate capacity of the Unit and in relation to the Power Station the total proposed nameplate capacity of the Power Station. Such proposed capacity of the Power Station in megawatt shall be the sum total of proposed nameplate capacities of each of the Units as mentioned below:

Unit *1: 660 MW* Unit *2: 660 MW*

*"*Available Capacity" *shall mean such of the Contracted Capacity as declared available by the Company in accordance with ABT;*

"Contracted Capacity*" shall mean the capacity equivalent to 30% of the Power Station's Installed Capacity contracted with the Procurer as per terms of this Agreement;*

*"*Declared Capacity" *in relation to a Unit or Power Station* at any time *means the Net Capacity of the Unit or Power*

Station at the relevant time *(expressed in MW at the delivery point) as declared by the Company in accordance with the Grid Code and dispatching procedures as per the Availability Based Tariff*;

"Installed Capacity*" shall mean the sum of MCR capacities of the Unit(s) of the Power Station, as confirmed by the respective Performance Test;*

"Scheduled Energy*" shall mean the energy corresponding to the Available Capacity, to be scheduled in accordance with ABT;*

"Tariff" shall mean the tariff payable by the Procurer to the Company for making available the Contracted Capacity and for supply Electrical Output corresponding to the Contracted Capacity at Normative Availability, as may be determined by the Appropriate Commission under Law.

13. Some of the important terms of the PPA binding the parties (the expression "the Company" denoting the appellant-generator) read as under:

"4.3 Right to Contracted Capacity and Scheduled Energy

4.3.1 Subject to the terms and conditions of this Agreement, the Company undertakes to make available to the Procurer the Contracted Capacity and the Procurer undertakes to purchase the Scheduled Energy and pay the Tariff. The title and risk to the Scheduled Energy shall pass from the Company to the Procurer at the Delivery Point.

4.3.2 Subject to the provisions of this Agreement, the entire Contracted Capacity shall at all times be for the exclusive benefit of the Procurer (through the Procurer to meet the Discoms requirements) who shall have the exclusive right to purchase the Scheduled Energy. The Company shall not grant to any third party or allow any third party to obtain, any entitlement to the Contracted Capacity and/or Scheduled Energy.

4.3.3 If the Procurer does not schedule the whole or part of the Available Capacity for any reason whatsoever, the

Company shall be entitled to make available such Available Capacity not scheduled by the Procurer, to any other person without losing the right to receive the Capacity Charges from the Procurer for such unscheduled Available Capacity. During this period, the Company will continue to receive the Capacity Charges from the Procurer. For any such third party sale, all open access charges including losses, as may be applicable, shall not be payable by the Procurer. The Company shall maintain accounts and provide all details regarding price of sale etc. to the Procurer in respect of such sales under this Article.

xxxx

4.3.5 Where the sale under Article 4.3.3 by the Company is consequent to a notice issued by the Procurer to the Company indicating its unwillingness to schedule the whole or part of the Available Capacity for a period specified in such notice, the Procurer shall be entitled to request the Company for the resumption of availability of the Available Capacity at any time, however, the Company shall not be liable to resume such availability earlier than the period specified in the said notice, and subject to the provisions regarding scheduling as per the Grid Code.

4.5 Liquidated damages for delay in providing Contracted Capacity

4.5.1 If the Company is unable to Commission any Unit of the Power Station by the Scheduled COD, or the Revised Scheduled COD as the case may be other than for the reasons specified in Article 4.4.1, the Company shall pay to Procurer liquidated damages as per Article 4.5.3, for the delay in such Commissioning and making the Contracted Capacity available for despatch by the Scheduled COD, or the Revised Scheduled COD as the case may be, without in any manner affecting the other rights of the Procurer.

Provided that the Company shall have the option to supply power from any alternative generation source from the Scheduled COD for a period not exceeding twelve (12) months at a tariff not exceeding the Tariff to mitigate the damages payable by the Company to the Procurer and without affecting the Procurer's interests.

Provided further, the cumulative Availability from such alternative generation source in the twelve (12) Months period shall not be less than the Normative Availability. If the Company fails to Commission any Unit of the Power Station and/or fails to achieve the required Availability as mentioned above in this Article, it shall pay to the Procurer liquidated damages determined under the provisions of Article 4.5.3 for such period of delay.

xxx

4.5.3 The sum total of the liquidated damages payable by the Company to the Procurer shall be calculated as follows:

xxx

For the avoidance of doubt it is clarified that the Company shall be entitled to make available the Contracted Capacity from any Unit or combination thereof and in such event LD shall be determined only in respect of Contracted Capacity not made available on Scheduled COD, or the Revised Scheduled COD as the case may be.

xxx

4.5.9 It is clarified that the liquidated damages payable under this Article 4.5.8 shall be in addition to the liquidated damages determined in terms of Article 4.5.3*"*

(Emphasis supplied)

14. As noted earlier, the Power Station consists of two units of 660 MW each, the total Installed Capacity being 1320 MW, and since the contracted capacity is 30% of the Power Station to MPPMCL i.e. 396 MW, the same can always be made available by generation of one of the two units. Clearly, the *inter-se* obligations between the appellant and the Procurers under the PPA are spelt out under Article 4.3.1 of the PPA, the obligation of the former (generator/seller) being to make available the *Contracted Capacity.*

15. In the submission of the procurers, Article 6 of the PPA titled “Capacity, Availability and Despatch" is material and deals squarely with the issue, the relevant part reading thus:

> “6.1 Availability, Scheduling and Despatch
>
> *6.1.1. The Company shall comply with the provisions of the applicable Law regarding Availability, scheduling and Despatch including*, *in particular*, *to the provisions of the ABT and Grid Code relating to declaration of Availability and the matters incidental thereto.*
> *6.1.2 The Contracted Capacity being part of the Power Station's Net Capacity in the event of Declared Capacity being less than the Power Station's Net capacity, the Available Capacity to the Procurer for despatch out of the Contracted Capacity shall be reduced in the same proportion as the Declared Capacity is reduced in proportion to the Power Station's Net Capacity.*
> *6.1.3 The Company agrees that the Availability entitlement of the Procurer for despatch over any Settlement Period is exclusive right of the Procurer and it cannot be offered to any third party other than for conditions under Article 4.3.3.*”
>
> (Emphasis supplied)

16. Reference has been made to the provisions contained in the *MPERC (Terms and Conditions for determination of Generation tariff) Regulations, 2012* (“the *MPERC Tariff Regulations 2012*”). Some relevant part thereof may be quoted thus:

> *“4. Definitions*
> *4.1 In these Regulations, unless the context otherwise requires,*
> *(y) “Normative Annual Plant Availability Factor (NAPAF)” in relation to a generating station means the availability factor as specified in Regulation 35 for thermal generating station and in Regulation 49 for hydro generating station.*
>
> *(cc) “Plant Availability Factor (PAF)” in relation to a generating station for any period means the average of the daily declared capacities (DCs) for all the Days during that period expressed as a percentage of the Installed Capacity*

in MW reduced by the normative Auxiliary Energy Consumption.

35. Norms of operation
35.2 Following norms shall be applicable for all the thermal generating Units/ stations for all capacities which are Commissioned on or after 01/04/2012 :
A. Normative Annual Plant Availability Factor (NAPAF) : 85%"

17. Regulation 40 of the MPERC Tariff Regulations 2012 deal with the subject of recovery of Annual capacity or fixed charges, the Regulations 40.2 to 40.4 providing the formulae for computation and recovery of Annual Capacity (fixed) Charges and Plant Availability Factor for a Month (PAFM) as under (quoted to the extent relevant):

40. *Recovery of Annual Capacity (fixed) charges*
40.1 *The fixed charge shall be computed on annual basis, based on norms specified under these Regulations, and recovered on monthly basis under Capacity Charges. The total capacity charges payable for a generating station shall be shared by its Beneficiaries as per their respective percentage share / allocation in the capacity of the generating station.*
40.2(1) The Capacity Charge (inclusive of incentive) payable to a thermal generating station for a calendar month shall be calculated in accordance with the following formulae:
(i) For generating stations in commercial operation for less than ten (10) Years: on 1st April of the financial Year:

(AFC x NDM*/ NDY) x (0.5 + 0.5xPAFM/NAPAF) (in Rs.):*

Provided that in case the Plant Availability Factor achieved during a Year (PAFY) is less than 70%, the total fixed charge for the Year shall be restricted to

AFC x (0.5 + 35/ NAPAF) x (PAFY/70) (in Rs.)"

"40.3 Full Capacity Charges shall be recoverable at Normative Annual Plant Availability Factor (NAPAF) specified in Regulation 35. Recovery of Capacity Charges

below the level of Normative Annual Plant Availability Factor (NAPAF) will be on pro rata basis. *At zero availability, no Capacity Charges shall be payable.*

40.4 The PAFM and PAFY shall be computed in accordance with the following formula:

$$PAFM \text{ or } PAFY = 10000 \times \sum_{i=1}^{N} DCi / [N \times IC \times (100 - AUX)]\%$$

Where,

AUX= Normative Auxiliary Energy Consumption in percentage

DCi = Average Declared Capacity (in ex-bus MW], subject to Regulation 40.5 below, for the ith Day of the period i.e. the month or the Year as the case may be, *as certified by the concerned Load Despatch Centre after the Day is over.*

IC = Installed Capacity (in MW] of the generating station

N -Number of Days during the period i.e. the month or the Year as the case may be.

Note: DCi and IC shall exclude the capacity of generating Units not declared under commercial operation. In case of a change in IC during the concerned period, its average value shall be taken.

40.5 In case of fuel shortage in a thermal generating station, the Generating Company may propose to deliver a higher MW during peak-load hours by saving fuel during off-peak hours. The concerned Load Despatch Centre may then specify a pragmatic Day-ahead schedule for the generating station to optimally utilize its MW and energy capability, in consultation with the Beneficiaries. DCi in such an event shall be taken to be equal to the maximum peak-hour ex-power plant MW schedule specified by the concerned Load Despatch Centre for that Day.

40.6 Payment of capacity charges shall be on monthly basis in proportion to allocated / contracted capacity."

(Emphasis supplied)

18. The first respondent MPPMCL representing the cause of the distribution licensees and the sixth respondent MPERC defend the impugned decision.

19. It is the submission of the State Commission (MPERC) that in terms of the PPA and applicable MPERC Tariff Regulations, the appellant is not entitled to recover the full Capacity Charges (blended tariff) for both of its units corresponding to its contracted capacity by supplying power from one unit only and keeping the other unit "off-bar". The PPA defines "Contracted Capacity" as the capacity equivalent to 30% of the power station's installed capacity contracted with the procurer as per "terms of this agreement". It is argued that in order to derive the correct and complete meaning of 'Contracted Capacity', the entire definition needs to be read in conjunction with "as per the terms of this agreement". It is submitted that "Declared Capacity" in relation to *a unit* or power stations *at any time* means the energy capacity of *Unit* or *Power Station* at the relevant time wherein a unit should have the capability to deliver ex-bus electricity in MW in any time block of the day. It means that if any of the units of appellant's power plant is "off-bar", then the capacity of such a unit cannot be considered to be "Declared Capacity", available at any time during the Time-Blocks of the day because the off-bar unit cannot deliver any energy at the bus-bar, at that instant and will take at least 8-12 hours for cold start. As per MPERC, the "Declared Capacity" is the base term for the other definitions like *Available Capacity* and *Scheduled Energy* in the PPA. Accordingly, the capacity of off-bar unit cannot be considered as available in terms of meaning of Available Capacity in the PPA.

20. The Commission further argued that Article 6 of the PPA establishes that 'Declared Capacity' at any time means the net capacity of the Power Station declared at that time. If any unit is off-bar, then the appellant cannot count that unit's capacity towards 'Declared Capacity'. If the Declared

Capacity gets reduced in absence of any one of the units, then the Contracted Capacity automatically gets reduced in that proportion, the natural corollary being that the Procurer's entitlement is proportionate to the Declared Capacity of the generator which cannot supply entire Contracted Capacity from one unit.

21. Referring to the MPERC Tariff Regulations 2012, the MPERC has submitted that for calculation of the Capacity Charges of a generating station as per Regulation 40.2, PAFM or PAFY is to be computed in terms of Regulation 40.4, the Declared Capacity for any day of the month to be considered as *certified by the concerned State Load Despatch Centre* after the day is over, and in terms of Regulation 40.3 no Capacity Charges being payable at Zero availability. It is further pointed out that as per formula prescribed under Regulation 40.4, the quantum of Plant Availability is based on "Declared Capacity" which is also the base term for Available Capacity and Scheduled Energy in the definitions under PPA and that in the event of one unit being “off-bar”, the Declared Capacity shall be reduced by half of the total installed capacity of generating station (considering normative auxiliary consumption as per formula).

22. In the submission of the MPERC, if the generator (the appellant) were to be allowed to recover Capacity Charges of the second off-bar unit as well, the end consumers of electricity in the State will be adversely affected. It argues that considering the Annual Capacity (Fixed) Charges of both the units/blended tariff of Rs. 637.91 Crore (corresponding to the contracted capacity) as determined/allowed by the Commission for FY 2015-16, the monthly capacity charges are around Rs. 53.16 Crore, In the event when one unit out of the two units of power plant stays “off-bar" while supplying power to the procurer, an additional burden of Rs.13.29 Crore per month or Rs.159.48 Crore per annum approximately is loaded on the end consumers

of electricity in the form of power purchase cost being paid by the procurer/Distribution licensees.

23. It is argued by the MPERC that reliance upon Article 4,3.1 of the PPA to contend that so long as the appellant makes available the Contracted Capacity irrespective of source, the Respondents are duty bound to schedule such power and pay tariff (including capacity charges) for such power is misplaced. It is argued that Articles 4.3.3, 4.3.4, 4.3.5 of the PPA dealing with 'Available Capacity' provide that the procurers may, at any time and without assigning any reason request the appellant to schedule whole or part of contracted/ available capacity. It is pointed out that the PPA provides for the generator to be compensated only by way of fixed cost to be paid by Procurer, in terms of PPA, in the event the Procurer off-takes less than the contracted capacity, the Procurer being not duty bound to schedule the power declared available by the Appellant. It is further submitted that Article 4.3.7 is a mitigation clause and is applicable in exigencies such as inability of the generator to make available the contracted capacity from the power station to the Procurer. It is stated that Clause 4.3.7 does not deal with routine supply in terms of the PPA but only deals with extra-ordinary situation and argued that interpreting Clause 4.3.7 as entitlement to supply power as deemed appropriate by the appellant is neither supported by express provisions of the PPA or by any other material on record. It is also the contention of the respondents that Article 4.5 of the PPA provides for liquidated damages if there was any delay in commissioning of any unit of the Project or making available the contracted capacity by the Scheduled COD.

24. The State Commission asserts that under the MPERC (Terms and Conditions for determination of Generation Tariff) (Revision II) Regulations, 2012 it may determine separate Tariff for new Unit(s) (added after 01.04.2013) if the installed capacity and operating norms of such Unit(s) are

different from other units of the Generating Station. It is sought to be explained that the Annual Capacity Charges were provisionally determined by the State Commission for both the units after COD of unit no.2 to avoid complexity in calculations in the tariff order.

25. The procurers, led by first respondent MPPMCL, have submitted that the consistent understanding of MPPMCL, Government of State of Madhya Pradesh and of the appellant has been that energy to the extent of 30% of the installed contracted is required to be supplied from both Unit 1 and Unit 2 of 2 X 660 MW Super critical Thermal Power Plant of the appellant. It is contended that the issue has been raised by the generator with an ulterior motive since balance power of both the Units is not tied up with other procurers through long term PPAs, it being unfair to burden the consumers of the State because of inefficiency of the appellant.

26. The procurers express doubts that if the generator would be inclined to supply 60% power to MPPMCL from the operational Unit as a first right in case any one Unit trips in a scenario wherein the balance power from both Units is tied up. In our considered view, this line of reasoning does not take the procurers' case anywhere. We are not to construe the terms of PPA on basis of speculation as to *inclination* of the parties to abide by the contract in imagined scenarios.

27. It is the argument of the procurers that in light of express stipulation that "in the event of Declared Capacity being less than the Power Station's Net Capacity, the Available Capacity to the Procurer for despatch out of the Contracted Capacity shall be reduced in the same proportion as the Declared Capacity" the contract for supply or purchase of '30% of Installed Capacity' cannot be interpreted to mean 396 MW which is 30% of the installed capacity but must mean 30% for Declared Capacity at all relevant times and, therefore, the appellant cannot as a matter of right insist on supplying 396 MW from one unit of the Generating Station. It is submitted

that the procurer can be responsible for payment of fixed charges only qua the declared capability and in the event that the Declared Capacity of the Appellant is less than Net Capacity of the Power Station then the entitlement of the MPPMCL is reduced proportionately. The sum and substance of the plea is that the entitlement of the respondents is proportionate to the net capacity and capacity charge is payable only for the on-bar unit.

28. The fifth respondent (SLDC) only defends its own position primarily submitting that the appellant has been aggrieved because SLDC did not grant Short Term Open Access (STOA) applications for several dates viz. 27.02.2015, 28.02.2015, 02.03.2015, 28.03.2015, 09.04.2015 and 18.04.2015. It explains that the STOA applications were forwarded to MPPMCL for their consent which was not granted. It contends that it is for the generator (appellant) and the procurer (first respondent), and not the SLDC, to sort out the issues and disputes between them, mutual agreement between buyer and seller being a prerequisite for processing of such applications. It refers to an alleged episode of mis-declaration submitting that both the units of the power station were under forced outage on 29.05.2015 (Unit 1 from 23.03.2015 & Unit 2 from 10.05.2015), the appellant having planned to take Unit No 2 on bar from 9th time block of 30.05.2015 and under such conditions it was required to declare its capacity (DC) from the only unit which was to come on-bar. It is stated that the second unit (Unit No.l) was synchronized on 08.06.2015 and consequently, per SLDC, there was mis-declaration of Declared Capacity by the appellant.

29. We must observe here itself that the solitary instance of misdeclaration (assuming it was a case of mis-declaration) cannot have a bearing on the main issue of capacity charge of off-bar Unit. We are not called upon here to examine as to whether the denial of STOA requests was proper or not. The issue of certification of availability by the SLDC has concededly been resolved, pursuant to the directions in the impugned order, and the issue of

payment of capacity charges of the unit not in use (off-bar) will depend on the decision rendered on the main contention of the generator (the appellant).

30. The appellant submits that while construing the terms of a contract, the court can look at surrounding circumstances also. In *Khardah Co. Ltd. v. Raymon & Co. (India) (P) Ltd.*, (1963) 3 SCR 183 : AIR 1962 SC 1810 it was ruled thus, the principle having been reiterated in *Modi & Co. v. Union of India*, (1968) 2 SCR 565: AIR 1969 SC 9:

> "*18. … We agree that when a contract has been reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be express or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well established that in construing a contract it would be legitimate to take into account surrounding circumstances. Therefore, on the question whether there was an agreement between the parties that the contract was to be non-transferable, the absence of a specific clause forbidding transfer is not conclusive. What has to be seen is whether it could be held on a reasonable interpretation of the contract, aided by such considerations as can legitimately be taken into account that the agreement of the parties was that it was not to be transferred. When once a conclusion is reached that such was the understanding of the parties, there is nothing in law which prevents effect from being given to it. That was the view taken in Virjee Daya & Co. v. Ramakrishna Rice & Oil Mills [AIR 1956 Mad 110], and that in our opinion is correct*."
>
> (Emphasis supplied)

31. It is trite that commercial contract must be interpreted to give effect to business efficacy. In *Southern Electricity Supply Co. of Orissa Ltd. v. Sri*

Seetaram Rice Mill, (2012) 2 SCC 108 the Supreme Court has laid down that the 'common sense' must be applied in reading a commercial contract to arrive at the actual intent of a businessman. It was held:

> "*47. The precepts of interpretation of contractual documents have also undergone a wide-ranged variation in the recent times. The result has been subject to one important exception to assimilate the way in which such documents are interpreted by Judges on the common sense principle by which any serious utterance would be interpreted by ordinary life. In other words, the common sense view relating to the implication and impact of provisions is the relevant consideration for interpreting a term of document so as to achieve temporal proximity of the end result.*
>
> *48. Another similar rule is the rule of practical interpretation. This test can be effectually applied to the provisions of a statute of the present kind it must he understood that an interpretation which upon application of the provisions at the ground reality, would frustrate the very law should not he accepted against the common sense view which will further such application.*"

32. In the matter of *Enercon (India) Ltd. v. Enercon GmbH*, (2014) 5 SCC I, the Court observed thus:

> *"… In other words, a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate. In such a case, the court ought to adopt, the attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may he peculiar to the business venture. The arbitration douse cannot be construed with a purely legalistic mindset*, *as if one is construing a provision in a statute. We may just add here the words of Lord Diplock in Antaios Componia Naviero S. A. v*. *Salen Redenerna A.B. 41*. *which are as follows: (ACp_201E)*
>
> > "... *if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must he made to yield to business common sense. "*
>
> *We entirely agree with the aforesaid observation*."

33. In *Bharat Heavy Electricals Ltd. Vs. Globe Hi Fabs Ltd.* 2004 (3) ARB LR 636 (Delhi) F.A.O.(OS) No. 222/2004 (decided on 30.11.2004), the High Court of Delhi followed the passage from *Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.; 1997 (2) WLR 945* as under:

> *"There has been a shift from strict construction of commercial instruments to what is sometimes called purposive construction of such documents. Lord Diplock deprecated the use of that phrase in regard to tie construction of private contracts as opposed to the construction of statutes Antaios Campania Naviera S. A. v. Salen Rederierna AB (I985) AC. 191.201D. That is understandable. There are obvious differences between the processes of interpretation in regard to private contracts and public statutes. For a perceptive exploration of the differences in the context of United States, see Robert S. Summers, "Statutes and Contracts as founts of formal Reasoning," in Essays for Patrick Atiyah, edited by Peter Cane and Jane Stapleton (1991), pp. 71 et seq. It is belter to speak of a shift towards commercial interpretation. About the fact of the change in approach to construction there is no doubt. One illustration will be sufficient. In Antaios Compania Naviera S.A. r. Salen Redcrierna A. II (1985) AC. 191, 201. Lord Diplock in a speech concurred in by his fellow Law Lords observed:*
>
> > *"if detailed semantic and syntactical analysis of a word in a Commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."*
> >
> > (Emphasis supplied)

34. A conjoint reading of the relevant provisions of the PPA shows that the contractual obligation of the appellant is to provide to the Procurers the Contracted Capacity i.e. *30% of the Installed Capacity of the Power Station*. The definition of *Contracted Capacity* uses the term *"equivalent to"* which suggests that the Contracted Capacity is a quantum in relation to and as a percentage of the Installed Capacity of the project. The Installed Capacity of the Power Station is a constant quantum. Therefore, the percentage derived

therefrom has to be a constant quantum. The Installed Capacity is the sum of Maximum Continuous Rating ("MCR") of the 2 units of the Power Station and, thus, the appellant's obligation towards the Procurers under the PPA is for 396MW (as 30% of 1320 MW = 396MW).

35. The PPA defines Contracted Capacity in relation to the Installed Capacity of the Power Station and not in relation to the units thereof. Article 4.3.1 does not provide any obligation to supply the Contracted Capacity from each of the units. It is wrong to attribute any different understanding unto the appellant. Contrary to what has been argued by the procurers, and belying their plea to such effect, the understanding of the parties as to the terms of the PPA is demonstrated by MPPMCL's own letter dated 25.04.2015 addressed to Deputy SecretarS (Energy department) of GoMP, a copy whereof was obtained by the appellant under the Right to Information Act and filed under cover of affidavit dated 13.11.2017. The said communication, the genuineness of which is not questioned, is revealing and its relevant part reads thus:

> *"4. As quoted above, …the implication is that the Contracted Capacity has been defined differently in each PPA. While in the PPAs of Jaypee Bina and Jhabua Power Limited, the contracted capacity is defined unit wise, **in** case of Jaypee Nigrie, M.B. Power and BLA Power Ltd., the contracted capacity is defined for the power station and is not unit-wise. This would be applicable when both the units are commissioned as in the case of Jaypee Nigrie and would apply on M.B. Power Ltd. and BLA Power Ltd. as and when their both units are commissioned.*
> *6. As mentioned in Article 4.3.1 of PPA, the procurer has to purchase "Scheduled Energy". Definition of Scheduled Energy depends on 'Available Capacity'. 'Available Capacity' is defined as 'such of the contracted capacity as declared available by the Company'. The Contracted Capacity, as analysed in para 4, pertains to the Power Station and is not Unit-wise for Jaypee Nigrie, MB Power and BLA Power Ltd. The Declared Capacity, as analysed in para 5 above, is split into On Bar and Off Bar Declared Capacity.*

7. Thus, ... as per definition of "Contracted Capacity" in the PPA, contractually the generator can supply contracted power of all Units from any one of the Units, if it is technically possible and once both the units are commissioned. Taking the example of M/s Jaypee Nigrie where 30% power is to be supplied from 2 x 660 MW Plant, then as per the PPA, the supply of (186+186=) 372 MW can be made either from Unit#1 or Unit#2 of from both Units.

9. …It is, therefore, in the interest of Procurer if the generator schedules energy from Units in such a way which promotes most efficient operation under the given circumstances. The same principle would be applicable in case of Jaypee Nigrie, MB Power and BLA Power Ltd., if they provide the entire contracted capacity from one unit, rather than running two units at sub optimum level."

(Emphasis supplied)

36. It appears that the Government of Madhya Pradesh did not agree with the submissions made in above-quoted communication. But that cannot detract from the fact that the procurers had also understood and were also interpreting the contractual terms the same way as the generator. The MPPMCL has subsequently pushed for contrary interpretation of the PPA at the insistence of a third party namely, the Energy Department, Government of Madhya Pradesh, which instructed MPPMCL not to allow such flexibility to the appellant. The luxury of such shifting of stand, contrary to its own understanding of the contract, at the instance of the State Government, cannot be permitted in favor of MPPMCL. Noticeably, the terms and conditions of the PPA of the appellant with the respondents in present matter are materially different from those in other PPAs as were referred to in the above communication. The express reference to Installed capacity *of the Power Station* in contrast to that *of units of the power stations* in other PPAs makes all the difference.

37. The State Commission has proceeded on the basis that Contracted Capacity has to be read in terms of Article 6.1.2 of the PPA and concluded that if the appellant is supplying Contracted Capacity only from one

generating unit, keeping the other unit “Off-Bar” on account of shut down for economic reasons, such generating unit cannot be declared as available and Capacity Charges in its respect are not payable. The Commission has failed to consider the difference between Declared Capacity and Scheduled Generation. Article 6.1.2 deals with a situation where the Declared Capacity is less than the Power Station’s Net Capacity.

38. The dispute as to application of PAFM (i.e. the aggregate Declared Capacity for a month) had arisen due to lack of certification of Declared Capacity by WRLDC and its inclusion in the REA. Subsequently, however, the WRLDC has been certifying the appellant’s Declared Capacity on regular basis, which is conclusive of the availability of the plant at the relevant time. In such circumstances, on such days as when both the units of the Power Station are declared to be available by the appellant, the supply of the entire Contracted Capacity of 396 MW is permissible from any of the two units. The economic and efficient running of the power station is the responsibility of the generator and the procurer cannot insist, not the least under a PPA which contains no such stipulation, that the electricity be generated from both units. So long as the contracted capacity is being generated and made available, even if from one Unit, it is none of the concerns of the procurers that the other Unit is kept in reserve. It is unfair and unreasonable to insist on generation by both Units particularly when the procurers are well aware that the generator does not have any tie up for the utilization of electricity generation whereof is in excess of the contracted capacity.

39. The Capacity Charges could not have been insisted to be paid for both units in the absence of plant availability factor for the month duly certified by WRLDC. Once the PAFM has been certified by WRLDC, it is the contractual obligation of the procurers under the PPA to pay the Capacity Charges of both Units as per such certification.

40. The appellant seems to have been declaring its availability as per the Indian Electricity Grid Code, 2010 ("IEGC") at all relevant times for both the units. The backdown/RSD of any unit of a generating station by shifting the load to any of the other unit(s) is permissible. Based on Declared Capacity of generators and demand of beneficiaries, a particular unit of a generating station may have to resort to RSD if its scheduled injection is less than the technical minimum (Regulation 6.3B of IEGC). As mentioned earlier, the Project's availability has admittedly since been duly certified by the WRLDC since the commissioning of the Project. A plain reading of the MPERC Tariff Regulations provides that full Capacity Charges shall be recoverable by the Project upon certification of its availability by the concerned Load Despatch Centre. On the occasions where the WRLDC certifies both the units of the Project, pursuant to the appellant's declaration, it (the appellant) cannot be denied recovery of the Capacity Charges. Failure to pay capcity charges even after the certification of the Declared Capacity vis-à-vis both Units constitutes default on part of the procurers in terms of the PPA and MPERC Tariff Regulations 2012.

41. The endeavor of the State Commission to demonstrate impact of Tariff in light of the MPERC Tariff Regulation, 2012 and Regulation 2020 during the hearing on appeal was improper. The assumption of the MPERC that the appellant had failed to declare the units' availability which led to additional financial burden due to supply total quantum of Contracted Capacity of 396MW from only 1 unit is misplaced. It has been consistent stand of the appellant that it had supplied the entire Contracted Capacity from one of the units, while keeping on Reserve Shut Down ("RSD") the other unit, otherwise capable of operation and available, as permissible under the regulatory regime. We do not agree with the contention of the respondents that the PAFM had to be worked out on the basis of the operating unit and not for the RSD unit. The certifications of WRLDC of the appellant's Declared Capacity

are conclusive of the availability of the Project at the relevant time. Once the PAFM has been certified by WRLDC, the Capacity Charges has to be paid as per such certification.

42. For the foregoing reasons, the impugned order cannot be sustained. The State Commission has fallen in grave error by misconstruing the terms of the PPA and denying to the appellant Capacity Charges on basis of availability of the two Units of the Power Station as certified by the WRLDC. The insistence of generation from both units of the Power Station as a pre-condition for such entitlement amounts to modifying the contract which is impermissible. The appellant is held entitled under the PPA to supply the Contracted Capacity from any single unit, both units or combination thereof of its Power Station to the procurers (first to fourth respondents) who, in turn, are under a contractual obligation to procure the Contracted Capacity from the appellant's Power Station whether from any single unit, both units or combination thereof. The direction of SLDC by Letter No. 07-05/CR dated 29.05.2015 informing WRLDC that power from the power station should be scheduled on a unit-wise basis is, thus, held bad and inoperative and consequently quashed. The appellant is held entitled to accordingly recover from the procurers the capacity charges for the relevant period, subject to confirmation of certification of availability statedly issued by WRLDC, along with the delayed payment surcharge, the determination whereof would need to be done by the State Commission.

43. The impugned order is, thus, set aside. The matter is remanded back to the MPERC for passing a fresh order on the petition (no. 64 of 2015) of the appellant, bearing in mind the above decision in this appeal and taking on record the certification by WRLDC as to availability of the Power Station during the relevant period. Having regard to the time lapse since the filing of the said petition, we direct that the Commission shall take up the matter on 06.09.2021 for further hearing of the parties and pass the consequential

order expeditiously within a period of three months of the said date and also follow up by adopting such measures as are necessary for securing timely compliance.

44. The appeal and pending applications are disposed of in above terms.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 24th DAY OF AUGUST, 2021.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member