IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEALNO. 68 OF 2020 &
IA NO. 241 OF 2020

AND

APPEAL NO. 90 OF 2020

Dated: **20th September 2021**

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

APPEALNO. 68 OF 2020
& IA NO. 241 OF 2020

In the matter of:

1. **RAJASTHAN URJA VIKAS NIGAM LIMITED**
Vidyut Bhawan, Janpath
Jyoti Nagar
Jaipur 302 005

2. **JAIPUR VIDYUT VITRAN NIGAM LIMITED**
Vidyut Bhawan, Janpath,
Jyoti Nagar,
Near New Vidhan Sabha Bhawan,
Jaipur-302005

3. **AJMER VIDYUT VITRAN NIGAM LIMITED**
Vidyut Bhawan, Makarwali Road,
Panchsheel Nagar,
Ajmer-305004

4. **JODHPUR VIDYUT VITRAN NIGAM LIMITED**
New Power House, Industrial Area
Jodhpur – 342 003 .... Appellants

VERSUS

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**
[Through Its Secretary]
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi-110001

2. **D B POWER LIMITED**
[Through Its Chairman & Managing Director]
Block 1A, 5"' Floor, Corporate Block,
DB City Park, DB City, Arera Hills,
Opposite MP Nagar, Zone I,
Bhopal-462016

3. **PTC INDIA LIMITED**
[Through Its Director]
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi-110066 …. Respondents

Counsel for the Appellant (s): **Mr. Basava Prabhu Patil, Sr. Adv.**
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Mr. Geet Ahuja A-1 & 2

Counsel for the Respondent (s): **Mr. Sajan Poovayya, Sr. Adv.**
Mr. Deepak Khurana
Mr. Vineet Tayal
Mr. Bhaskar
Ms. Nishtha Wadhwa for R-2

Mr. Ravi Kishore
Mr. Niraj Singh
Ms. Prerna Singh
Ms. Rajshree Chaudhary for R-3

APPEAL NO. 90 OF 2020

In the matter of:

1. **D B POWER LIMITED**
[Through Its Chairman & Managing Director]
Block 1A, 5"' Floor, Corporate Block,
DB City Park, DB City, Arera Hills,
Opposite MP Nagar, Zone I,
Bhopal-462016 .... Appellant(s)

VERSUS

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**
   [Through Its Secretary]
   3rd & 4th Floor, Chanderlok Building,
   36, Janpath,
   New Delhi-110001

2. **RAJASTHAN URJA VIKAS NIGAM LIMITED**
   Vidyut Bhawan, Janpath
   Jyoti Nagar
   Jaipur 302 005

3. **JAIPUR VIDYUT VITRAN NIGAM LIMITED**
   Vidyut Bhawan, Janpath,
   Jyoti Nagar,
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4. **AJMER VIDYUT VITRAN NIGAM LIMITED**
   Vidyut Bhawan, Makarwali Road,
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Ms. Nishtha Wadhwa

Counsel for the Respondent (s): **Mr. Basava Prabhu Patil, Sr. Adv.**
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Mr. Geet Ahuja for R-2 to 5

Mr. Ravi Kishore
Mr. Niraj Singh
Ms. Prerna Singh
Ms. Rajshree Chaudhary for R-6

J U D G M E N T

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

1. The procurers (the distribution licensees) for the State of Rajasthan, having selected the source (generators) of supply of electricity through the bidding route (under Section 63 of Electricity Act, 2003), and having entered into formal contracts on terms settled, modified by negotiations, reduced the capacity unilaterally, the action being struck down as bad in law in previous round of litigation. They are before us to challenge the grant of capacity charges (in subsequent round of proceedings) for the capacity originally offered, essentially for the period prior to restoration. The sellers (generators), by contrast, feel short-changed and by their appeal claim higher compensation.
2. These two appeals challenge the Order dated 15.01.2020 passed by the first Respondent, Central Electricity Regulatory Commission (hereinafter referred as "*the Central Commission*" or "*CERC*"), in Petition No. 63/MP/2019 thereby allowing recovery of "*deemed*" Capacity Charges for the period from 30.11.2016 to 31.07.2018 in favour of DB Power Limited (hereinafter referred to as "*DBPL*" or "*the generator*"), second Respondent in first captioned appeal (no. 68 of 2020) and appellant in second captioned appeal (no. 90 of 2020), on the ground that DBPL had the right to capacity charges as

a consequence of the Order dated 25.04.2018 of the Hon'ble Supreme Court passed in civil appeal nos. 2502-2503 of 2018. The appellants in first captioned appeal are distribution licensees (collectively referred to as "*the Discoms*") operating in State of Rajasthan, they having been impleaded by the generator in its appeal as second to fifth Respondents. The Power Trading Corporation India Limited ("*PTC*") is added to the fray in the two appeals as the third and sixth Respondent respectively.

BACKDROP

3. A peep, *albeit* brief, into the history is necessary.
4. On 19.01.2005, the Ministry of Power ("MoP") in the Government of India had issued the 'Guidelines for Determination of Tariff by Bidding Process for procurement of Power by Distribution Licensees' (hereinafter "*the Bidding Guidelines*") under section 63 of the Electricity Act, 2003 (for short, "*the Act*"). On 23.03.2011, the Rajasthan Electricity Regulatory Commission ("RERC") had granted its approval to the procurers (appellants in first captioned appeal) - Jaipur Vidyut Vitran Nigam Limited ("JVVNL"), Ajmer Vidyut Vitran Nigam Limited ("AVVNL") and Jodhpur Vidyut Vitran Nigam Limited ("JoVVNL") - to invite bids for the supply of power on long term basis by tariff based competitive bidding, through Rajasthan Rajya Vidyut Prasaran Nigam Limited ("RVPNL"), now Rajasthan Urja Vikas Nigam Limited ("RUVNL"). The bidding guidelines provided that the bidding process shall conclude upon adoption of tariff by the commission under section 63, the relevant clause reading thus:

> "*6.14. The final PPA along with the certification by the evaluation committee shall be forwarded to the Appropriate*

Commission for adoption of tariffs in terms of Section 63 of the Act.”

5. On 28.05.2012, the RUVNL, pursuant to the approval of RERC dated 23.03.2011, invited bids - Request for Proposal (for short, “*RFP*”) - for the procurement of 1000 MW (+/- 10%) of power on a long-term basis through tariff based competitive bidding under Case – 1 route under Section 63 of the Electricity Act, 2003 (for short, "the Act"). The RFP at clause 1.2 provided as under:

   “….The procurer(s) shall pay to the seller(s), the quoted tariff of the successful bidder(s) which has been adopted by the RERC as per the terms and conditions of the PPA.”
   (Emphasis supplied)

6. The generator (DBPL) had set up and operates a 1200 MW (2 x 600 MW) Thermal Power Plant at Village Badadarha, in District Janjgir Champa, Chhattisgarh (“the Project”). The bids were submitted in February 2013, DBPL also having participated. Upon financial bids being opened on 04.04.2013, the generator DBPL emerged as the second lowest (L-2) bidder, below the lowest (L-1) PTC – Maruti Clean Coal and Power Limited. It may be noted that while the said lowest bidder (for short, “*Maruti*”) had offered capacity of 195 MW (that also being the cumulative capacity offered) against levelized tariff of Rs. 4.517 per kWh (also average cumulative tariff), the generator before us (through PTC which issued back-to-back LOI to DBPL) as the L-2 bidder had offered capacity of 311 MW (cumulative capacity offered being 506 MW) against levelized tariff of Rs. 4.811 per kWh (the average cumulative tariff working out at Rs. 4.698 per kWh), the quotation of the next lower (L-3) bidder PTC – Lanco Babandh Power Limited (for short, “*Lanco*”) offering capacity of 100 MW (cumulative capacity offered being 606 MW)

against levelized tariff of Rs. 4.943 per kWh (the average cumulative tariff being Rs. 4.738 per kWh). In the opinion of the Bid Evaluation Committee, rates that had been quoted varied considerably and so it was decided on 04.06.2013 that bidders be engaged in negotiations. Pursuant to negotiations, Maruti (L-1), DBPL (L-2) and Lanco (L-3) agreed to provide additional quantum of power wherein their revised offer was for capacity of 250 MW, 410 MW and 350 MW respectively, as against originally offered capacity of 195 MW, 311 MW and 100 MW respectively. The procurer issued, on 27.09.2013, Letter of Intent ("LOI") accordingly for total revised capacity of 1010 MW to the said three bidders. In the wake of this, PPAs were signed on 01.11.2013 by PTC on back-to-back basis with the aforesaid generators subject to the approval and adoption of tariff under Section 63 read with the bidding guidelines and documents and the PPA, as per recital 'G' the procurer being responsible for moving the regulatory Commission for adoption of tariff.

7. The following clauses of the PPA have been referred during the arguments:

> *"Article 1.1 – Aggregate Contracted Capacity*
>
> *…*
>
> *With respect to the seller, shall mean the aggregate capacity in 410 MW contracted with the Procurer(s) for supply at the interconnection Point from the Power Station's Net Capacity;…"*

> "*Article 4.3 – Procurer(s)' obligations*
>
> *1.3.1 Subject to the terms and conditions of this Agreement, the Procurer(s) shall:*

a. Ensure the availability of Interconnection Facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be;

b. be responsible for payment of the Transmission Charges (from the Injection Point Onwards) and applicable RLDC/SLDC charges, limited to the charges applicable to the Contracted Capacity of Procurer(s). The Procurer(s) shall reimburse any of the above charges, if paid by the Seller;

c. Not Used.

d. make all reasonable arrangements for the evacuation of the Infirm Power from the Power Station; subject to the availability of transmission capacity; and

e. fulfil all obligations undertaken by the Procurer(s) under this Agreement."

4.4 Purchase and sale of available capacity and Scheduled Energy

4.4.1 Subject to the terms and conditions of this Agreement, the seller undertakes to sell to the Procurer(s), and the Procurer(s) undertake to pay tariff for all the Available Capacity up to the Contracted Capacity and corresponding Scheduled Energy."

………………..

Schedule 4
4.2.2.1 The Monthly Capacity Charges payment for any Month m in a Contract Year n shall be calculated as below:

f) CAA is the cumulative Availability, as per REA, from the first day of the contract Year "n" in which Month "m" occurs up to and including Month "m" (expressed in percentage)'

g) AA is the Availability, as per REA, in the relevant Settlement Period (expressed as a percentage of

Contracted Capacity in such Settlement Period), expressed as a percentage.

Article 4.9 – Liquidated Damages for delay due to Procurer Event of Default or Indirect Non Natural Force Majeure Events or Natural Force Majeure Event (affecting the Procurer)

4.9.1 if the Seller is otherwise ready to commence supply of power and has given due notice, as per provisions of Article 4.1.2, to the Procurer(s) of the date of commencement of power supply, where such date is on or before the Scheduled Delivery Date or Revised Scheduled Delivery Date, as the case may be, but is not ab1e to Commence supply of power by the said date specified in the notice due to a Procurer Event of Default or due to Indirect Non Natural Force Majeure Event or (Natural Force Majeure Event affecting the Procurer) provided such Indirect Non Natural Force Majeure Event or (Natural Force Majeure Event affecting the Procurer(s)) has continued for a period of more than three (3) continuous or non-continuous Months, the Seller shall, until the effects of the Procurer Event of Default or of Indirect Non Natural Force Majeure Event or (Natural Force Majeure Event affecting the Procurer(s)) no longer prevent the Seller from providing supply of power to the Procurer(s), be deemed to have an Available Capacity equal to the Aggregated Contracted Capacity relevant to that date and to this extent, be deemed to have been providing supply of power with effect from the date notified, and shall be treated as follows:

a) In case of delay on account of the Procurer Event of Default, the Procurer(s) shall make payment to the Seller of Capacity Charges in proportion to their Contracted Capacity, calculated on Normative Availability of Contracted Capacity for and during the period of such delay.

b) Not Used

c) In case of delay due to Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the procurer(s)) or Procurer Event of Default, the Procurer(s) shall be liable to make payments mentioned in (a) and (b) above, after commencement of supply of power,

in the form of an increase in Capacity Charges. These amounts shall be paid from the date of cessation of such Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer(s)) or Procurer Event of Default

Provided such increase in Capacity Charges shall be determined by Appropriate Commission on the basis of putting the Seller in the same economic position as the Seller would have been in case the Seller had been paid amounts mentioned in (b) above in a situation where the Force Majeure Event or Procurer Event of Default had not occurred.

For the avoidance of doubt, it is specified that the charges payable under this Article 4.9.1 shall be paid by the Procurer(s) in proportion to their then Contracted Capacity."

Article 4.12 – Limit on amounts payable due to default

4.12.1 The Parties expressly agree that the Procurers' only liability for any loss of profits or any other loss of any other kind or description whatsoever (except claims for indemnity under Article 12), suffered by the Seller by reason of the Procurers' failure to meet its obligations under Article 4.3.1 shall be to pay the Seller the amounts specified in Article 4.9 and Article 11.
…"

"*Article 11.2 – Procurer Event of Default*

11.2.1 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 or a Seller Event of Default, shall constitute the Event of Default on part of defaulting Procurer;

(i) A defaulting Procurer fails to meet any of its obligations, as specified in Article 4.3; or
(ii) 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

(iii) 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

(iv) except where due to any Seller's failure to comply with its obligations, the defaulting Procurer(s) is/are in material breach of any of its obligations pursuant to this Agreement or of any of the other RPF Documents where the Procurer(s) and the Seller are Parties, 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 the Procurer(s); or

(v) any representation and warranties made by the Procurer(s) in schedule 7 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 Procurer in writing of at least thirty (30) days; or…"

Schedule 7 – Representation and Warranties

7.1 Representations and Warranties by the Procurer(s)
"Each Procurer" hereby represents and warrants to and agrees with the Seller as follows and acknowledges and confirms that the Seller is relying on such representations and warranties in connection with the transactions described in this Agreement.

7.1.1
…
vi) The quantum of Contracted Capacity of Procurer does not exceed the projected Additional demand forecast for the next three (3) years, as required under the Bidding Guidelines. In case the quantum of Contracted Capacity of Procurer exceeds the additional demand forecast for the next three (3) years, the Procurer has already obtained the approval of the Appropriate Commission for the quantum of power proposed to be procured, as required under Para 3.1(i) of the Bidding Guidelines….."

12.6 Limitation on Liability

12.6.1 Except as expressly provided in this agreement neither the Seller nor Procurer(s) nor its/ their respective officers, directors, agents, employees or Affiliates (or their officers, directors, agents or employees). shall be liable or responsible to the other Party or its Affiliates, officers, directors, agents, employees, successors or permitted assigns or their respective insurers incidental, indirect or consequential damages, connected with or resulting from or non-performance this Agreement, or anything done in connection herewith, including claims in the nature of lost revenue, income or profits (other than payments expressly required and properly due under this Agreement), any increased expense of, reduction in or loss or power generation or equipment used therefore, irrespective whether such claims are based upon breach of warranty, tort (including negligence, whether of the Procurer(s), the Seller or others), strict liability, contract, breach of statutory duty, operation of law or otherwise.

12.6.2 Procurer(s) shall have no recourse against any officer, director or shareholder of the Seller or any Affiliate of the Seller or any of its officers, directors or shareholders for such claims excluded under this Article. The Seller shall have no recourse against any officer, director or shareholder of Procurer(s), or Affiliate of Procurer(s) or any of its officers, directors or shareholders for such claims excluded under this Article."

8. A petition (no. 431 of 2013) for adoption of tariff was filed, in pursuance of the above, by the procurer (RUVNL) before the Rajasthan Electricity Regulatory Commission ("RERC"). DBPL also took steps on 13.05.2014 for grant of Long-Term Open Access ("LTA") by moving an application before the Power Grid Corporation of India Ltd ("PGCIL") for wheeling of 410 MW of power from the project. While the said petitions were pending, the Energy Assessment Committee (EAC) of the Government of Rajasthan decided (in January-May 2014) that as against the 1000 MW bid only 600 MW should be procured due to reduced demand in the

State. Eventually, on 25.07.2014, the State Government, acting on the recommendation of the EAC, approved the purchase of a quantum of 500 MW power on long term basis as against the quantum of 1000 MW. This led to RVPNL filing on 24.11.2014 an application in pending Petition (no. 431 of 2013) to bring on record the EAC recommendation and the Government of Rajasthan approval, *inter alia*, praying for adoption of tariff and approval of the reduced quantum of 500 MW capacity. The RERC, noting the reduced demand in the State, by order dated 22.07.2015, approved the procurement of 500 MW and adopted the tariff for the same, the capacity allocated to Maruti (L-1) and DBPL (L-2) having been slashed to 250 MW each.

9. The above-mentioned decision (dated 22.07.2015) rendered by RERC approving reduction of capacity to be procured was challenged by DBPL (L-2) and Lanco (L-3) before this tribunal by appeal nos. 235 and 191 of 2015 respectively. It may be mentioned that two other entities – Athena Power (L-4) and SKS Power (L-5) – having participated in the bid process also brought appeals (nos. 202 and 264 of 2015) questioning the legality of grant of additional quantum to bidders placed higher to them.
10. On 20.10.2015, DBPL addressed a letter to PGCIL wherein it stated that it (DBPL) did not require Long Term Open Access ("LTA") for 410 MW since the Commission had only approved reduced quantum of 250 MW, the request being that the LTA application for 410 MW be kept pending until the "PPA quantum is finalised" by this tribunal, also requesting that the existing LTA of 175 MW be increased to 250 MW since that was the requirement at that stage. Pursuant to the said request, by communication dated 03.12.2015, PGCIL closed the LTA application of DBPL towards

410 MW stating that it was not permissible under the applicable CERC Regulations to keep the application pending and informed that the request for enhancement of existing LTA of 175 MW to 250 MW was under process.

11. It is not in dispute that against the above backdrop, and arrangements, DBPL commenced supply of electricity under the PPA for a capacity of 175 MW with effect from 30.11.2016. Concededly, during the period 30.11.2016 to 26.03.2017, DBPL could obtain Open Access for only 175MW, as against 250 MW applied for, and availability was declared, and supply was made accordingly only up to 175MW. On 23.03.2017, DBPL entered into a supplementary agreement for LTA with PGCIL for supply of 250 MW from DBPL's project to the Discoms and from 27.03.2017 onwards availability was declared and power supply made up to 250 MW till 01.08.2018.
12. On 02.02.2018, the appeals of Lanco and DBPL were allowed by this tribunal. It was held that in terms of the arrangement emerging from bid process, negotiations and the PPAs, 1000 MW was to be procured, the negotiated and increased quantum of 410 MW to DBPL also having been upheld.
13. On 09.02.2018, DBPL filed an application (IA no.1/2018) in Petition no.431/2013 before the RERC praying the Commission to pass consequential orders in terms of the judgement of the APTEL and to direct the Discoms forthwith to start procuring power from it (DBPL) to the extent of 410 MW as per the PPAs dated 01.11.2013.
14. The above-said judgment of this tribunal was challenged before Supreme Court by the Discoms (and L-5 bidder SKS Power), by appeal nos. 3481-82 (and batch) of 2018, which were decided on 25.04.2018. The Supreme Court upheld the decision of this tribunal

setting aside the reduction of quantum of procurement from 1000 MW to 500 MW. However, the direction by this tribunal on the quantum to be procured from individual bidders was vacated and it was held that the quantum originally offered by the bidders cannot be increased by negotiation. It was directed that the L-1 to L-5 bidders *shall be entitled to supply of power in terms of the originally offered amount*. The relevant part of the judgment of Supreme Court reads thus:

> "*We are in agreement with the earlier conclusion of the APTEL. We are of the view that the direction of reduction of capacity from 1000 mw to 500 mw by the State Commission was correctly set aside. Since L-1 to L-5 were represented before this Court, we direct that they shall be entitled to supply of power in terms of the originally offered amount, mentioned above, in accordance with para 3.5 of the Request for Proposal. The power supply will now be reduced to a total of 906 mw. The State Commission may now go into the issue of approval for adoption of tariff with regard to L-4 and L-5. All Letters of Intent (LOIs) shall stand modified in terms of the above.*"
>
> (Emphasis supplied)

15. On 27.04.2018, by its letter to PGCIL, DBPL informed PGCIL of the order of the Supreme Court dated 25.04.2018 stating that, in its terms, DBPL was entitled to supply 311 MW of power and, therefore, there was an additional requirement of 61 MW LTA to the Northern Region. The application to PGCIL for LTA for 61 MW was formally submitted on 25.05.2018.
16. The final decision in the above dispute rendered by Supreme Court by judgment dated 25.04.2018 led to issuance by RVPN of modified LOI on 02.05.2018, *inter alia*, in favour of DBPL for a capacity of 311 MW (as was originally offered). The parties

(procurers and generator) executed, on 15.05.2018, an amendment to the PPA, to recognize the capacity of 311 MW in terms of the order of the Supreme Court. The amendment to PPA was approved by RERC by order dated 29.05.2018. On 19.07.2018, PGCIL by its letter to the Discoms intimated enhancement of LTA granted to DBPL from 250 MW to 311 MW. On 25.07.2018, DBPL entered into a supplementary agreement for LTA with PGCIL for additional 61 MW of power from DBPL's Project to the Discoms. DBPL declared availability and proceeded to supply power up to 311 MW with effect from 01.08.2018.

THE DISPUTE

17. On 10.12.2018, by its notice to the Discoms, DBPL demanded an amount of Rs.510.82 Crores towards Capacity Charges, calculated on Normative Availability of Contracted Capacity for the period from 30.11.2016 to 25.04.2018. RUVNL, by its reply sent on 10.01.2019, *inter alia*, contended that RERC had only adopted the tariff for 250 MW and, thus, the Discoms cannot be held responsible for any additional liability. Similar position was taken by PTC by its reply dated 25.01.2019.
18. On 22.02.2019, DBPL filed the Petition (no. 63/MP/2019) before the Central Commission from which the impugned decision has come before us by appellate challenge. The said Petition sought recovery of deemed capacity charges for 410 MW, on the basis that this tribunal had approved the PPA for 410 MW, computed at Rs.546.66 Crores for the period between 30.11.2016 and 31.07.2018 calculated on the Normative Availability of Contracted Capacity. By the impugned order passed on 15.01.2020, the CERC

has granted deemed capacity charges for 311 MW, it being premised on the conclusions that quantum of 311 MW could have supplied under the PPA and that DBPL is entitled to supply 311 MW and receive deemed capacity charges in terms of the above-mentioned judgment of Supreme Court.

THE CHALLENGES

19. The Discoms are aggrieved by the impugned order and seek by their appeal (no. 68 of 2020) for it to be set aside on the grounds that the impugned order wrongly proceeds on the basis that the relief is a consequence of the order of the Hon'ble Supreme Court dated 25.04.2018 allowing supply of 311MW, the said order not having granted any such relief, nor any such relief having even been claimed in said matter; there is no provision under the Power Purchase Agreement ("PPA") for payment of capacity charges without capacity being declared, the relief having been granted *de-hors* the PPA; DBPL had never declared any availability up to 311 MW and had claimed capacity charges on deemed basis, contrary to the PPA which provides for the capacity charges only corresponding to the availability declared in its terms; the contention of DBPL that the Discoms had prevented or directed Powergrid to restrict open access to only 250 MW being factually incorrect and misleading; there can be no question of DBPL claiming deemed capacity charges for an additional quantum on the basis that it was in a position to supply, the factual position being that it (DBPL) was not in a position and could not even supply the actual approved quantum of 250MW; and that the Discoms, being regulated distribution licensees, could not have legally procured any quantum

of power which was not approved and adopted by the State Commission.

20. The generator is aggrieved by the impugned order and contends by its appeal (no. 90 of 2020) that the CERC has erroneously omitted and failed to grant to it (DBPL) the Capacity Charges for the entire quantum of 160 MW (410MW – 250 MW) seeking appropriate modification and a finding that it (generator) is entitled to Capacity Charges for the balance reduced quantum of 99MW as well for the period 30.11.2016 to 31.07.2018 on normative availability of contracted capacity along with past, *pendente lite* and future interest @ 18% p.a.

SCRUTINY

21. We may examine the contentions of the Discoms assailing the conclusions on which claim of DBPL has been partially granted by the Commission by the impugned judgment as indeed the ground of dissatisfaction presented by DBPL with the extent of relief denied.

The premise that relief is a consequence flowing from Supreme Court Judgment dated 25.04.2018 is erroneous?

22. It is vivid from bare reading of the text of the impugned decision that relief has been granted to DBPL on the ground that the relief of capacity charges for 61MW (311MW – 250MW) flows from the judgment dated 25.04.2018 of the Supreme Court, it being a consequential relief of modification of the contracted capacity from 250MW to 311 MW.

23. We have earlier quoted the operative part of the judgment of Supreme Court. The Discoms question the correctness of the plea of DBPL that the LoI was restored by the Court and, therefore, would have retrospective effect. Pointing out that the Court has directed that the LoI "*shall stand modified*", it is argued that the language employed - '*they shall be entitled to supply*'… '*power will now be reduced …*' – shows that the intent is for the direction to supply to be only prospective. It is submitted that the LoIs stand modified and, therefore, the parties were to start from the stage of the LoI pursuant to the order of the Supreme Court, the only remit or consequential orders to be passed in pursuance of the decision being with respect to adoption of tariff for L-4 and L-5 bidders, all other rights and obligations of the parties having been closed and determined.

24. It is further the submission of the Discoms that while signing the amended PPA for 311MW on 15,05.2018, in pursuance of the Supreme Court judgment, DBPL did not reserve right to claim capacity charges for the past period, it having also understood that the final order of the Court did not grant any relief of capacity charges for the past period, the claim on retrospective basis being only an after-thought. Reliance is placed on Order dated 29.05.2018 of the State Commission approving the amended PPA, reading as under:

> *"11. M/s D.B. Power Ltd. on 18.05.2018 filed an affidavit submitting that in compliance of the order dated 25.04.2018 of the Hon'ble Supreme Court, RVPN has issued modified LOI dated 02.05.2018 in favour of PTC India Ltd. Consequently PTC India Ltd. issued modified LOI dated 03.05.2018 in favour of M/s DBPL Ltd. Subsequent to the above modified LOIs, DBPL Ltd. also executed the amended PPA with PTC on 15.05.2018 based on the*

amended PPA signed between Discoms and PTC India Ltd. dated 15.05.2018. In view of above it is stated that D.B. Power Ltd., PTC India Ltd. and Discoms have complied with the order dated 25.05.2018 passed by the Hon'ble Supreme Court."

25. The argument is that at the stage of proceedings for approval of amended PPA, DBPL had specifically stated and represented on affidavit that the parties had complied with the order of the Hon'ble Supreme Court. It is submitted that against such backdrop, there was no occasion for DBPL thereafter making a claim or any claim being awarded as a consequence of the directions of the Supreme Court. It is contended that there is full accord and satisfaction between the parties pursuant to the order dated 25.04.2018 of the Supreme Court, the parties having consciously agreed that the order has been fully implemented.
26. The Discoms argue that the principle of accord and satisfaction debars any further dispute being raised subsequently. Reliance is placed on the ruling of Supreme Court reported as *Union of India v. Hari Singh*, (2010) 15 SCC 201, the relevant part reading thus:

6. The learned Additional Solicitor General appearing on behalf of the Union of India has strenuously submitted that the matter is no longer res integra and is covered by a series of judgments for almost a century. He referred to the judgment of the Privy Council in Payana Reena Saminathan v. Pana Lana Palaniappa [(1913-14) 41 IA 142] [reiterated in Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362] (at AIR p. 1366, para 5)] which reads as under: (Payana Reena case [(1913-14) 41 IA 142] , IA pp. 145-46)

<u>"…The 'receipt' given by the appellants, and accepted by the respondent, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement</u>

> *formulated in the 'receipt'. It is a clear example of what used to be well known in common law pleading as 'accord and satisfaction by a substituted agreement'. No matter what were the respective rights of the parties inter se they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it."*

He submitted that this judgment has been approved and followed by this Court even in the year 2009.

7. The learned Additional Solicitor General also placed on record the judgment of this Court in State of Maharashtra v. Nav Bharat Builders [1994 Supp (3) SCC 83] . In this case, the Court observed that the dispute between the parties was conclusive (sic concluded) and the respondent fully and finally accepted the claim and thereafter received the amount. Thus, there was accord and satisfaction of the claim relating to labour escalation charges and thereafter the matter could not have been referred to arbitration.

8. The learned Additional Solicitor General also relied on another judgment of this Court in P.K. Ramaiah and Co. v. NTPC [1994 Supp (3) SCC 126] . In this case also the respondent received the amount in full and final settlement of his claim. Consequently, there was an accord and satisfaction and thereafter no arbitrable dispute remained for reference to arbitration.

9. This Court in Nathani Steels Ltd. v. Associated Constructions [1995 Supp (3) SCC 324] also had an occasion to examine a similar case. The Court observed that after settling the entire matter and receiving the payment, it was not open to the respondent to treat the settlement as non est and proceed to invoke the arbitration clause.

10. This Court in a relatively recent case has examined the legal position once again in National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] In para 25 of the said judgment, the Court observed as under: (SCC p. 284)

> *"25. … <u>Where both the parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Similarly, where one of the parties to the contract issues a full and final discharge voucher (or no-dues certificate, as the case may be) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim, that amounts to discharge of the contract by acceptance of performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim nor can it seek reference to arbitration in respect of any claim.</u>"*

11. The Court further observed in para 29 as under: (Boghara Polyfab case [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , SCC pp. 285-86)

> *"29. It is thus clear that the arbitration agreement contained in a contract cannot be invoked to seek reference of any dispute to arbitration, in the following circumstances, when the contract is discharged on account of performance, or accord and satisfaction, or mutual agreement, and the same is reduced to writing (and signed by both the parties or by the party seeking arbitration):*
>
> *(a) where the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a full and final discharge voucher/receipt, nothing survives in regard to such discharged contract;*
>
> *(b) where the parties to the contract, by mutual agreement, accept performance of altered, modified and substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations;*

> *(c) where the parties to a contract, by mutual agreement, absolve each other from performance of their respective obligations (either on account of frustration or otherwise) and consequently cancel the agreement and confirm that there are no outstanding claims or disputes."*
>
> *In this case the Court relied on earlier judgments of this Court and reiterated the legal position which has been crystallised by a series of judgments where both the parties to a contract confirmed in writing that the contract has been fully and finally discharged by the parties and there was no outstanding claim or dispute and thereafter the matter could not have been referred to arbitration.*
>
> *12. In a celebrated book, Russell on Arbitration, 19th Edn., p. 396, it is stated that "an accord and satisfaction may be pleaded in an action on award and will constitute a good defence".*
>
> *13. In our considered view, on the basis of the above settled legal position that when the parties by a supplementary agreement obtained a full and final discharge after paying the entire amount, which was due and payable to the contractor, thereafter the contractor would not be justified in invoking arbitration because there was no arbitral dispute for reference to arbitration.*
>
> (Emphasis supplied)

27. The Discoms, in essence, submit that the Supreme Court has neither granted any consequential relief to DBPL nor given any liberty to again approach the Central Commission for any relief on ground of retrospective effect; no consequential relief was even claimed by the DBPL before the Supreme Court, nor was any such relief granted; DBPL itself has duly accepted and acknowledged (on oath) that with approval of the PPA of 311 MW by the State Commission on 29.05.2018, the order of the Supreme Court stood complied with.
28. The Discoms invoke the principle of *constructive res judicata* and rely on decisions of Supreme Court reported as *Shiv Chander More*

v. Lt. Governor, (2014) 11 SCC 744 and *Asgar v. Mohan Varma*, (2020) 16 SCC 230.

29. In *Shiv Chander More v. Lt. Governor* (supra), the Supreme Court held thus:

> *20. It is, therefore, evident that not only the writ petitioners but even the High Court was conscious of the repeal of the 1926 Regulations by the 1966 Regulations and the provisions of the latter Regulations permitting a fresh grant. That being so, it need not have prevented the occupants (the appellants herein) from urging before the High Court as they appear to be doing now, that the 1966 Regulations entitled them to continue in occupation regardless of whether there was a renewal of the grant in their favour and regardless of whether or not, there was a fresh grant in respect of the land. The contention now sought to be urged that the occupants can continue to occupy the land in question in perpetuity without even a renewal or without a fresh grant in their favour subject only to the condition that they did not violate the provisions of Regulation 151 was available to the occupants which could and indeed ought to have been raised by them at that stage. Inasmuch as the occupants did not urge any such point or raise any such contention in the previous round of litigation ending with the order of this Court in Lt. Governor v. Shiv Chander More [Lt. Governor v. Shiv Chander More, (2008) 4 SCC 690] , they are debarred from doing so in the present proceedings on the principles of constructive res judicata. That constructive res judicata in principle applies even to writ proceedings is fairly well settled by several decisions of this Court.*
>
> *21. We may briefly refer to some of those decisions which elaborate the principle and extend their application to proceedings before a writ court. But before we do so, we need to say what is trite, namely, the doctrine of res judicata being one of the most fundamental and well-settled rules of jurisprudence. The doctrine is found in all legal systems of civilised society in the world. It is founded on a twofold logic, namely, (1) that there must be finality to adjudication by the competent court; and (2) no man should be vexed twice for the same cause. These two principles attract the doctrine of*

res judicata even to inter partes decisions that may be erroneous on a question of law. That the doctrine is applicable even to writ jurisdiction exercised by the superior courts in this country is settled by a Constitution Bench decision of this Court in Amalgamated Coalfields Ltd. v. Janapada Sabha Chhindwara [AIR 1964 SC 1013] wherein this Court observed: (AIR p. 1018, para 17)

> *"17. … Therefore, there can be no doubt that the general principle of res judicata applies to writ petitions filed under Article 32 or Article 226. It is necessary to emphasise that the application of the doctrine of res judicata to the petitions filed under Article 32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India. It only seeks to regulate the manner in which the said rights could be successfully asserted and vindicated in courts of law."*

22. The principles of constructive res judicata which are also a part of the very same doctrine have been held to be applicable to writ proceedings, by another Constitution Bench decision of this Court in Devilal Modi v. STO [AIR 1965 SC 1150] wherein this Court observed: (AIR p. 1152, para 8)

> *"8. It may be conceded in favour of Mr Trivedi that the rule of constructive res judicata which is pleaded against him in the present appeal is in a sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure. This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred."*

23. Reference may also be made to the Constitution Bench decision in Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra [(1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348] wherein this Court once again reiterated that the principles of constructive res judicata apply not only to what is actually adjudicated or determined in a case but every other matter which the parties might and ought to have litigated or which was incidental to or essentially connected with the subject-matter of the litigation. This Court observed: (SCC p. 741, para 35)

> *"35. … an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Civil Procedure Code was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata."*

24. It is in the light of the above authoritative decisions of this Court no longer open to the appellants to contend that the principles of constructive res judicata would not debar them from raising the question which, as observed earlier, could and indeed ought to have been raised by them in the previous round of litigation. The High Court was, in that view of the matter, perfectly justified in holding that the plea sought to be raised by the appellants in the purported exercise of liberty given to them by the orders of this Court dated 9-4-2008 in Lt. Governor v. Shiv Chander More [Lt. Governor v. Shiv Chander More, (2008) 4 SCC 690] was not legally open and should not be allowed to be urged.

30. In *Asgar v. Mohan Varma* (supra), the Court observed thus:

21. While dismissing the special leave petition against the judgment of the High Court, this Court in its order dated 25-7-2014 [South Coast Spices Exports (P) Ltd. v. Mohan Varma, 2014 SCC OnLine SC 1706] observed that: (Mohan Varma case [South Coast Spices Exports (P) Ltd. v. Mohan Varma, 2014 SCC OnLine SC 1706] , SCC OnLine SC para 4)

> *"4. Insofar as the question of compensation for improvements made by the appellants is concerned, the appellants were free to pursue an appropriate remedy for the redressal of their grievances in accordance with law."*

These observations as contained in the order of this Court cannot be construed to mean that the respondents would be deprived of their right to set up a plea of constructive res judicata if the appellants were to raise such a claim. The appellants were, as this Court observed, free to pursue the "appropriate remedy for redressal of their grievances in accordance with law." This must necessarily be construed to mean that all defences of the respondents upon the invocation of a remedy by the appellants were kept open for decision. The liberty granted by this Court was not one-sided. It encompasses both the ability of the appellants to take recourse and of the respondents to raise necessary defences to the invocation of the remedy. Therefore, we do not find any merit in the submission urged on behalf of the appellants that the earlier judgment of the Kerala High Court and the order of this Court preclude the respondents from raising the bar of constructive res judicata.

31. It is submitted by Discoms that the conclusions of the Central Commission that the issue in the previous round of litigation was limited to the issue of quantum of power to be procured and that there was no occasion to claim capacity charges are self-contradictory. In the submission of Discoms the dichotomy in the impugned order is that if the issue before the Supreme Court was only restricted to the issue of quantum of power procurement, then

the consequential relief of capacity charges cannot flow from the order of the Supreme Court where the issue was not dealt with.

32. We do not accept the objections of the Discoms. The reduction of quantum of power to be procured has been held in the previous round to be without jurisdiction and, thus, *non est*. A bare reading of the order of Supreme Court shows that it has been directed that the Discoms (successful bidders) shall be entitled to supply power in terms of the originally offered amount, though the total quantum was reduced to 906 MW. The expression "*now be reduced to 906 MW*" obviously means with effect from the date of the Order (25.04.2018). The quantum of power under the PPAs stood revised to 311 MW, pursuant to which, LOI was "*modified*" on 02.05.2018 and amended PPA between RUVNL and DBPL was executed on 15.05.2018 based on the amended PPA dated 15.05.2018 signed between the Discoms and DBPL. The modification would relate back to the date of effect of PPA.

33. A bare perusal of the chronology of events makes it clear that only two issues were the subject matter of earlier round of litigation before the RERC, this tribunal and Supreme Court, viz. (i) the legality of reduction of quantum of power for adoption of tariff to 500 MW from 1010 MW and, (ii) the legality of increase in quantum to individual bidders (including DBPL) by means of negotiations. Having regard to the limited issues being adjudicated, DBPL neither had any opportunity nor any occasion to make any claim for capacity charges or damages in the said earlier proceedings.

34. The Order of RERC for reduction of quantum of power to be procured by RUVNL was under challenge before this tribunal. The scrutiny in appeal before this tribunal, and subsequently before Supreme Court, was also consequently restricted to the legality &

validity of the said Order. In this view, the claim of capacity charges could not have been raised in earlier round before this tribunal or before the Supreme Court. For this reason, the contentions of Discoms based on the principle of constructive res judicata *vis-à-vis* the claim of DBPL for deemed capacity charge is untenable. Further, the subject matter of amendment to the PPA was only to record the arrangement as regards quantum of power to be supplied, in terms of the Order dated 25.04.2018 passed by the Supreme Court. Therefore, there was no need or occasion for DBPL to reserve any right to claim capacity charges.

35. We reject the contentions of the Discoms and endorse the view taken by the Central Commission. The claim for additional capacity charges is a consequence directly flowing from the order of the Supreme Court and this conclusion has been rightly reached by the impugned decision, the challenge thereto being unfounded.

The relief granted without capacity being declared is de-hors the PPA and so erroneous?

36. It is the contention of the Discoms that the impugned order is bad because it has granted relief to DBPL, *de hors* the provisions of the PPA, there being no stipulation for payment of deemed capacity charges. It is submitted that the impugned order proceeds contrary to the basic principle of electricity law and also the specific provisions of the PPA that capacity charges can only be raised against actual capacity declared as available. It is not in dispute that to the extent the capacity has been declared as available, DBPL has received the capacity charges. The impugned order applies the decision of Supreme Court retrospectively, compelling payment of

the capacity charges for 311 MW, on deemed basis, without availability being declared. Reference is made to the provisions contained in Article 4.4 besides Article *4.2.2.1 in Schedule 4* of the PPA (extracted earlier) to submit that that the capacity charges correspond to the available capacity and there is no deeming provision for the availability to be considered.

37. It is urged by the Discoms that their liability is for payment for Available Capacity certified by the REA. Asserting that the entire capacity charges for the Available Capacity as certified by REA have been paid for, it is contended that the claim of DBPL is for capacity charges contrary to the specific provisions of the PPA. It is pointed out that the Available Capacity as certified by REA is only up to 250 MW for the relevant period, for a large part of such period, DBPL being not even in a position to declare up to 250 MW and the actual availability being much less. Reference is made to Article 12.6 of PPA (quoted earlier) to argue that it provides for the liability of the parties to be only to the extent as expressly provided in the PPA, and that neither party shall be liable or responsible for incidental, indirect or consequential damages, connected with or resulting from the performance or non-performance of the PPA.

38. Placing reliance on certain observation in *ONGC Ltd v. Saw Pipes (2003) 5 SCC* 705, it has been argued by Discoms that grant of relief contrary to the agreement is contrary to public policy and, therefore, liable to be set aside. The Supreme Court, examining the limited grounds of challenge under Section 34 of the Arbitration and Conciliation Act, 1996, observed thus in *ONGC Ltd v. Saw Pipes*:

"13…………..
In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.
………...
15. The result is — if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties."

39. It is trite that the terms of the PPA are binding on the parties and it is not open to the Central Commission to vary the terms of the PPA (*Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company (India) Limited*, (2017) 16 SCC 498). It is argued that the impugned decision to grant relief is not only *de-hors* the PPA, but contrary to its specific terms.

40. The submission is that availability under the PPA and in terms of the Regulations is the ability of the generator to make available the requisite capacity. It is argued that there is no concept of technical availability, without the generator being in a position to actually deliver the electricity when required. The technical availability, it is argued, is a presumption and an after-thought based on the unilateral statement of the generator, without the availability actually being declared during the relevant period.

41. We are of the view that in the given fact-situation, there was no requirement in the PPA for DBPL to have open access for the

Aggregate Contracted Capacity. It is not in dispute that DBPL had reserved and was always ready to supply the said capacity from its 1200 MW Plant, Unit-I of which was in commercial operation since 03.11.2014 and Unit-II of which was in commercial operation since 26.03.2016. It was on account of the application filed by the procurer that the quantum of power was reduced.

42. As borne out from the record, DBPL had applied for long term access ("LTA") for the quantum of 410 MW on 13.05.2014. The said application was closed by the PGCIL on 12.01.2016, in the wake of application for reduction of quantum of power filed on behalf of RUVNL on 24.11.2015 and the consequent Order dated 22.07.2015 passed thereon. The Long-Term Open Access Capacity was dependent on the quantum of power to be supplied to RUVNL. Since, on an Application of RUVNL, the quantum of power was reduced, there was no reason for DBPL to have an open access over and above the quantum approved by RERC.

43. The argument in the appeals at hand against the claim of DBPL to deemed capacity charges over and above 175MW prior to 27.03.2017, and over and above 250 MW from 25.04.2018 till 01.08.2018 on the ground that DBPL did not have the claimed capacity of 311 MW is not appropriate in as much as no such contention (particularly for the period prior to 27.03.2017) was raised by RUVNL before the CERC in the original proceedings or in the captioned appeal of Discoms. It cannot be ignored that DBPL had applied to PGCIL for grant of LTA of 410 MW of power from the project to the Discoms, in 2014, right after having been assured of purchase of such quantum of power by the latter. It is thereafter that RUVNL moved RERC for approval of procurement of a reduced quantity of 500 MW, which was allowed by order dated 22.07.2015.

It is against this backdrop that PGCIL closed the request of DBPL for LTA on 12.01.2016. Even though DBPL had achieved commercial operation to supply the original contracted quantity of 410 MW, it commenced supply on basis of the then limited LTA (175 MW) as made available by PGCIL and upon further LTA in terms of supplementary agreement dated 23.03.2017 for 250 MW from 27.03.2017. DBPL had the commercial capacity to commence supply of the originally contracted capacity of 410 MW from 30.11.2016 onwards. However, it could not do so on account of the illegal reduction of quantum of power to be procured at the instance of procurers. We agree with the submission of DBPL that being responsible for non-grant of LTA of the contracted capacity, the Discoms cannot be allowed to take advantage of their own wrongs by denying to DBPL its legitimate entitlement towards deemed capacity charges for the available contracted capacity on account of non-availability of LTA.

44. We do not find substance in the argument of Discoms that DBPL, having declared availability of only 250 MW even after passing of order dated 25.04.2018 by the Supreme Court up till 31.07.2018 is not entitled to claim deemed capacity charges for anything over and above the said quantum for the said period. It is soon after passing of the said order dated 25.04.2018 that DBPL, by its letter dated 27.04.2018, requested PGCIL for the additional LTA of 61 MW LTA, over and above 250 MW, to make it up to 311 MW. It is pursuant to the said order dated 25.04.2018 that the procurer (RUVNL) issued the modified Letter of Intent on 02.05.2018 and amended the PPA for contracted capacity of 311 MW on 15.05.2018. The enhancement of LTA from 250 MW to 311MW was intimated by PGCIL on 19.07.2018, consequent to which the supplementary LTA

for the said additional quantum was entered into between DBPL and PGCIL on 25.07.2018. Therefore, having itself modified the LoI and amended the PPA almost a month after passage of order dated 25.04.2018 by the Supreme Court, this resulting in modifications and amendments of LTA for addition of 61 MW, the contention that DBPL cannot claim deemed capacity charges for quantum above 250MW from the date of the order of the Supreme Court (i.e. 25.04.2018) till 31.07.2018 is unfair and unacceptable.

45. The claim of DBPL is for capacity charges on account of breach committed by RUVNL. The PPA was entered into pursuant to the representations and warranties given by RUVNL. However, after signing the PPA for supply of 410 MW of power with DBPL, it was RUVNL which filed the application before the RERC for reduction of quantum of power agreed to be procured. This was in breach of the representation made by RUVNL, amounting to infraction of fundamental terms of the PPA. If RUVNL had not committed such infringement, DBPL would have supplied power for requisite quantum from the date of commencement of supply under the PPA, i.e., from 30.11.2016 onwards, which it had reserved and was throughout ready to supply. On account of non-supply of the said power due to the above violation by RUVNL, DBPL was not able to do so from 30.11.2016 to 31.07.2018 and, consequently, it is entitled to recover the capacity charges for the period commencing from 30.11.2016 to 31.07.2018, by way of damages and compensation for breach on part of RUVNL to DBPL. Reliance is placed, and rightly so, on provisions of PPA for payment of such deemed capacity charges – particularly Article 4.9 and 4.12, quoted earlier - and on judgment dated 19.07.2021 of this tribunal in matter of *Talwandi Sabo Power Limited v. Punjab State Electricity*

Regulatory Commission & Ors. (appeal no. 220 of 2019 decided on 19.07.2021). We do not agree with the plea of Discoms that the failure to declare availability is not on account of any failure of the Discoms to fulfil their obligation. On the contrary, the illegal reduction of capacity (as already held) is what created the situation wherein DBPL having reserved capacity under the original offer has suffered loss which is bound to be compensated.

46. The above-noted objections are thus repelled.

The contention that Discoms prevented DBPL from obtaining Open Access beyond 250 MW is factually incorrect or misleading?

47. It is the argument of the Discoms that there is no question of any such claim being entertained for the period for which DBPL was not in a position to supply for capacity of 311 MW since it had to first obtain open access for such capacity. It is also submitted that it is grossly erroneous on the part of DBPL to contend that the Discoms had prevented it or directed Powergrid to reduce the Open Access to only 250 MW.

48. It is submitted that the application for open access is to be made by DBPL. It is argued that the contention of DBPL that on account of the State Commissions' order, Powergrid had reduced the Open Access capacity to 250MW is factually incorrect. After the order dated 22.07.2015 of the State Commission, DBPL by letter dated 21.08.2015, had addressed a formal request to Powergrid to reduce the Open Access to 250 MW and keep the balance in abeyance, subject to the result of the appeal that had been filed by DBPL. Therefore, in the submission of Discoms, it was the decision of DBPL to take open access only for 250 MW, as per the order of the

State Commission. It is contended that the finding of the Central Commission that in case 311 MW quantum was granted to DBPL at the first instance itself, it would have arranged for open access accordingly is misconceived and based on assumptions and conjectures. The submission is that while DBPL expects the Discoms to have given effect to the PPA of 410MW without the approval of the State Commission, it (DBPL) had never acted upon the said PPA and was not in a position to supply 250 MW, the capacity approved by the State Commission.

49. It is also argued that compensation cannot be granted on the basis of assumptions or presumptions, it being the onus of DBPL to have pleaded and proven actual loss. The Discoms contend that there is no evidence adduced by DBPL on the quantum of open access they would have even received if 311 MW was applied for.

50. The above line of arguments is virtual rehash of same logic, differently nuanced, as already dealt with and rejected.

51. As observed earlier, RUVNL had given an unambiguous and unequivocal representation that it intended to procure 1000±10% base load power for a period of 25 years for meeting its base load requirements of power. Thereafter, PTC India Limited (on behalf of DBPL) had submitted the bid of 311 MW. Further, additional 99 MW was offered by DBPL on the same terms and conditions of RFP and at the quoted tariff in its bid for 311 MW. In such fact-situation, the application filed by RUVNL for reduction was contrary to and in breach of the representations and warranties given by RUVNL. This is sufficient ground to create a liability on its part to compensate DBPL, particularly because there was no right vesting in RUVNL to unilaterally reduce the quantum of PPA executed pursuant to Section 63 bidding process, especially when such quantum was

approved by the appropriate Commission prior to RUVNL coming out with the tender.

The Discoms could not have procured higher quantum till State Commission passed the enabling order?

52. It is submitted by Discoms that while the State Commission in its initial order dated 22.07.2015 had only approved 250MW for procurement from DBPL and adopted the tariff, it was not that the Discoms had acted illegally in only procuring 250 MW. It is pointed out that at no point of time up till the order of the Supreme Court, passed on 25.04.2018, was there any approval of 311 MW by the State Commission. It is argued that the Discoms being regulated distribution licensees under the Electricity Act, 2003, could not have legally procured any additional quantum in excess of 250MW, which was approved by the State Commission. It is pointed out that this tribunal, by judgment dated 02.02.2018, while holding that DBPL would be entitled to supply 410 MW, did not approve the PPA but had held that *"State Commission shall be required to pass appropriate/revised order enabling the Appellants namely DBPL Ltd. and Lanco Power Ltd. to supply the contracted power under the respective PPA (dated 01.11.2013) viz. 410 MW & 350 MW, respectively expeditiously in the interest of justice and equity"* and had directed the "*State Commission … to pass consequential order in accordance with the law*". Therefore, in the submission of the Discoms, by operation of law, there was no right vesting in DBPL to claim entitlement to supply of any quantum exceeding 250 MW till the passing of order by the Supreme Court on 25.04.2018. The quantum of 411 MW was never approved, the only approval being

for 311 MW as modified by the Supreme Court on 25.04.2018. The LoIs stood modified, and the PPA was amended, and thereafter approved by the State Commission. For the past period, at no point of time was there any approval for a quantum exceeding 250MW for the Discoms.

53. It is argued that the Central Commission has erred in holding that despite the non-approval of the PPA and adoption of tariff for any quantum above 250 MW, the Discoms ought to have procured the said capacity from DBPL. The contention is that by this logic, even DBPL ought to have obtained open access for additional quantum and declared such availability. The Discoms contend that the impugned order is contrary to the approval granted by the State Commission, the Central Commission having given the PPA a higher status than the terms of approval and adoption of tariff by the State Commission, and to seek charges contrary to the adoption order of the State Commission.

54. The Discoms also argue that the impugned decision has the effect of double jeopardy. It is submitted that they (Discoms) and their consumers have already paid the capacity charges to the other bidder. In this regard, reference is made to the fact that the Supreme Court had varied the capacity of the L-1 Bidder– Maruti Clean Coal and Power Ltd from 250 MW to 195 MW, reducing it by 55 MW while increasing the capacity of L-2 Bidder – DBPL by 61 MW from 250 MW to 311 MW, the "net increase" of the capacity for the Discoms being only 6 MW. It is stated that the Discoms having already paid the capacity charges on 55 MW to the L-1 bidder, they cannot be burdened with the liability to that extent all over again. The plea is that if the contention of DBPL and the decision of the Central Commission is to be implemented, the capacity charges are

to be recovered from the L-1 bidder to the extent of 55 MW and paid to DBPL to the extent of 61 MW. The Discoms urge that they and their consumers cannot be asked to pay 55 MW plus 61 MW, since that would lead to a capacity over and above what has been approved by the Supreme Court.

55. It bears repetition to note here that RUVNL had filed the Petition before the RERC on 28.11.2013 for adoption of tariff for 410 MW power on the basis of the Power Purchase Agreement. While the said matter was pending, in contravention of the representations given, the terms & conditions of the PPA as well as its own petition for adoption of tariff for the said quantum, the procurer filed the application for reduction which was allowed by the RERC. But for the said move, the quantum of power would have not been reduced and DBPL would have supplied the requisite power under the PPA. In this scenario, the stand of RUVNL that DBPL had no vested right before adoption of tariff is fallacious and misconceived, it amounting to the party in default taking advantage of its own wrong which cannot be permitted.

56. It is already determined that RERC ought not have approved reduction in quantum of power to be procured from the original quantum which was approved by it at the beginning based on which the bid process was initiated by the procurer. The power of the State Commission under Section 63 is limited to examine the transparency of the bidding process and its conformity with the bidding guidelines. The contention of Discoms that the bidder had no vested right for adoption of tariff is misconceived. Once the bid process was complete under Section 63 of the Act, as per quantum and bid documents earlier approved, the RERC was only to adopt the tariff. The action of filing the application to reduce the quantum

has already been found to be illegal and in breach of the PPA, as upheld by the Supreme Court. The right of DBPL to supply the electricty in terms of capacity originally offered and the corresponding obligation of the Discoms to procure the same has been settled in the previous round. As observed earlier, the amendment to LoI and PPA in compliance with the final and binding decision of Supreme Court relates back to the date of commencement of contractual obligations.

57. If in the midst and as a result of the events that occurred the Discoms have ended up paying towards capacity charges to another seller more than what was due, that is no reason why DBPL should suffer the corresponding loss. It (DBPL) must get what is due in terms of the contracted capacity as determined post final decision in the first round of proceedings. It is for the Discoms to recover from the other supplier the excess payment, if any, in terms of the contract and in accordance with law. We must add that we have not examined or determined that any excess payment has actually been made to another entity. It would be unfair to do so in the present proceedings because such entity is not a party before us.

58. We, thus, reject the objections of Discoms.

The Claim of DBPL for additional capacity charges of (410 MW – 311 MW) 99 MW (Appeal no. 90 of 2020)

59. By its appeal (no. 99 of 2020), DBPL essentially claims additional capacity charges of 99 MW i.e. 410MW – 311MW arguing that the CERC has erroneously failed to grant relief to the full extent.

60. The Discoms contest the appeal arguing that additional capacity charges of 99MW claimed by DBPL on the plea that it had

negotiated with the Discoms for additional capacity and had thereafter kept the total capacity of 410MW in its power plant reserved for such supply cannot be allowed on mere principles of equity.

61. We agree that this additional claim of DBPL is contrary to the order of the Supreme Court which has held that it would only be entitled to supply in terms of the originally offered quantum i.e. 311 MW. The quantum of capacity to be supplied has been finally determined and the contracts suitably modified on its basis. There is no justification to allow capacity charges over and above the final contractual stipulations only because DBPL had reserved such additional capacity for the State Discoms under the fond hope that the negotiated terms would be upheld in judicial scrutiny.

62. We, thus, reject this plea of DBPL.

CONCLUSION

63. For the foregoing reasons, we find no substance in both appeals at hand. The appeals along with pending applications are dismissed

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 20th DAY OF SEPTEMBER, 2021.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member