APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

Appeal No.222 of 2021

Dated : 14.11.2022

Present: Hon'ble Mr. Justice R. K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

Sasan Power Limited
C/o Reliance Power Limited
3rd Floor, Reliance Energy Centre,
Santa Cruise East, Mumbai – 400055 ……..Appellant

Versus

1. **Central Electricity Regulatory Commission**
   3rd& 4th Floor, Chanderlok Building,
   36, Janpath, New Delhi – 110001.

2. **MP Power Management Company Limited**
   Shakti Bhawan, Jabalpur,
   Madhya Pradesh– 482008

3. **Pashchimanchal Vidyut Vitran Nigam Limited**
   Victoria Park, Meerut,
   Uttar Pradesh – 250001.

4. **Purvanchal Vidyut Vitran Nigam Limited**
   Hydel Colony, Varanasi,
   Uttar Pradesh – 221004.

5. **Madhyanchal Vidyut Vitran Nigam Limited**
   4A-Gokhale Marg, Lucknow,
   Uttar Pradesh – 226001.

6. **Dakshinanchal Vidyut Vitran Nigam Limited**
   220 kV Vidyut Sub-Station,
   Mathura Agra By-pass Road,
   Sikandara, Agra,
   Uttar Pradesh – 282007.

7. **Ajmer Vidyut Vitran Nigam Limited**

Hathi Bhata, City Power House,
Ajmer, Rajasthan – 305001.

8. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Jaipur,
Rajasthan – 302005.

9. Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area,
Jodhpur, Rajasthan – 342003.

10. Tata Power Delhi Distribution Limited
Grid Sub-Station Building, Hudson Lines,
New Delhi – 110009.

11. BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,
New Delhi – 110019.

12. BSES Yamuna Power Limited,
BSES Bhawan, Nehru Place,
New Delhi – 110019.

13. Punjab State Electricity Board,
The Mall, Patiala,
Punjab – 147001.

14. Haryana Power Generation Corporation Limited
Shakti Bhawan, Panchkula,
Haryana – 134109.

15. Uttarakhand Power Corporation Limited
Urja Bhawan, Kanwali Road,
Dehradun, Uttarakhand – 248001. **…Respondents**

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Ms. Poorva Saigal
Mr. Shubham Arya
Mr. Ravi Nair
Ms. Reeha Singh
Ms. Tanya Sareen
Ms. Srishti Khindaria for R-7 to 9 & 13 to 14

Ms. Ranjana Roy Gawai
Ms. Vasudha Sen
Ms. Niharika Behl
Mr. Ujjwal Jain
Mr. Shikhar Upadhyay for R-10

Mr. Hasan Murtaza
Mr. Sameer Sharma for R-11 & 12

J U D G M E N T

Per Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

1. The captioned Appeal has been filed by M/s. Sasan Power Limited (in brief "Appellant" or"SPL") assailing the Order dated 25.01.2021 (herein after "Impugned Order") passed by the Central Electricity Regulatory Commission (in short "CERC" or Central Commission") in Petition No. 71/MP/2019 (herein after "Petition71"), being aggrieved by the decision of the Central Commission

disallowing the claim of the Appellant for compensation on account of the unprecedented, unforeseen and uncontrollable depreciation of the Indian Rupee ("INR") vis-à-vis United States Dollar ("USD") which has adversely impacted project economics of the 3960 MW coal fired Ultra-Mega Power Project at Sasan, District Singrauli Madhya Pradesh ("Sasan UMPP" or "Project").

Parties

2. The Appellant, Sasan Power Limited, is a special purpose vehicle incorporated by Power Finance Corporation Limited ("PFC"), the nodal agency of Government of India for implementation of its Ultra Mega Power Project ("UMPP") initiative on 10.02.2006 for the development and implementation of a coal fired, UMPPbased on linked captive coal mine using super-critical technology with an installed capacity of 4000 MW (plus/minus 10%) at Sasan, District Singrauli, Madhya Pradesh (in brief "Sasan UMPP" or "Project"), to be implemented by a developer selected through a tariff based international competitive bidding process.

3. Respondent No. 1 is Central Electricity Regulatory Commission, which has passed the Impugned Order, is a statutory body constituted under Section 76 of the Electricity Act, 2003 and has been vested with the powers to adjudicate disputes under Section 79 of the Electricity Act, 2003 between a generating company and a licensee as defined under the Electricity Act, 2003.

4. Respondent No. 2 to 17 are the State holding companies procuring power on behalf of the distribution licensees or are the distribution licensees, the beneficiaries of the Sasan UMPP under the PPA, of whom MP Power Management Company Limited (in short "MPPMCL"), the Respondent no. 2,

is the lead Procurer under the PPA. MPPMCL is a successor company of Madhya Pradesh State Electricity Board (in short "MPSEB") vested with the functions of bulk purchase of electricity from generating companies for supplying the same to the 3 Distribution Companies (in short "Discoms") of Madhya Pradesh ("MP") and being the lead Procurer, is authorised to represent all the Procurers for discharging the rights and obligations of the Procurers.

Facts of the case

5. The Petition 71 was filed by SPL before CERC, pursuant to remand order dated 18.01.2019 ("Remand Order") passed by this Tribunal in IA No. 163 of 2018 in Appeal No. 202 of 2016 directing the Central Commission to hear SPL's claim of compensation on the ground of exercise of regulatory powers under Section 79(1)(b) of the Electricity Act, 2003 (the "Electricity Act") due to steep depreciation of INR vis-a-vis the USD.

6. The Central Commission, in compliance to the Remand Order, conducted the hearing in the matter and vide the Impugned Order, has dis-allowed the Appellant's claim for compensation on account of the unprecedented, unforeseen and uncontrollable depreciation of the Indian Rupee ("INR") vis-à-vis United States Dollar ("USD") which has adversely impacted project economics of the 3960 MW coal fired Sasan UMPP, as submitted by the Appellant through this Appeal. the Appellant is aggrieved by the following findings of the Commission: -

(a) The Appellant is not eligible for compensation and restoration to the same economic position on account of the unprecedented, unforeseen and uncontrollable depreciation of the INR vis-à-vis the USD.

(b) The Central Commission is not bound by its decision in Order dated 21.2.2014 in Petition No.14/MP/2013 (“14 MP Order”) wherein the Commission had already held that the case of SPL was fit for exercise of the regulatory powers considering the unprecedented, uncontrollable and unforeseen depreciation of INR vis-a-vis USD.

(c) The Competitive Bidding Guidelines, the biding documents and the PPA specifically stipulate that Foreign Exchange Rate Variation (“FERV”) shall be to the account of the selected bidder, hence, the steep depreciation of the INR vis-à-vis the USD cannot be the ground for exercising regulatory powers under section 79(1)(b).

(d) There is no ground for the Central Commission to exercise its general regulatory powers under Section 79(1)(b) of the Electricity Act to grant any claim for compensation due to FERV,accordingly, the prayer of the Petitioner that it is to be compensated and restored to the same economic position due to depreciation of the INR vis-à-vis the USD stands rejected.

7. The Appellant submitted that the Impugned Order is being challenged on the following grounds, each without prejudice to the other: -

(a) The Central Commission has erred in concluding that the Appellant is not eligible for compensation and restoration to the same economic position on account of the unprecedented, unforeseen and uncontrollable depreciation of the INR vis-à-vis the USD.

(b) The Central Commission has erred in not properly considering the scope of regulatory powers under Section 79(1)(b) and the fact that such

steep unprecedented, unforeseen and uncontrollable depreciation of INR was not contemplated under the Competitive Bidding Guidelines (in short "CBG") or the PPA, which was a consequence of the global financial crisis which occurred in 2008 much after issuance of the CBG in 2005 and therefore could not have been dealt with by the CBG and in the absence of a regulatory framework dealing with this situation, the Central Commissionought to have exercised its regulatory powers to grant relief to the Appellant.

(c) The Central Commission has erred in disregarding the findings in the 14 MP Order, wherein the Commission noted that given the trend of depreciation of the INR vis-à-vis the USD, from September 2011 onwards, it cannot be denied that the depreciation of INR is unforeseeable and uncontrollable and has adversely affected the industries which are making payment for import or debt servicing in USD.

(d) The Commission has proceeded on an incorrect basis that the Remand Order passed by this Tribunal has restricted the scope of the Central Commission, so much so that the Central Commission has observed that it cannot consider its own findings in the 14 MP Order and has incorrectly interpreted the scope of its regulatory powers under Section 79 of the Electricity Act.

(e) The Impugned Order has failed to consider judicial pronouncements holding the global financial crisis to be an unforeseeable event.

(f) The Central Commission has failed to appreciate and address the grave implications of not restoring viability of the Appellant's Project and its detrimental impact on the public interest and hasfailed to appreciate that SPL is supplying power to 47 Crore population served by 14

Distribution Companies in 7 Procurer States, who are the beneficiaries of the cheapest (Levelized tariff : Rs. 1.196/kWh – Lowest in the country) and most reliable (PLFs: FY2018-19 :95% and 2019-20: 96% - Highest in the country) source of thermal power in the country.

8. Hence the present Appeal.

Our Observations and Analysis

9. The main issue which is emerging out of the instant case is whether the SPL is eligible for any compensation due to FERV vis-à-vis the occurrence of Force Majeure Events (in short "FME") or an event akin to FME due to steep depreciation of Indian Rupee as against the US Dollar by invocation of FME provision in the PPA or through the Regulatory Powers vested with the Central Commission under section 79(1)(b) of the Electricity Act, 2003 (hereinafter "the Act").

10. It is therefore, important to note the history of the petitions/ appeals filed by the Appellant or by the Respondents before the Central Commission or before this Tribunal or before the Hon'ble Supreme Court of India and the directions issued while these are disposed of.

11. The Appellant, in the year 2013, approached the Central Commission through Petition No. 14/MP/2013 seeking relief as under:

"Prayer

135. The Petitioner therefore most humbly and respectfully prays that this Hon'ble Commission be pleased to adjudicate upon the present Petition to: -

(a) ***Declare that unprecedented, unforeseeable and uncontrollable depreciation of Indian Rupee vis-a-vis the US Dollar as a Force Majeure event under the PPA;***

(b) Restitute the Petitioner to the same economic condition as if the Force Majeure Event never occurred, including regarding the additional equity outlay and debt service obligations; and

(c) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case."

12. The Central Commission vide its Interim Order dated 21.02.2014 in Petition No. 14/MP/2013 holds that:

"D. Depreciation of INR vis-à-vis USD: Whether Force Majeure under the PPA?

…

64. As regards the applicability of Article 12.4 in this case, we notice that "unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, fuel or consumables for the projects" are not included under force majeure except to the extent they are consequence of an event of force majeure. ***Volatility of international currency market is a normal phenomenon and cannot be considered as a force majeure event. Therefore, change in the price of imported equipment on account of depreciation of INR cannot be considered as a direct consequence of force majeure.***

Therefore, the case of the petitioner cannot be covered under the exception to the exclusion provision under Article 12.4 of the PPA.

65. In the light of the discussion above, we conclude that the petitioner's case is not covered under any of the provisions of "force majeure" under Article 12 of the PPA.

…

(e) Whether a case is made out under section 79(1)(b)

…

72. Considering the extremely competitive rate at which the procurers are getting power from the petitioner's generating station, there may be a case for the procurers to share a part of the burden as compensation on account of depreciation of INR in order to make the project viable. ***The Commission considers it necessary to examine all the issues with reference to the base records of the petitioner in contracting debts for the project before taking a final view on intervening and giving any directions in this regard in exercise of its power under Section 79(1)(b) of the Act in the interest of the project developer as well as the consumers of the procurer States****."*

(Emphasis Supplied)

13. From the above, it is observed that the Central Commission has held that volatility of FERV is a normal phenomenon and cannot be considered as FME, therefore, change in the price of imported equipment on account of such depreciation is not a direct consequence of FME, however, realizing that there is sharp reduction in the value of INR as against the USD and the extremely competitive rate at which power is supplied to the beneficiaries, the Central Commission made an observation that there may be a case for the procurers to share a part of the burden as compensation on account of

depreciation of INR in order to make the project viable, and therefore, it can exercise powers under section 79(1)(b) of the Act in the interest of the consumers of the beneficiaries and the developer.

14. Being aggrieved by the aforesaid Interim Order passed by the Central Commission, some of the beneficiaries approached this Tribunal vide Appeal Nos. 99 of 2014 and 104 of 2014, seeking the following relief:

> *"21. RELIEF SOUGHT*
>
> *In view of the facts mentioned in Para 7 above, points in dispute and questions of law set out in Para 8 and the grounds of appeal stated in Para 9, the Appellant prays for the following reliefs:*
>
> *(a) Allow the appeal and set aside the order dated 21.02.2014 passed by the Central Commission to the extent challenged in the present appeal.*
>
> *(b) Pass such Order(s) that this Hon'ble Tribunal may deem just and proper."*

15. It is also important to note here the reasons for filing the aforesaid Appeals No. 99 of 2014 and 104 of 2014, as under:

> *"1. Details of Appeal*
>
> *…*
>
> *The Appellant is aggrieved on the following aspects of the Impugned Order -*
>
> *a. As per the terms and conditions of the tariff based competitive bidding held pursuant to which the Respondent No. 2 was selected and the Power Purchase Agreement was signed, the foreign exchange rate variation was entirely to the account of the Respondent No. 2 and any depreciation of*

Indian Rupees cannot be a ground for seeking any adjustment in tariff or otherwise any compensatory relief from the Procurers;

b. ***The Central Commission cannot, in exercise of the Regulatory Power under Section 79 of the Act revise the tariff adopted under Section 63 of the Electricity Act, 2003****;*

c. ***The Respondent No. 2, as a commercial entity, should be held to be bound by the bidding terms and to the contracted price****."*

(Emphasis Supplied)

16. It is seen that the Respondents in the present Appeal have challenged the Interim Order of CERC on the ground that the Central Commission cannot exercise powers under section 79 of the Act in case the tariff is adopted under section 63 of the Act.

17. This Tribunal vide judgment dated 07.04.2016 disposed of the aforesaid Appeals deciding as under:

"310. Appeal No.99 of 2014 and Appeal No.104 of 2014 have been filed against Order dated 21/02/2014 passed by the Central Commission in Petition No.14/MP/2013. ***Petition No.14/MP/2013 had been filed by SASAN Power inter alia for a declaration that the unprecedented, unforeseen and uncontrollable depreciation in the Indian Rupee vis-a-vis US Dollar as a Force Majeure Event under the PPA and to restitute SASAN to the same economic condition as if the Force Majeure Event had never occurred.*** *By Order dated 21/2/2014, the Central Commission held that the depreciation in Indian Rupees is not a Force Majeure Event within the meaning of Article 12 of the*

PPA. However, after referring to its Interim Order dated 15/4/2013 in Petition No.159/MP/2012 (CGPL v. GUVNL &Ors.), the Central Commission proceeded to exercise its regulatory power under Section 79(1)(b) of the said Act and sought for certain documents from SASAN Power. Being aggrieved by the said order, Haryana Utilities have filed Appeal No.99 of 2014 and Rajasthan Utilities have filed Appeal No.104 of 2014. Admittedly, this matter relates to the generation and sale of electricity from the power plant of SASAN Power where the tariff was determined under the tariff based competitive bid process under Section 63 of the said Act. ***We have already answered Issue No.5 of the Agreed Issues that the Central Commission has no regulatory powers under Section 79(1)(b) of the said Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act.*** *In view of this, Appeal Nos.99 of 2014 and Appeal No.104 of 2014 are allowed. The impugned Order dated 21/2/2014 is hereby set aside.*

311. The appeals are disposed of in the afore stated terms. Needless to say, that all interim applications shall stand disposed of accordingly."

(Emphasis Supplied)

18. This Tribunal, as seen from the above, has categorically held that the Central Commission cannot invoke its Regulatory Powers under section 79(1)(b) of the Act for varying or modifying the tariff for the generating companies in case their tariff is adopted under section 63 of the Act, however, no discussion was held whether the Central Commission is correct in its

approach by declaring the "***unprecedented, unforeseeable and uncontrollable depreciation of Indian Rupee vis-a-vis the US Dollar"*** is not a Force Majeure event under the PPA as "***Volatility of international currency market is a normal phenomenon"***. The decision of this Tribunal was confined only on the contents/ prayers made in the Appeals Nos. 99 of 2014 and 104 of 2014.

19. Thereafter, the Central Commission on 26.04.2016 passed the final order in Petition No. 14/MP/2013 under the directions of this Tribunal, relevant extract quoted as under:

> *"5.* ***In Appeal Nos. 99 of 2014 and 104 of 2014, challenge was limited to the decision of the Commission to examine the claims of the petitioner under section 79(1) (b) of the Act. The said appeals have been allowed and the order dated 21.2.2014 in Petition No.14/MP/2013 has been set aside. Therefore, the Commission cannot consider the case of the petitioner under section 79(1)(b) of the Act. Accordingly, the details submitted by the petitioner vide affidavit dated 14.3.2014 and subsequent submissions are not required to be examined.***
>
> *6. The Commission had already held in order dated 21.2.2014 that depreciation of INR vis-a-vis US Dollar is not a force majeure event in terms of the provisions of the PPA between Sasan Power Limited and the procurers of Sasan UMPP and accordingly, rejected the prayers of the petitioner. This finding has neither been challenged by the petitioner nor by any of the respondents. The only issue on which the petition was under consideration of the Commission was the possibility of granting relief to the*

petitioner in exercise of regulatory power under section 79(1)(b) of the Act. ***The Appellate Tribunal has held that the Commission has no regulatory powers under section 79(1) (b) of the Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. In view of the said findings of the Appellate Tribunal, nothing survives in Petition No.14/MP/2013."***

(Emphasis Supplied)

20. Therefore, the prayer of the Appellant, SPL was finally rejected on both the counts i.e. relief sought under FME by CERC, with the observation that there is a possibility of invoking the Regulatory Powers under section 79(1)(b), however, which in turn was rejected by this Tribunal, therefore, the possibility of challenging the decision on the issue of Force Majeure provision was denied to the Appellant at that stage as the decision of CERC was not under challenge and whereas CERC was in the process of deciding the matter on invoking the Regulatory Powers.

21. Certainly, the original prayer of the Appellant seeking relief on account of "*unprecedented, unforeseeable and uncontrollable depreciation of Indian Rupee vis-a-vis the US Dollar* ***as a Force Majeure event under the PPA",*** has not been adjudicated before this Tribunal.

22. Considering the rejection of its prayers on the relief sought under two folds i.e. Force Majeure Event and the invocation of Regulatory Powers, SPL approached this Tribunal throughAppeal No. 202 of 2016 against CERC Order dated 26.04.2016 in Petition No. 14/MP/2013, with the prayer as under:

"The Appellant therefore most humbly and respectfully prays that this Hon'ble Tribunal be pleased to: -

(a) Declare that unprecedented, unforeseeable and uncontrollable steep depreciation of Indian Rupee vis-a-vis the US Dollar as a Force Majeure event under the PPA;

(b) Allow the Appellant to recover the increase in cost on account of unprecedented, unforeseeable and uncontrollable steep depreciation of Indian Rupee vis-a-vis the US Dollar; and

(c) Pass any such other and further reliefs as this Hon'ble Tribunal deems just and proper in the nature and circumstances of the present case."

23. Also, being deprived relief under the Regulatory Powers, SPL again approached this Tribunal seeking relief under **the Force Majeure provisions** by the said Appeal No. 202 of 2016, and through Interlocutory Application (IA) No. 163 of 2018 in Appeal No. 202 of 2016 prayed for the following:

"15. The Applicant/SPL most humbly and respectfully prays that this Hon'ble Commission be pleased to: -

(a) ***Remand the present Appeal to Ld. CERC to consider the Applicant's claims for compensation on account of unprecedented, unforeseen and uncontrollable steep foreign exchange rate variation;***

(b) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case."

24. It is important to note here that SPL is praying for compensation on account of "*unprecedented, unforeseen and uncontrollable steep foreign exchange rate variation",* by claiming it to be an event akin to FME as can be seen from the first relief Petition (Petition No. 14/MP/2013), it filed before CERC and thereafter, in subsequent petitions/ appeals, however, the Central Commission disallowed the claim on account of FME, and considered the matter under its Regulatory Powers vested under section 79(1)(b).

25. Separately, being aggrieved of the findings of the Tribunal regarding the Regulatory Powers vested with the Central Commission, SPL filed Appeal No. C.A. No. 9643 – 9644 of 2016 before the Hon'ble Supreme Court, praying for:

> *"54. It is therefore most respectfully prayed that this Hon'ble Court may most graciously be pleased to:*
>
> (a) Allow the present Appeal;
>
> *(b) Set aside the Impugned Order dated 07.04.2016 passed by Ld. Tribunal,* ***to the limited extent that it holds that the Ld. Central Commission does not have the regulatory power to vary or modify the tariff adopted under Section 63 of the Electricity Act;***
>
> *(c) Pass any other order that this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."*

26. It is worth mentioning here that the above proceedings and decisions were taken place prior to the **judgment dated 11-4-2017rendered by the Hon'ble Supreme Court of India** in *"Civil Appeal Nos. 5399-5400 of 2016 (Energy Watchdog vs. Central Electricity Regulatory Commission and Others)*

and other connected matters", to be referred hereafter as "**the*Energy Watchdog Judgment***".

27. In the light of *the Energy Watchdog Judgment*, the Hon'ble Supreme Court dismissed the said appeals filed by SPL by its judgment dated 20.04.2017 *inter-alia* observing as under:

> *"Civil Appeal Nos. 9643-9644/2016:-*
> *We have heard the learned Senior counsel/learned counsel appearing for the parties.*
> ***Since the points which arise for determination in these matters have already been dealt with by us in the Judgment delivered in "Civil Appeal al Nos. 5399-5400 of 2016 (Energy Watchdog vs. Central Electricity Regulatory Commission and Others) and other connected matters" on 11-4-2017****, we do not find any reason to entertain these Civil Appeals.*
> *Accordingly, the Civil Appeals are dismissed."*
>
> ***(Emphasis Supplied)***

28. Subsequently, on 02.05.2017, the Hon'ble Supreme Court amended the aforesaid order by recording that:

> *"Mr. Kapil Sibal, learned Senior counsel appearing for the appellant - M/s. Sasan Power Limited orally mentioned this matter today and informs us that on 20th April, 2017, we dismissed the Civil Appeals and requests that instead of dismissing the Civil Appeals, the same may be directed to be disposed of.*
>
> ***In view of the above, the words "the Civil Appeals are dismissed" shall be read as "the Civil Appeals are disposed***

of". *The order passed by us on 20th April, 2017 is modified to the above extent."*

29. Subsequently, this Tribunal vide its judgment dated 18.01.2019 in Appeal No. 202 of 2016 has held that:

"11. ***It's not in dispute that the Appellant in the petition filed before the Commission for compensation did claim compensation pertaining to steep depreciation of INR vis-a-vis USD on the ground of force majeure.*** *Commission while rejecting the said claim of the petitioner (Appellant herein), did reserve the matter and called upon the Appellant herein to furnish the relevant documents and papers by opining that compensation pertaining to steep depreciation of INR vis-a-vis USD may be considered by exercising regulatory powers.* ***The Appellant contends that it did not challenge the said order rejecting force majeure event since it believed and did hope that regulatory power would be exercised to consider the said claim, therefore, it did not file any appeal.***

…

14. ***Since the Appellant is not pursuing the claim based on force majeure event, we need not ponder over the contentions raised in the appeal and arguments advanced in that regard by all the parties.***

15. ***So far as fair opportunity of hearing being given or not is concerned, admittedly, the Appellant was not asked to address arguments on the pending petition, though the Commission itself opined in the initial order that claim of the Appellant for exercising powers under Section 79(1 (b) may***

be available. *Since the opinion of the Full Bench of this Tribunal so far as exercise of regulatory powers came to be reversed by the Apex Court in Energy Watch Dog's case,* ***it is incumbent upon the Commission to decide the said issue in the light of the Judgment of the Energy Watch Dog's case by affording an opportunity of being heard. No prejudice whatsoever is caused to the Respondents, since they will also be heard before the Commission.***

16. In that view of the matter, we are of the opinion that the instant appeal and IA No. 163 of 2018 deserve to be allowed. The Commission is directed to hear the Appellant's claim of compensation only on the ground of exercise of regulatory powers under Section 79(1)(b) of the Act and not the ground of force majeure event."

(Emphasis Supplied)

30. It cannot be denied that SPL vide Appeal No. 202 of 2016 approached this Tribunal seeking relief praying "*Declare that unprecedented, unforeseeable and uncontrollable steep depreciation of Indian Rupee vis-a-vis the US Dollar as a Force Majeure event under the PPA",* however, the said Appeal was disposed of by directing the Central Commission *"to hear the Appellant's claim of compensation only on the ground of exercise of regulatory powers under Section 79(1)(b) of the Act and not the ground of force majeure event" b*y observing that "*Since the Appellant is not pursuing the claim based on force majeure event, we need not ponder over the contentions raised in the appeal and arguments advanced in that regard by all the parties".*

31. It cannot be disputed that the only relief as sought by the Appellant is compensation on account of *unprecedented, unforeseeable and uncontrollable depreciation of Indian Rupee vis-a-vis the US Dollar*which was observed by the Central Commission in its interim order dated 21.02.2014 and also by this Tribunal in its order remand order dated 18.01.2019.

32. Undisputedly, the issue whether the "*unprecedented, unforeseeable and uncontrollable depreciation of Indian Rupee vis-a-vis the US Dollar"* is a FME or akin to FME has not been adjudicated in any of the Appeals except the first Petition filed by the Appellant before the Central Commission and rejected by the interim order dated 21.02.2014 passed by the Central Commission due the reason that the powers vested with the Central Commission under section 79(1)(b) were challenged and rejected, later on accepted under various judgments/ orders rendered by this Tribunal and the Hon'ble Supreme Court.

33. It was also observed by this Tribunal that "*Commission while rejecting the said claim of the petitioner (Appellant herein), did reserve the matter and called upon the Appellant herein to furnish the relevant documents and papers by opining that compensation pertaining to steep depreciation of INR vis-a-vis USD may be considered by exercising regulatory powers",* and therefore *"The Appellant contends that it did not challenge the said order rejecting force majeure event since it believed and did hope that regulatory power would be exercised to consider the said claim, therefore, it did not file any appeal."*

34. We opine that the main prayer of the Appellant in Appeal No. 202 of 2016 that "*Declare that unprecedented, unforeseeable and uncontrollable steep depreciation of Indian Rupee vis-a-vis the US Dollar as a Force Majeure event under the PPA",* was notconsidered on merit as was not pressed by the SPL only because at that stage, the Central Commission was

considering the relief under the Regulatory Powers for the only claim made by the SPL.

35. Pursuant to the remand by this Tribunal by order dated 18.01.2019, SPL filed Petition No. 71/MP/2019 before the Central Commission with the following prayers:

> *"85. In view of the foregoing, it is respectfully prayed that this Hon'ble Commission be pleased to adjudicate upon the present Petition to: -*
>
> *(a) Allow the present Petition and mould appropriate relief to compensate SPL for the unprecedented, uncontrollable and unforeseen steep depreciation of the INR vis-a-vis USD as detailed in the paragraphs above.*
>
> *(b) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case."*

36. Consequently, the Central Commission passed the order dated 25.01.2021, relevant extract is quoted as under:

> *"43.* ***Thus, the RfP document makes it mandatory for the bidder to quote an all inclusive tariff which shall reflect all cost including the capital & operating cost andstatutory levies, taxes and duties****. It is also the responsibility of the seller (the successfulbidder to execute the project and supply power) to ensure availability of all inputs forgeneration of power at the project site and to reflect alt cost in the quoted tariff. Thus, the RfP document does not require a bidder to quote the different elements of tariff suchas equity, interest on loan, depreciation,*

O&M expenses and interest on working capital,but to quote an all-inclusive tariff, taking into account all expenditure for building andoperating the project. ***Since the tariff is all inclusive, the bidder is expected to factor inall possible expenditures, including the expenditure on foreign exchange rate variationthat may arise on account of depreciation of INR if the project has a component ofimported equipment or foreign loan.*** *Also, the bidders are required to quote non escalable capacity charges, escalable capacity charges, non-escalable energy charges and escalable energy charges in Rupees/kWh only, as per format 1 Annexure 4.Therefore, both, the Competitive Bidding Guidelines and the provisions of the RfP require the bidders to quote in INR only. Further, the bidders have been granted liberty to quote escalable capacity charges and escalable energy charges. The purpose of such escalable charges is to enable the bidder to factor in the variation in the prices ofequipment and machinery, exchange rate variation, variation in interest rates, andchanges in taxes, duties and levies etc.* ***Since the quoted tariff is in INR only, it is theclear intention of the Competitive Bidding Guidelines and the bidding documents thatthe bidder should factor in the foreign exchange component of the project, includingforeign exchange rate variation in the bid while quoting in Indian Rupees.*** *The foreignexchange risk, if any, has been exclusively assigned to the bidder and the failure of thebidder to factor the same, cannot, therefore, be passed on to the Procurers. ThePetitioner had consciously not quoted escalable capacity charge.*

44. ***As stated, the Hon'ble Supreme Court in Energy Watchdog case has decidedthat in case the biding guidelines issued by the Central Government under Section 63 ofthe 2003 Act cover the situation, the Commission is bound by those guidelines.*** *In thepresent case, the competitive bidding guidelines, the biding documents and the PPAspecifically stipulate that FERV shall be to the account of the selected bidder. Hence,the Petitioner cannot say that the steep depreciation of Indian Rupee vis-a-vis USD isunprecedented and unforeseeable and that the same has threatened the viability andsustainability of the project.*

45. ***In the above background, we find no ground for exercising the general regulatorypowers of the Commission under Section 79(1)(b) of the 2003 Act to grant any claim forcompensation due to FERV.*** *Accordingly, the prayer of the Petitioner that it is to be compensated and restored to the same economic position due to depreciation of Indian Rupee vis-à-vis USD stands rejected."*

(Emphasis Supplied)

37. Therefore, the main prayer of the SPL in petition filed in the 2013 seeking relief for declaring theunprecedented, uncontrollable and unforeseen steep depreciation of the INR vis-a-vis USD as Force Majeure, as also challenged before this Tribunal, remained to be adjudicated on merits by this Tribunal, as the original observation of the Central Commission that it is proceeding to exercise its regulatory power under Section 79(1)(b) of the said Act and sought for certain documents from SASAN Power has shadowed the adjudication on merit as prayed by the SPL.

38. The Central Commission while disallowing the claim has observed that it is not bound by its Order dated 21.02.2014 passed in Petition No. 14/MP/2013 wherein the Central Commission had already held that the case of SPL was fit for exercise of the regulatory powers considering the unprecedented and unforeseen depreciation of INR vis-a-vis USD, the relevant extracts of the Impugned Order is reproduced below:

> *"37. The matter has been examined. The Petitioner has submitted that* ***the Commission vide its order dated 21.2.2014 in Petition No.14/MP/2013 had already held that the case of the Petitioner was fit for exercise of the regulatory powers considering the unprecedented, uncontrollable and unforeseen depreciation of INR vis-a-vis USD, the lowest thermal tariff (levelized tariff of Rs 1.196/kWh) and highest reliability in the country (PLF of 96% in 2019-20)*** *offered by the Petitioner has benefitted the consumers in seven Procurer States and that* ***the Respondent MPPMCL, the lead Procurer, has conceded the fact that depreciation of INR vis-a vis USD was unprecedented.According to the Petitioner, since there has been no change in the factual situation between the passing of the said order dated 21.2.2014 and now, the Commission, as a quasi-judicial body is bound by its earlier decision, and it is not open to the Respondents to argue that the steep depreciation of INR vis-a-vis USD is not an unforeseeable event and that the Petitioner is not entitled to any relief.***
>
> *38. This submission of the Petitioner is not acceptable since APTEL in its order dated 18.1.2019 in IA No. 163 of 2018 in Appeal No. 202 of 2016 has directed this* ***Commission to consider the exercise of the regulatory powers, not in terms***

of the Commission's order dated 21.2.2014 calling for certain additional information, but only in the light of the judgment of the Hon'ble Supreme Court in Energy Watchdog case to grant of such relief. *In other words, the Petitioner's claim for relief in exercise of the regulatory powers under Section 79(1)(b) is required to be considered in terms of the observations of the Hon'ble Supreme Court in its judgment in Energy Watchdog case read with the APTEL order dated 18.1.2019.*

…

44. As stated, the Hon'ble Supreme Court in Energy Watchdog case has decided that in case the biding guidelines issued by the Central Government under Section 63 of the 2003 Act cover the situation, the Commission is bound by those guidelines. ***In the present case, the competitive bidding guidelines, the biding documents and the PPA specifically stipulate that FERV shall be to the account of the selected bidder.Hence, the Petitioner cannot say that the steep depreciation of Indian Rupee vis-a-vis USD is unprecedented and unforeseeable and that the same has threatened the viability and sustainability of the project.***

45. ***In the above background, we find no ground for exercising the general regulatory powers of the Commission under Section 79(1)(b) of the 2003 Act to grant any claim for compensation due to FERV.*** *Accordingly, the prayer of the Petitioner that it is to be compensated and restored to the same economic position due to depreciation of Indian Rupee vis-a-vis USD stands rejected."*

(Emphasis Supplied)

39. We fail to understand the observation of the Central Commission that once the CBG, the bidding documents and the PPA stipulates that FERV shall be borne by the Appellant, then Appellant cannot declare steep depreciation of INR versus USD is uncontrollable, unprecedented and unforeseeable, whereas it is not by the Appellant only but the fall in INR was recognized as uncontrollable, unforeseeable and unprecedented by every recognized organizations of the field or the financial expertsas also by the Central Commission itself and the lead Procurer, as recorded in CERC order dated 21.02.2014 as under:

> *"---Considering the extremely competitive rate at which the procurers are getting power from the Project and* ***the fact that the sudden depreciation of the INR vis a vis USD is an unprecedented and unforeseen event, there may be a case for the procurers to share a part of the burden as compensation on account of such unprecedented depreciation of INR*** *in order to make the project viable---"*
>
> ***(Emphasis Supplied)***

40. The Appellant submitted that the Central Commission methodically arrived at a projected depreciation rate of INR vis-à-vis USD of 0.74% per annum based on the trend of previous nine (9) calendar years starting from 1998 to 2006 (both inclusive) using 3 years moving average rate whereas the CAGR of the depreciation of INR vis-à-vis USD from July 2007 till date has been nearly 4.7% (CAGR) per annum, this is contrary to all expectations and projections including the Escalation Index notified by Central Commission, therefore, it can very well be said that such a steep depreciation is unprecedented, unforeseeable and uncontrollable.

41. The Appellant also argued thatit was also not contemplated under the Competitive Bidding Guidelines or the PPA or the Escalation Index notified by the Central Commission, its reliance on the Competitive Bidding Guidelines to hold that the Guidelines in clear terms state that any variation in FERV shall be borne by the bidder stand failed as the said Clause 4.3 of the CBG will not apply in the present case as it does not cover uncontrollable, unforeseen and unprecedented events and only covers day-to-day foreseeable risks which can be anticipated, the depreciation of the INR vis-à-vis USD anticipated by Central Commission was in the range of 0.74% per annum, whereas in contrast, the actual depreciation of the INR since 2007 is 5% per annum.

42. This Tribunal vide the above said judgment dated 18.01.2019 remanded the matter to CERC for considering the same under the Regulatory Powers, with reference to the Energy Watchdog Judgment rendered by Hon'ble Supreme Court, however, the Central Commission in the remand proceedings passed the Impugned Order by disallowing such claims in the light of provisions contained under CBG and Request for Proposal ("RfP") documents without deliberating on the issue which at one stage was held by the Central Commission as *unprecedented, unforeseeable and uncontrollable* inter-alia it is covered under *normal phenomenon* as observed by it.

43. Therefore. It cannot be disputed that there was an "*unprecedented, unforeseen and uncontrollable situation due to steep foreign exchange rate variation",* as also noted and observed by CERC, however, it has not been considered on its merit whether the same is covered under the provisions contained in CBG or RfP which is referred by the Central Commission for considering the claim of the Appellant under its Regulatory Powers by claiming such an event as "***Volatility of international currency market is a normal phenomenon*** *and cannot be considered as a force majeure event. Therefore, change in the price of imported equipment on account of*

depreciation of INR cannot be considered as a direct consequence of force majeure".

44. We agree that this Tribunal vide order dated 18.01.2019 has remanded the matter to the Central Commission only for considering the claim of the Appellant for compensation on the ground of exercise of regulatory powers under Section 79(1)(b) of the Act, however, the main prayer which was made under the said Appeal require re-examination to provide equal opportunity to the Appellant and there will be no prejudice whatsoever is caused to the Respondents, since they will also be heard as the issue of "*unprecedented, unforeseen and uncontrollable steep foreign exchange rate variation"*is akin to FMEhas not been dealt with.

45. There cannot be any argument against the performance parameters for the Sasan UMPP that the power generated and supplied by the Sasan UMPP is one of the cheapest powers (**the quoted levelized Tariff of Rs. 1.19616 per unit basis**) available in the country, therefore, economic viability of the project is important for the successful operation of the plant *inter-alia* for the developer and the consumers. Further, these UMPPs are based on Super Critical Technology and achieve higher levels of fuel efficiency leading to fuel saving as well as lower green-house gas emissions.

46. Therefore, as observed by the Central Commission in its order passed in Petition No. 14/MP/2017 that "*The Commission considers it necessary to examine all the issues with reference to the base records of the petitioner in contracting debts for the project before taking a final view on intervening and giving any directions in this regard in exercise of its power under Section 79(1)(b) of the Act in the interest of the project developer as well as the consumers of the procurer States.",* weendorse such consideration by considering all issues afresh.

47. At the same time, we are constrained to examine the decision of the Central Commission whereby the prayer of the Appellant for considering the steep depreciation as FME was rejected and the same was not pressed by the Appellant during the proceedings held before this Tribunal in Appeal no. 202 of 2016, however, as the issue of considering the same under Regulatory Powers is under adjudicationin terms of whether the event is akin to FME and whether it is covered by the provisions contained under CBG or RfP or PPA.

48. The relevant provisions under the CBG and RfP are reproduced below for reference:

a) The Bidding Guidelines:

"4.3 Tariffs shall be designated in Indian Rupees only. ***Foreign exchange risks, if any, shall be borne by the supplier****. Transmission charges in all cases shall be borne by the procurer…"*

b) The RfP:

"*2.4 Tariff-The Tariff shall be specified in the PPA and shall be payable in Indian Rupee Only. The Bidder shall quote Quoted Tariff for each Contract Year during the term of the PPA as per Format 1 of Annexure-4.*

Each of the Procurers shall provide the Letter of Credit and Collateral Arrangement as per the terms of the PPA.

2.7.1.1.3 ***The Quoted Tariff in Format 1 of Annexure 4 shall be an all inclusive tariff and no exclusions shall be allowed. The Bidder shall take into account all costs including capital and operating costs, statutory taxes, duties, levies while quoting such tariff.*** *Availability of the inputs necessary for generation of power should be*

ensured by the Seller at the Project Site and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the Project Site must be reflected in the Quoted Tariff…"

49. As seen from above, it cannot be denied that in the present case, neither guidelines nor the bid document provides any allocation of risk for an unprecedented, unforeseen and uncontrollable steep depreciation of the INR vis-a-vis the USD and therefore, in the absence of a regulatory framework dealing with this situation, the Central Commission can exercise its regulatory powers to grant relief to SPL, in terms of the Energy Watchdog Judgment. These documents cover only the **"*foreign exchange risk*"** and as observed by CERC that such risk on account of FERV is a common occurring event stating that "***Volatility of international currency market is a normal phenomenon",*** therefore, it is important todecide whether the referred steep depreciation is a normal phenomenon or not.

50. Our attention was invited to the judgment rendered by this Hon'ble Tribunal while considering the scope of regulatory powers in its Judgment dated 07.09.2018 in Appeal No. 336 of 2017 *titled 'UPPCL v. Lanco & Ors**.'***, wherein it was held as under:-

"10.25 We are of the considered view, based on the findings of the Apex Court cited hereinabove, ***that the general regulatory powers of the Central/State Commission are not done away in its entirety and can be exercised in the exceptional circumstances where there are no guidelines or in a situation which is not covered by the guidelines.*** *As in the present case,* ***such a change in law impacting several consequential issues is required to be dealt by the State***

Commission as an unforeseen event and to be decided by striking a judicious balance between the generator and the Discom/consumers*. The State Commission has analyzed the issues in detail based on the report/ recommendations of the Expert Committee and decided the matter after applying prudence check. We further consider the judgement of this Tribunal in Nabha Power Limited V/s. PSPCL case dated 17.05.2018 in Appeal No. 283 of 2015. The above case was primarily for granting compensation for increased SHR as per the new guidelines/amendments of the Government of India/CERC. Vide this judgement, the Tribunal had taken a stand that under case 2 bidding, the SHR was one of the critical parameters for bid evaluation and any margin/compensation thereon was not envisaged in bidding documents and concluded PPA. It was further decided by this Tribunal that the cited guidelines/amendments relating to compensation of SHR and other parameters resulting due to part load operation cannot be applied retrospectively to old plants and are meant for new power plants coming after notification of the said documents. The above case did not involve a change in law as in this case and was confined to non-achieving operating parameters due to part/varying load operation of the super critical units.*

10.26 The Appeal No. 359 of 2017 has been filed for adjudication on behalf of consumer of the State and need to be decided keeping the justice and equity in mind for ultimate interest of the generators as well as distributors and consumers. While in past, the sole factor for consumer interest was considered to be cheaper power but with the change in supply vs. demand pattern, the same is not

limited now to that alone and the interest of distribution companies and in turn, consumers lie in availability of reasonably affordable power in reliable and quality manner besides being sustainable in long run. We accordingly, conclude that the decision of the State Commission is covered under the ambit of legal framework as well as the long term consumer interest.

…

11.1 In view of our findings and analysis of the issues involved in the instant appeals, we arrive at a fair conclusion that the core issue is primarily a result of change in law pertaining to NCDP which, inter-alia, disturbed the basic fabric of the contract between the parties. ***The change in law impacted the several consequential issues which were not anticipated / provided for in the biddings documents and the concluded PPA. Taking cognizance of the views of the Appellant and the Respondent, the State Commission considered that both the parties have contemplated for the operation of Anpara 'C' project to continue being one of the cheapest source of power for the State of Uttar Pradesh. Specifically, keeping this in view, the State Commission, in line with the findings of the Hon'ble Supreme Court in its judgment in Energy Watchdog v Central Electricity Regulatory Commission case has evolved a compensatory mechanism for restoration of the economic position of Lanco under the periphery of law, based on the analysis and recommendations of an Expert Committee constituted by it.*** *The Appellant has, on a number of occasions, acknowledged the need for helping out Lanco so as to run its plant for the ultimate benefit of the public of the State at large. However, the*

Appellant maintained that the measures for financial restoration / compensation should lie under the legal and judicial framework."

[Emphasis Supplied]

51. From the above it is seen that the regulatory powers of the Central/State Commission cannot be abated in its entirety and can be exercised in the exceptional circumstances where there are no guidelines or in a situation which is not covered by the guidelines like in the present case due to "***occurrence of an unprecedented, unforeseen and uncontrollable event"***, and any such event is required to be dealt by the Central Commission as an unprecedented, unforeseen, uncontrollable event and to be decided by striking a judicious balance between the generator and the Discom/consumers.

52. We find it most reasonable and just, the decision of the Central Commission in order dated 21.02.2014 by observing that the present case is a fit case for exercise of regulatory powers as the depreciation of INR vis a vis USD is an unforeseen, uncontrollable and unprecedented event and Sasan UMPP is one of the cheapest and most reliable Thermal Power Plant in the country, however, failed in acknowledging the fact that there had been no change in the factual situation between the passing of order dated 21.02.2014 and the Impugned Order and as a quasi-judicial body, it should have followed its earlier decision.

53. It is also observed that the lead procurer, MPPMCL has changed its stand from what is recorded in the CERC order, it took the following stand before us which is contrary to its earlier stand taken as recorded in the CERC order:

a) It is not a fit case for exercise of Regulatory Powers by the Central Commission under Section 79(1)(b) of the Act 2003 since regulatory powers can only be invoked in case there are no guidelines or the guidelines do not deal with a given situation. In the present case, the issue regarding FERV is squarely covered by the Guidelines.
b) In the present case, the bidding documents and the RfP specifically stipulate that FERV shall be to the account of the selected bidder and hence SPL cannot argue that steep depreciation of INR vis-a-vis USD is unprecedented and unforeseeable and that the same has threatened the viability and sustainability of the project.
c) In this backdrop, it was argued that the Energy Watchdog Judgment is wholly inapplicable in the facts and circumstances of the present case.

54. The stand taken by the MPPMCL is reiteration of the Impugned Order passed by the Central Commission, additionally stating that the remand by this Tribunal is specific to only exercise of Regulatory Powers by CERC and the issue of FME is closed as the same was not pressed by the SPL during the proceedings held in Appeal no. 202 of 2016.

55. Similar contentions were also raised by Respondent No. 3 to Respondent No. 6, i.e. the Distribution Licensees of Uttar Pradesh.

56. The Respondent No. 7,8 and 9, i.e. RUVNL also reiterated the submissions as summarised below:

i. The Energy Watchdog Judgment in categoric terms holds that ‘it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.’

ii. Since the Bid Documents as well as the Guidelines categorically deal with the risk allocation in case of variation in FERV (i.e. with the bidder), the Energy Watchdog Judgment is inapplicable.

iii. It was for SPL to make appropriate financial arrangement including hedging of FERV and the same was entirely at the cost and risk of SPL.

iv. The Order dated 21.02.2014 was passed by the Central Commission prior to the law laid down by the Hon'ble Supreme Court in the Energy Watchdog Judgment as regards the scope of regulatory powers under Section 79(1)(b) of the Act and cannot be still held to be valid (vis-à-vis) the scope of regulatory powers.

57. Respondent No. 10, i.e. TPDDL reiterated the submissions made by other Distribution Licensees as quoted above, also argued that SPL's claim is barred by *Res Judicata* as SPL's claim has already been considered and rejected by this Hon'ble Tribunal as well as the Hon'ble Supreme Court.

58. Respondent No. 13 and 14 also submitted on similar lines and further argued that the Order dated 21.02.2014 passed by Central Commission is of no consequence as the same was eventually set aside by this Tribunal.

59. Before examining the merits of the contentions raised by the parties, it is important to bear in mind some of the merits of the Sasan UMPP, as noted in the preceding paragraphs, which is a captive coal based project, awarded under the global bidding route, also super-critical technology was being introduced in India for the first time.

60. Also, the global economic crisis in 2007–2008 impacted the world wide industries and USD financing became scarce and the cost of finance rose exponentially, impacting the project cost also.

61. The Appellant submitted that steep depreciation of the INR vis-à-vis the USD, the Project cost as approved by the lenders (in November 2015) as Rs. 26,405 Crores increased by approximately Rs. 1574 Crore from original cost of Rs 19,600 Crores.

62. The issue, as already discussed in the foregoing paragraphs, is principally whether the Central Commission should have exercised its regulatory powers or not in the facts and circumstances of the case, the power to regulate takes its color from Section 79(1)(b) of the Act, which specifies that Central Commission shall discharge the function of regulating the tariff of generating companies as in the instant case, and the scope of the term "regulate" has been dealt by the Hon'ble Supreme Court in the *Energy Watchdog Judgment* and also by this Hon'ble Tribunal, reliance is placed on the following judgments interpreting the meaning and application of the '*Regulate*':-

i. *V.S. Rice & Oil Mills* v. *State of A.P.*, AIR 1964 SC 1781:

> *"20. Then it was faintly argued by Mr. Setalvad that the power to regulate conferred on the respondent by Section 3(1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is entirely misconceived.* ***The word "regulate" is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to***

arrange for its equitable distribution and its availability at fair prices*."*

ii. *State of T.N.* v. *Hind Stone*, (1981) 2 SCC 205, wherein the Hon'ble Supreme Court has observed that that the word '*Regulate*' also included 'prohibition':

"10. … We do not think that 'regulation' has that rigidity of meaning as never to take in 'prohibition'. Much depends on the context in which the expression is used in the statute and the object sought to be achieved by the contemplated regulation. It was observed by Mathew, J. in G.K. Krishnan *v.* State of T.N. *[(1975) 1 SCC 375] : (SCC p. 381, para 14) 'The* ***word "regulation" has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied.' In modern statutes concerned as they are with economic and social activities, 'regulation' must, of necessity, receive so wide an interpretation that in certain situations, it must exclude competition to the public sector from the private sector****. More so in a welfare State. It was pointed out by the Privy Council in* Commonwealth of Australia *v.* Bank of New South Wales *[[1950] A.C. 235 : (1949) 2 All ER 755 (PC)] — and we agree with what was stated therein—that the problem whether an enactment was regulatory or something more or whether a restriction was direct or only remote or only incidental involved, not so much legal as political, social or economic consideration and that it could not be laid down that in no circumstances could the exclusion of competition so as to create a monopoly, either in a State or Commonwealth agency, be justified.* ***Each case, it was said, must be judged on its own facts and in its own setting of time and circumstances***

and it might be that in regard to some economic activities and at some stage of social development, prohibition with a view to State monopoly was the only practical and reasonable manner of regulation*. The statute with which we are concerned, the Mines and Minerals (Development and Regulation) Act, is aimed, as we have already said more than once, at the conservation and the prudent and discriminating exploitation of minerals. Surely, in the case of a scarce mineral, to permit exploitation by the State or its agency and to prohibit exploitation by private agencies is the most effective method of conservation and prudent exploitation. If you want to conserve for the future, you must prohibit in the present. We have no doubt that the prohibiting of leases in certain cases is part of the regulation contemplated by Section 15 of the Act."*

iii. *Deepak Theatre, Dhuri* v. *State of Punjab*, 1992 Supp (1) SCC 684:

"3. It is settled law that the rules validly made under the Act, for all intents and purposes, be deemed to be part of the statute. The conditions of the licence issued under the rules form an integral part of the statute. The question emerges whether the word regulation would encompass the power to fix rates of admission and classification of the seats. The power to regulate may include the power to license or to refuse the licence or to require taking out a licence and may also include the power to tax or exempt from taxation, but not the power to impose a tax for the revenue in rule making power unless there is a valid legislation in that behalf. ***Therefore, the power to regulate a particular business or calling implies the power to prescribe and enforce all such proper and reasonable***

rules and regulations as may be deemed necessary to conduct the business in a proper and orderly manner. It also includes the authority to prescribe the reasonable rules, regulations or conditions subject to which the business may be permitted or conducted*. A conjoint reading of Section 5, Section 9, Rule 4 and condition 4-A gives, therefore, the power to the licensing authority to classify seats and prescribe rates of admission into the cinema theatre."*

iv. *Vidarbha Industries Association v. Maharashtra State Electricity Distribution Co. Ltd.*, 2006 SCC OnLine APTEL 110:

"26. The learned counsel for the appellant contended that the power to regulate will not confer or take in the power to collect load management charge. This aspect has already been considered by the Supreme Court in the said two pronouncements. ***That apart while considering the expression 'regulate' in U.P. Cooperative Cane Unions Federations v. West U.P. Sugar Mill and Association reported in 2004 Vol 5 SCC 430, after analyzing pronouncement in Giyajee Rao Cotton Mills Ltd. and the entire case the law, majority of the judges held that the power to 'regulate' shall include full power over the thing and the power must be regarded as plenary over the entire subject. It was further held that 'regulate' means to control or to adjust by rule or to subject to governing principles. Their Lordships held that it is a word of broad impact having wide meaning comprehending all facts not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be***

ascertained in the context in which it has been used and the purpose of the statute*."*

[***Emphasis Supplied***]

63. From a perusal of the above judgments, it is obvious that the powers under the phrase "*to regulate*" are very wide and therefore, the widest possible execution is expected, having such a wide jurisdiction, the Central Commission may exercise such powers, if satisfied that the issue need the executionof such powers as is observed in its interim order dated 21.02.2014by observing that:

"*taking a final view on intervening and giving any directions in this regard in exercise of its power under Section 79(1)(b) of the Act in the interest of the project developer as well as the consumers of the procurer States"*.

64. Therefore, in the present case the Appellant has approached the Central Commission seeking compensation on account of "*occurrence of an unprecedented, unforeseen and uncontrollable event due to steep depreciation of INR vis-à-vis USD" inter-alia* Sasan UMPP existence in the context of the financial deprivation faced on account of FERV, the Central Commission is duty bound to consider the plea and if a case is made out then exercise its power to regulate to ensure that the stated objective of Section 79(1)(b) is achieved, expressly in the light of the *Energy Watchdog Judgment* wherein it was made categorically clear that the Central Commission can indeed exercise powers to regulate tariff under Section 79(1)(b), even where the tariff has been determined under Section 63 of the Act, subject to the condition that such power is exercised consistently with the Guidelines,relevant para of the *Energy Watchdog Judgment* is as follows:

"19. The construction of Section 63, when read with the other provisions of this Act, is what comes up for decision in the present appeals. It may be noticed that Section 63 begins with a non obstante clause, but it is a non obstante clause covering only Section 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not "determine" tariff but only "adopts" tariff already determined under Section 63. Thirdly, such "adoption" is only if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a standalone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this section on 19-1-2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4.

20. ***It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are***

specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b).For one thing, such regulation takes place under the Central Government's guidelines. *For another, in* ***a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions.*** *The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways –*

either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(l)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. ***In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of***

electricity is dealt with by Section 79(l)(d), Section 79(l)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.”

65. As apprehended in the above judgment, the Central Commission can be exercised its Regulatory Powers in two exceptional circumstances: -

(a) where no Guidelines are framed, or
(b) where the Guidelines do not deal with a given situation.

66. The Appellant submitted that the Central Commissionhas not considered certain critical facts before passing the Impugned Order as under:-

a. The Competitive Bidding Guidelines were issued under Section 63 of the Act in the year 2005, when the exchange rate between INR and USD was very much stable.
b. SPL, submitted its bid and executed PPA based on the Central Commission notification dated 04.04.2007 wherein USD-INR annual escalation of exchange variation rate of the 0.74% was incorporated for the purpose of bid evaluation and payment at the time, based on observation of the trend of previous nine calendar years (1998-2006) using 3 years moving average rate.

c. The Global Financial Crisis occurred in 2007-2008, resulting into the USD financing a scarcity, and the cost of finance rose exponentially, also impactingthe Project cost on account of global economic crisis, and a steep depreciation of INR vis a vis USD.

d. The steep depreciation was noted as unprecedented in Rajya Sabha, Lok Sabha and in the World Bank report, hence, the parties could not have contemplated such an unforeseeable and unprecedented event.

e. From conjoint reading of Para 4.3 of Competitive Bidding Guidelines, which provides that foreign exchange risks, if any, shall be borne by the Seller, with the Central Commission's escalation index, it evinces that any Dollar-Rupee exchange rate variation up to 0.74% p.a., which was notified by the Central Commission by adopting a rigorous approach considering past data, would be considered as a foreseeable foreign exchange rate variation (FERV) risk and ought to be borne by the Seller of the power and FERV beyond 0.74% p.a. is clearly not envisaged by CBG. Even the PPA does not address risk arising from FERV.

67. Further submitted that when the Central Commissioncould not foresee the drastic change, then how could have SPL or any other Generator foreseen the same.

68. It is a settled principle that the role of a Regulator in the instant case the Central Commissionis more than just an adjudicator of disputes, as opposed to that of a Court, Hon'ble Supreme Court in *Lafarge Umium Mining Pvt Ltd in T N Godhavarman Thirumulpad v. Union of India*,(2011) 7 SCC 338, has held that:

"122…The difference between a Regulator and a Court must be kept in mind. The Court/Tribunal is basically an authority which reacts to a given situation brought to its notice whereas a Regulator is a proactive body with the power conferred upon it to frame statutory rules and regulations…"

69. This Tribunal vide judgement dated 26.07.2022 in NTPC Vidyut Vyapar Nigam Limited v. M/s Godawari Green Energy Limited (Appeal No. 403 of 2017) has held that FERV can be akin to Force Majeure in very specific circumstances and need to be examined by the Central Commission for providing relief to the generators and if FERV is 'akin to force majeure', it needs to be examined by the Central Commission under Section 79(1)(b) of the Act.

70. The Central Commissionvide order dated 21.02.2014 in Petition No. 14/MP/2013 despite observing that the depreciation of INR and the rise in FERV is an unprecedented event and accordingly claim for compensation may have to be considered, rejected SPL's claim of force majeure, aadmittedly, this finding has never been challenged by SPL even though grounds of Force Majeure were raised by SPL in subsequent proceedings before Hon'ble Tribunal as well as the Central Commission. The Central Commission in its interim order has held that "However, *taking into account the trend of depreciation from September 2011 onwards, it cannot be denied that the depreciation of INR is unforeseeable and uncontrollable and has adversely affected the industries which are making payment for import or debt servicing in USD*" (Ref. Para 46 on Pg 44 of the said CERC order).

71. It is a admitted fact that during the present proceedings SPL has not pursued the compensation on the basis of Force Majeure event, therefore,

the contentions raised in the appeal and arguments advanced in that regard by all the parties, cannot be considered now against the compensation for FME, however as SPL also has sought the matter to be remanded back to the Central Commission on the limited issue of power to regulate under section 79 (1) (b) of the Act due to unforeseen, unprecedented, and uncontrollable event because of steep depreciation in INR as against USD, it is opined that:

i. Once SPL itself had conceded its claim of Force Majeure, it now cannot reagitate the issue, however, as mentioned earlier, the present case may be examined under the Regulatory Powers the steep depreciation of FERV is and uncontrollable, unforeseen and unprecedented event which is beyond the control of the Appellant,
ii. The project was set up under the initiative taken by Government to develop UMPPs on Super Critical technology to meet the growing needs of the Indian economy,
iii. There was significant share of forex component irrespective of source of procurement of equipment, since in response to the competitive bids invited for sourcing Boiler, Turbine and Generator ***("BTG")*** equipment by SPL, even domestic supplier like Bharat Heavy Electricals Limited (***"BHEL"***) [while quoting 85% higher price than the lowest bidder i.e., Shanghai Electric Corporation ***("SEC")***] was seeking substantial amount (49%) of its quote in USD denominated terms which was equivalent to 91% of the total price offered by SEC.
iv. Significantly higher quote in USD terms by BHEL was clearly reflective of its dependence on imports for key equipment and its then existing business model as an aggregator and if SPL had gone for placing order on BHEL, the BTG package cost would have been higher by nearly Rs. 4000 Crore compared to the bid of lowest the bidder i.e., SEC.

72. Considering the aforementioned circumstances, we find it most appropriate, just and reasonable that this Tribunal in these special circumstances has the right to recast the relief by keeping justice, equity and good conscience in mind as held by this Tribunal in Appeal No. 241 of 2016 Adani Power Maharashtra Ltd. vs. Maharashtra Electricity Regulatory Commission & Ors. by Judgment dated 31.05.2019,while referring to the *Energy Watchdog Judgment*, that in order to grant relief on equities by keeping justice, equity and good conscience at the back of the mind, Tribunal can recast the relief by exercising discretionary power which is consistent with facts and circumstances established in a given cause of action, the relevant extract is as under:

> ***"154.*** *With regard to discretionary powers of AppellateTribunal for Electricity, there cannot beadoubt that this Tribunal is a Courtoffirst Appeal to consider orders of various State Commissions as well as CERC.* ***Whether this Tribunal has discretionary power to mould relief, if specifically not sought for is one of the arguments addressed before us. It is well settled by various judgments of the Hon'ble Apex Court that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that such plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence.*** *What Courthas to consider for such situation is whether the parties knew that the matter in question involved in the trial and they brought to the notice of the trial court about the same? Then it is purely a formality.*

155. In order to grant relief on equities by keeping justice, equity and good conscience at the back of the mind, the Tribunal can shape the relief consistent with facts and circumstances established in a given cause of action. The Tribunal feels moulding of relief is necessary to meet ends of justice, after taking all facts and circumstances into consideration, can mould the relief by exercising discretionary power.

200. On account of various subsequent events as specified above including judgment to Full Bench and reversal of the Full Bench judgment by Hon'ble Apex Court on certain issues and analysis and opinion on the points of force majeure and change in law in Energy Watchdog case, we are of the opinion that there has to be a holistic consideration of the matter afresh. In the circumstances referred to above, we are of the opinion there is necessity to relook in to the matter afresh by the State Commission on the issues of force majeure and change in law.

201.We are of the opinion, in view of the opinion of the Hon'ble Apex Court on the issue of exercising regulatory powers by appropriate Commission, we hold that MERC can exercise regulatory powers to grant compensatory tariff. Therefore, MERC need not ponder over this issue afresh.

202. *In the above circumstances, we are of the opinion, the relief sought in the present appeal does not amount to review of Order dated 11.05.2016 in Appeal No. 296 of 2013.*

203. *From the discussion above based on pleadings and arguments, it is crystal clear that appellant had not abandoned the plea of 'change in law' event.*

204. For the reasons mentioned above, the reliefs deserve to be moulded in the above appeal. Accordingly, all points are answered in favour of appellant.

205. *For the reasons mentioned above, the Appeal is allowed by setting aside the impugned orders of a rasitrelates to issue of force majeure. The matter is remitted back to MERC for fresh* ***consideration on the issues of force majeure and change in law.***

206. MERC shall hear the parties on the above two issues afresh, so that all facts and law which came into existence subsequent to impugned order could be brought on record for the benefit of MERC.

207. MERC untrammeled by its earlier reasoning on the issue of force majeure shall proceed with the matter on the issues pertaining to force majeure as well as change in law and consequences thereof in the light of our observations and reasoning.*"*

73. Also, this Tribunal in Judgment dated 27.05.2019 in Appeal No. 195 of 2016 GMR Kamalanga Energy Ltd. v. CERC & Ors. has held that:

> *"68.**Therefore, it is clear that this Tribunal being the Appellate Authority having regard to the facts and circumstances of the case can allow the prayer by moulding the relief to meet the ends of justice**. If the terms of the contract provide that parties must be brought to same economic position, it would include that all additional costs, which occurs after the cut-off date in terms of the change in law event, have to be compensated and if there is any time gap between the date of spending and realizing the said amount, carrying cost/ interest has to be paid then only the parties could be put to same economic position. Therefore, this claim of the Appellant is also allowed."*

74. We, therefore, feel that in such a situation where neither the PPA nor the Competitive Bidding Guidelines deal with a situation of a unforeseeable, uncontrollable and unprecedented depreciation, the Central Commissionought to have examined the application of its general regulatory powers under Section 79 (1) (b), to frame suitable mechanism for the purpose of appropriate compensation especially in the peculiar facts and circumstances of the present case and balancing the competing interest of all the stakeholders including general public, specifically consumers as well as the project developer.

ORDER

For foregoing reasons as stated supra, we are of the considered view that the Appeal filed by SPL has merit and is thus allowed. The Impugned Order dated 25.01.2021 passed by the Central Electricity Regulatory Commission in Petition No. 71/MP/2019 is set aside, the Central Electricity Regulatory

Commission is directed to pass necessary consequential order in the light of observation and conclusions recorded by us in the foregoing paragraphs.

PRONOUNCED IN THE OPEN COURT ON THIS 14TH DAY OF NOVEMBER, 2022.

(Sandesh Kumar Sharma)	**(Justice R. K. Gauba)**
Technical Member	**Officiating Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

pr/mkj