

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**APPEAL NO. 91 OF 2020  
APPEAL NO. 145 OF 2021  
AND  
APPEAL NO. 327 OF 2022**

**Dated: 25.08.2022**

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

**APPEAL NO. 91 OF 2020**

**In the matter of:**

**TAMIL NADU GENERATION AND DISTRIBUTION  
CORPORATION LIMITED (TANGEDCO)**

*Rep. by Chief Engineer/PPP*

*NPKRR Maaligai*

*144, Anna Salai,*

*Chennai – 600 002*

... Appellant(s)

**VERSUS**

**1. CENTRAL ELECTRICITY REGULATORY COMMISSION**

*Rep. by the Secretary,*

*3<sup>rd</sup> Floor, Chanderlok Building*

*36, Janpath,*

*New Delhi-110 001*

**2. D B POWER LIMITED**

*Rep. by its Manager*

*3<sup>rd</sup> Floor, Naman Corporate Link,*

*Opp. Dena Bank, C-31, G-Block,*

*Bandra – Kurla Complex, Bandra (E)*

*Mumbai – 400 051*

... Respondent(s)

Counsel for the Appellant (s) : Mr. Basava Prabhu Patil, Sr. Adv.  
Ms. Anusha Nagarajan,  
Mr. Geet Ahuja  
Mr. Rahul Ranjan

Counsel for the Respondent (s) : Mr. Gopal Jain, Sr. Adv.  
Mr. Deepak Khurana  
Mr. Vineet Tayal  
Ms. Nistha Wadhawa  
Mr. Ashwini Tak for R-2

## APPEAL NO. 145 OF 2021

### In the matter of:

#### **TAMIL NADU GENERATION AND DISTRIBUTION CORPORATION LIMITED (TANGEDCO)**

*Rep. by Chief Engineer/PPP*

*NPKRR Maaligai*

*144, Anna Salai,*

*Chennai – 600 002*

... Appellant(s)

### **VERSUS**

#### **1. CENTRAL ELECTRICITY REGULATORY COMMISSION**

*Rep. by The Secretary,*

*3<sup>rd</sup> Floor, Chanderlok Building*

*36, Janpath, New Delhi-110 001*

#### **2. M/S KSK MAHANADI POWER COMPANY LIMITED**

*8-2-292.82.A.431.A, Road No. 22,*

*Jubilee Hills,*

*Hyderabad -500 033*

*Andhra Pradesh*

... Respondent(s)

Counsel for the Appellant (s) : Ms. Anusha Nagarajan,  
Mr. Rahul Ranjan

Counsel for the Respondent (s) : Mr. Anand K. Ganesan  
Ms. Kriti Soni for R-2

## APPEAL NO. 327 OF 2022

### In the matter of:

#### **M/S KSK MAHANADI POWER COMPANY LIMITED**

*Though its Executive Vice President*

*8-2-292/82/A/431/A, Road No. 22,*

*Jubilee Hills,*

*Hyderabad -500 033*

*Andhra Pradesh*

... Appellant(s)

### **VERSUS**

#### **1. CENTRAL ELECTRICITY REGULATORY COMMISSION**

*Though its Secretary,*

*3<sup>rd</sup> & 4<sup>th</sup> Floor, Chanderlok Building*

*36, Janpath,*

*New Delhi-110 001*

#### **2. TAMIL NADU GENERATION AND DISTRIBUTION CORPORATION LIMITED (TANGEDCO)**

*Though its Chairman and Managing Director*

*Western Wing, 6<sup>th</sup> Floor, NPKRR Maaligai*

*144, Anna Salai, Chennai – 600 002*

... Respondent(s)

Counsel for the Appellant (s) : Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Kriti Soni

Counsel for the Respondent (s) : Ms. Anusha Nagarajan,  
Mr. Rahul Ranjan for R-2

## **J U D G M E N T**

**PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON**

1. *Tamil Nadu Generation and Distribution Corporation Limited* (for short "TANGEDCO"), the appellant in the first two captioned appeals is the licensee engaged in the business of distribution of electricity in the State of Tamil Nadu. *D.B. Power Limited* (for short "DBPL"), and *KSK Mahanadi Power Company Limited* (for short "KSK"), the second respondents in the first two captioned appeals, the latter being the appellant in the third captioned appeal, are companies engaged in the business of generation of electricity through their respective power projects. TANGEDCO had entered into Power Purchase Agreements ("PPAs") with DBPL and KSK for procurement of electricity through competitive bidding process, the bid quoted price being the agreed tariff.

2. Disputes arose as to the applicable tariff for the period from which the electricity has been procured and were taken to the first respondent i.e. *Central Electricity Regulatory Commission* (for short "the Central Commission") by petition nos.117/MP/2017 and 227/MP/2017 which were decided by similar orders passed on 22.07.2019 and 23.07.2019 respectively. TANGEDCO feeling aggrieved by the said dispensation has come up in appeals. KSK had gone back to the Commission by review petition (no.7/RP/2020) over part denial of certain relief. The said petition was decided by the Central Commission by order dated 30.08.2021 partly modifying the original order dated 23.07.2019. The third captioned appeal

brought by KSK assails the view taken by the Central Commission in the review jurisdiction.

**3.** In the wake of competitive bidding process under case-1 bidding procedure initiated by TANGEDCO on 01.10.2013, with approval of the *Tamil Nadu Electricity Regulatory Commission* (“the State Commission”), floating a long term tender for procurement of power for a period of 15 years mentioning the *Scheduled Delivery Date* (“SDD”) as 01.10.2013, with agreement validity period specified as up to 30.09.2028 (“the Expiry Date”), the bids submitted, *inter alia*, by DBPL and KSK having been accepted, PPAs were executed on 19.08.2013 and 27.11.2013 respectively for supply of 208 MW RTC Power and 500 MW RTC Power respectively, the SDD specified in the contracts being 01.02.2014 and 01.06.2014 respectively. The “quoted tariff” of each of these generating companies was reflected in the respective PPAs as the tariff schedule (schedule-8), it having been made part thereof without any change with respect to the *Effective Date* or the *Contract Year*. The supply by the generating companies, and procurement thereof by TANGEDCO (the “distribution licensee” – hereinafter also referred to as “the procurer”), concededly depended on the arrangement and operationalization of *Long Terms Access* (“LTA”) by the *Power Grid Corporation of India Limited* (“PGCIL”). DBPL commenced supply of 117 MW upon operationalisation of LTA to that extent by PGCIL w.e.f. 01.08.2015 and the entire capacity of 208 MW (including the balance 91 MW) w.e.f. 05.10.2015. Likewise, KSK secured from PGCIL operationalisation of LTA for 281 MW w.e.f. 01.08.2015 and for the balance 219 MW (total 500 MW) w.e.f. 05.10.2015, and supplied electricity to TANGEDCO accordingly effective from the said dates.

**4.** The terms and conditions of the two PPAs are almost identical (barring the quoted tariff adopted as the tariff schedule), they being based

on the model PPA as per the bid document. Some of the said terms and conditions, relevant here, may be taken note of.

5. Certain expressions were defined in Article-1, the critical ones being as under:

*“ ‘Contract Year’ shall mean the period commencing on the Effective Date (as defined hereunder) and ending on the immediately succeeding March 31 and thereafter each period of twelve (12) months commencing on April 1 and ending on March 31;*

*Provided that:*

- i) in the financial year in which the Scheduled Delivery Date would occur, the Contract Year shall end on the date immediately before the Scheduled Delivery Date and a new Contract Year shall commence once again from the Scheduled Delivery Date and end on the immediately succeeding March 31, and thereafter each period of twelve (12) months commencing on April 1 and ending on March 31, and*
- ii) provided further that the last Contract Year of this Agreement shall end on the last day of the Term of this Agreement;*

*And further provided that for the purpose of payment, the Tariff shall be the Quoted Tariff for the applicable Contract Year as per Schedule 8 of this Agreement;*

*‘Delivery Date’ shall mean the date on which the seller commences supply of the Aggregate Contracted Capacity to the Procurer;*

*‘Effective Date’ shall have the meaning ascribed thereto in Article 2.1 of this Agreement;*

*‘Expiry Date’ shall mean the date which is the 30.09.2028 (15<sup>th</sup>) anniversary of the Delivery Date;*

*‘Tariff’ shall mean the tariff as computed in accordance with Schedule 4 of this Agreement;*

*‘Scheduled Delivery Date’ shall have the meaning ascribed thereto in Article 4.1 of this Agreement;*

*‘Force Majeure’ shall have the meaning ascribed thereto in Article 9.3 of this Agreement”*

*[Emphasis supplied]*

6. As noted above, the meaning ascribed to the expression *force majeure* is defined by Article 9.3 which, to the extent relevant, reads as under:

**“9.3 Force Majeure**

9.3.1 A ‘Force Majeure’ means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

Any restriction imposed by PGCIL in scheduling of power due to breakdown of transmission / grid constraint shall be treated as force Majeure without any liability on either side (Non availability of open access is treated as Force Majeure).

**i. Natural Force Majeure Events**

*act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years,*

**ii. Non-Natural Force Majeure Events**

1. *Direct Non-Natural Force Majeure Events attributable to the Procurer*  
...
2. *Direct Non-Natural Force Majeure Events not attributable to the Procurer*  
...
3. *Indirect Non-Natural Force Majeure Events*  
... ”

*[Emphasis supplied]*

7. Article 3 of the PPA relates to “Conditions Subsequent to be Satisfied by Seller / Procurer”. The following clauses of the said Article are relevant and have come up for debate in these proceedings:

**“3.1 Satisfaction of conditions subsequent by the Seller**

3.1.1 The Seller agrees and undertakes to duly perform and complete the following activities at the Seller's own cost and risk on or before the scheduled delivery date, unless such completion is affected by any Force Majeure event or due to the Procurer's failure to comply with their obligations under Article 3.2.1 of this Agreement, or if any of the activities is specifically waived in writing by the Procurer

a) Deleted

b) The Seller shall have obtained all the necessary permission for the long term open access for the intrastate transmission system from the Power Station bus bar to the Injection Point (except in case if dedicated transmission access and provided a copy of the same to the Procurer;

c) The Seller shall have obtained the necessary permission for long term open access for the transmission system from the Injection Point up to the Delivery Point and have executed the Transmission Service Agreement with the transmission licensee for transmission of power from the Injection Point up to the Delivery Point and provided a copy of the same to the Procurer;

...

i) The Seller is permitted to apply for Open Access under Medium Term Open Access in case Long Term Open Access is granted from a day later than the Scheduled Delivery date.

...

### **3.3 Joint responsibilities of the Procurer and the Seller**

3.3.1 The Procurer and the Seller shall have jointly agreed on the specific date for commencement of supply of power of power and quantum of the Contracted Capacity to be supplied to Procurer. Such mutually agreed date shall not be later than the Scheduled Delivery Date, and the total quantum of power shall be equal to the Aggregate Contracted Capacity.

3.3.2 This date shall be mutually agreed upon and shall be the Revised Scheduled Delivery Date for the respective quantum of power.

### **3.4 Consequences of non-fulfillment of conditions subsequent**

3.4.1 If any one or more of the conditions specified in Article 3.1 is not duly fulfilled by the Seller, even within three (3) Month after the time specified under Article 3.1, otherwise than for the reasons directly attributable to the Procurer or Force Majeure event in terms of Article 3.4.3, then on and from the expiry of

such period and until the Seller has satisfied all the conditions specified in Article 3.1, the Seller shall, on weekly basis, be liable to furnish to the Procurer additional Contract Performance Guarantee from any of the banks listed in Schedule 11 of this Agreement, of Rupees Three Crores and Twelve Lakhs (Rs.3.12 Crores) which has been provided to the Procurer within two (2) Business Days of expiry of every such week. Such additional Contract Performance Guarantee shall initially be valid till the Scheduled Delivery Date, and the Procurer shall be entitled to hold and/ or invoke the Contract Performance Guarantee, including such additional Contract Performance Guarantee, in accordance with the provisions of this Agreement. However, upon satisfaction of the conditions subsequent by the Seller, the additional Contract Performance Guarantee shall be returned by the Procurer.

3.4.2 Subject to Article 3.4.3, if:

- (i) fulfillment of any one or more of the conditions specified in Article 3.1 is delayed beyond the period of three (3) Months after the date specified in Article 3.1 above, and the Seller fails to furnish the additional Contract Performance Guarantee to the Procurer in accordance with Article 3,1 above, and the Seller fails to furnish the additional Contract Performance Guarantee to the Procurer in accordance with Article 3,4,1 hereof; or
- (ii) the Seller furnishes additional Contract Performance Guarantee to the Procurer in accordance with Article 3,4,1 hereof, but fails to fulfill the conditions specified in Article 3,1 for a period of six (6) Months beyond the period specified in Article 3.1 above.

The Procurer shall have the right to terminate this Agreement by giving a Termination Notice to the other Party in writing of at least seven (7) days. The termination of the Agreement shall take effect upon the expiry of the last date of the said notice period ("Termination Date").

If the Procurer elects to terminate this Agreement in the event specified in the preceding paragraph of this Article, the Seller shall be liable to pay to the Procurer on the Termination Date an amount of Rupees Eighty Three Crores and Twenty Lakhs (Rs,83.20 Crores) only as liquidated damages.

The Procurer shall be entitled to recover this amount of liquidated damages on the Termination Date, by invoking the Contract Performance Guarantee and shall then return the balance Contract Performance Guarantee, if any, to the Seller, If the Procurer is unable to recover the amount of liquidated damages or any part thereof from the Contract Performance Guarantee, the amount of liquidated damages not recovered from the Contract Performance Guarantee, if any, shall be



payable by the Seller to the Procurer within ten (10) days from the Termination Date.

For the avoidance of doubt, it is clarified that this Article shall survive the termination of this Agreement.

3.4.3 In case of inability of the Seller to fulfill any one or more of the conditions specified in Article 3.1 due to any Force Majeure event, the time period for fulfillment of the Conditions Subsequent as mentioned in Article 3.1, shall be extended for the period of such Force Majeure event, subject to a maximum extension period of ten (10) months, continuous or non-continuous in aggregate. Thereafter, this Agreement may be terminated by either the Procurer or the Seller by giving a Termination Notice of at least seven (7) days, in writing to the other Party. The termination of the Agreement shall take effect upon the expiry of the last date of the said notice period.

...

3.4.6 No Tariff adjustment shall be allowed on account of any extension of time arising under any of the sub-articles of Article 3.4;

Provided that due to the provisions of Articles 3.4.3, 3.4.4 and 3.4.5, any increase in the time period for completion of conditions subsequent mentioned under Article 3.1, shall also lead to an equal extension in the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be.

... ”

[Emphasis supplied]

8. Article 4 of the PPA regulates the “Supply of Power”. The following clauses of the said provision being germane:

**“4.1 Commencement of Supply of Power to Procurer**

4.1.1 The Seller shall be responsible to commence supply of power up to the Aggregated Contracted Capacity by the Scheduled Delivery Date in accordance with the provisions of this Agreement, which is 01.02.2014. However, the Seller and the Procurer may mutually agree for commencement of supply of power in a phased manner from the Revised Scheduled Delivery Date as specified in Article 3.3 of this Agreement.

...

**4.7 Extensions of Time**

4.7.1 In the event that the Seller is prevented from performing its obligations under Article 4.1.1 by the Revised Scheduled

Delivery Date(s) or the Scheduled Delivery Date, as the case may be, due to:

- a) any Procurer Event of Default; or
- b) Force Majeure Events affecting the Procurer, or
- c) Force Majeure Events affecting the Seller,

the Revised Scheduled Delivery Date, Scheduled Delivery Date and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.7.2, for a reasonable period but not less than 'day for day' basis, to permit the Seller or the Procurer through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Seller or the Procurer, or till such time such Event of Default is rectified by the Procurer.

...

4.7.5 As a result of such extension, the Scheduled Delivery Date and the Expiry Date newly determined shall be deemed to be the Scheduled Delivery Date and the Expiry Date for the purposes of this Agreement.

... ”

[Emphasis supplied]

**9.** The definition of *force majeure*, as appearing in Article 9.3.1, has already been taken note of. It may be mentioned here that there are certain exclusions to the doctrine of *force majeure*, the primary test being as to whether the event or circumstance is or was “*within reasonable control*” of the party claiming relief in such respect, the claim for relief being contingent, *inter alia*, on the notification of *force majeure* event or circumstance and duty to perform or to mitigate.

**10.** Since reference has come to be made during the hearing on the clauses relating to “waiver” appearing in Article 15.5, in the Chapter labelled as “Miscellaneous Provisions”, the same may be extracted as under:

**“15.5 Waiver**

*15.5.1 No waiver by either Party of any default or breach by the other Party in the performance of any of the provisions of this Agreement shall be effective unless in writing duly executed by an authorised representative of such Party;*

15.5.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement nor time or other indulgence granted by one Party to the other Parties shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right under this Agreement, which shall remain in full force and effect.

11. As mentioned earlier, Schedule 4 of each PPA governs the subject of “Tariff”, the following clause thereof being relevant for present discussion:

**“ 4.1 General**

- i) The method of determination of Tariff Payments for any Contract Year during the Term of Agreement shall be in accordance with this Schedule.
- ii) The Tariff shall be paid in two parts comprising of Capacity Charge and Energy Charge as mentioned in Schedule 8 of this Agreement.
- iii) For the purpose of payments, the Tariff will be Quoted Tariff as specified in Schedule 8, duly escalated as provided in Schedule 6 for the applicable Contract Year.
- iv) The full Capacity Charges shall be payable based on the Contracted Capacity at Normative Availability and incentive shall be provided for Availability beyond (85%) as provided in this Schedule. In case of Availability being lower than the Normative Availability, the Capacity Charges shall be payable on proportionate basis in addition to the penalty to be paid by the Seller as provided in this Schedule.”

*[Emphasis supplied]*

12. It bears repetition to say that Schedule 8 of the PPA, as mentioned in Para 4.1 of Schedule 4 extracted above is same as the “Quoted Tariff”, submitted with the bid, in tabulated form, captioned as “Format for Financial Bid: Scenario 2 – Power Generation Source Linkage Based Coal”. The Tariff schedule of each PPA (quoted here from the case of DBPL) reflects the first contract year (Contract Year-1) as one commencing w.e.f. 01.10.2013 and ending on 31.03.2014, the Scheduled Delivery Date (SDD) being specified as 01.02.2014. The next contract years (Contract Year-2

onwards) correspond to the succeeding Financial Years (FYs), the Contract Year-2 thus being for the period 01.04.2014 to 31.03.2015, the third contract year (Contract Year-3) being 01.04.2015 to 31.03.2016 and so on. The last contract year (described as Contract Year-16) corresponds to the period from 01.04.2028 and ending with 30.09.2029. Interestingly, while incorporating the quoted tariff as the applicable tariff, it was clarified in each PPA that it was for a period of 15 years i.e. "From 01.02.2014 To 30.09.2028"

**13.** There were delays in arrangements being made for LTA and for commencement of supply under each PPA. The undisputed facts in that regard may be noted in brief.

**14.** In the case of DBPL, Medium Term Open Access ("MTOA") had been granted by PGCIL on 10.07.2013 for 208 MW w.e.f. 01.06.2014 subject to certain formalities to be completed. DBPL addressed a request to TANGEDCO on 09.08.2013 seeking Revised Scheduled Delivery Date and Effective Date to be notified bearing in mind that LTOA was to be available from January / July 2014, this being followed by another request on 16.08.2013 suggesting that the SDD be revised to 01.02.2014. It is on that basis that the SDD was mentioned in the PPA to be 01.02.2014. Upon the request of DBPL, made on 23.08.2013, PGCIL granted LTA for 36MW for period 01.06.2014 to 31.07.2014 and for 208 MW for period of 01.08.2014 to 30.09.2028. DBPL took it as *force majeure* event and notified TANGEDCO accordingly on 03.01.2014. In the wake of enquiry made by TANGEDCO. DBPL informed it on 28.01.2014 that its power plant was ready for operation, and declaration of COD was pending on account of non-availability of LTOA, the latter events showing that the required dedicated transmission line was expected to be completed by end of May, 2014, it actually having been completed on 20.06.2014.

**15.** In the case of KSK, it had applied for LTA on 27.11.2013, the date it had signed the PPA, for 500 MW RTC power. As noted earlier, PGCIL permitted LTA for 281 MW on 01.08.2015 when supply under the PPA was commenced, the full capacity of 500 MW being made available after LTA for the balance was allowed on 05.10.2015.

**16.** It appears that the generating companies, having commenced the supply, raised invoices for payments there against, initially in terms of the quoted tariff for the relevant Contract Year (third Contract Year onwards). Subsequently, it was claimed that the period 01.08.2015 to 31.03.2016 (when the supply had commenced) ought to be treated as the first Contract Year, revised invoices having been raised accordingly, the procurer (TANGEDCO) being not agreeable. Eventually, the dispute reached the Central Commission by the two petitions on which the impugned orders were passed.

**17.** The reliefs claimed in the petition of DBPL before the Central Commission have been summarized as under:

*“ a) Declare that the Delivery Date and the Expiry Date for supply of 117 MW power under the PPA dated 19.08.2013 are 01.08.2015 and 31.07.2030 respectively, and the Delivery Date and the Expiry Date for supply for 91 MW power under the PPA dated 19.08.2013 are 05.10.2015 and 04.10.2030 respectively; and the Tariff for the period commencing from 01.08.2015 shall be the Tariff for the First Contract Year (01.02.2014 to 31.03.2014) mentioned in Schedule 8 to the PPA and so on and consequently direct the Respondent to pay tariff for the entire term of the PPA on the said basis;*

*b) Direct the Respondent to pay the amount of Rs. 18,73,53,192/- towards shortfall in Tariff for the period 01.08.2015 up till 31.03.2017;*

*c) Direct the Respondent to pay interest @ 18% p.a. on the said amount from the day it became due and payable (i.e. the dates of supply till realization);*

*d) Pending hearing and final disposal of the present Petition; pass an ex-parte ad interim Order directing the Respondent to forthwith start paying tariff stipulated for 3rd Contract year*

*mentioned in Schedule-8 for the current Contract Year commencing from 01.04.2017 and continue to pay the tariff on the said basis for the subsequent years;*

*e) Pass such other and further order or orders as this Commission may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.”*

**18.** The reliefs claimed by KSK through petition before the Central Commission are similarly set out thus:

*“ (a) Hold and declare that the Respondent is liable to pay the first year tariff as quoted, adopted and provided for in the PPA for the supply commencing from 01.08.2015 till 31.03.2016 being the first year of supply by the Petitioner to the Respondent;*

*(b) Pass an order directing the Respondent to pay the differential amounts of Rs. 282742785/-, being the tariff short-paid for the period till May, 2017 billing and any further tariff short-paid for the period after May, 2017 billing;*

*(c ) Grant interest at the rate of SBIPLR for the amounts payable by the Respondent to the Petitioner, calculated from the date when the amounts became due and till the date of actual payment;*

*(d) Grant costs of the present proceedings in favour of the Petitioner and against the Respondent.”*

**19.** By order dated 22.07.2019, in the case of DBPL, the Central Commission has concluded and directed thus:

*“(a) Non-availability of LTA to the Petitioner is a force majeure event in terms of the PPA.*

*(b) On account of force majeure, the deemed/extended scheduled delivery date shall be 15.3.2015 taking into account non-availability of dedicated transmission system of the Petitioner up to 19.6.2014.*

*(c) On account of force majeure, the Expiry date of the PPA shall be extended up to 31.3.2029 i.e. six months after the expiry date as per PPA.*

*(d) The first contract year tariff (2013-14) as per original dates in the Schedule 8 of the PPA shall now be the applicable tariff for 2014-15, even though the actual supply has not started during this period. Similarly, the second contract year tariff (2014-15) as per original dates in Schedule 8 of the PPA shall now be the*

*applicable tariff for the 2015-16 i.e. the first year of power supply and so on.*

*(e) The Petitioner is entitled to recover the difference in terms of the above extended schedule delivery date and revised tariff for respective contract years.*

*(f) The Petitioner shall not be entitled for any interest for difference in bills for the past period. However, if the Respondent does not pay the differential tariff within 60 days of raising of bills, it shall be liable to pay late payment surcharge as per rates specified in the PPA.”*

**20.** In the case of KSK, the Central Commission has summarized its conclusions and directions as under:

*“ 62. In view of the above, summary of our decisions with respect to the prayers of the Petitioner is as under:*

*(a) Non-availability of LTA to the Petitioner is a Force Majeure event in terms of the PPA.*

*(b) On account of Force Majeure, the deemed/ extended scheduled delivery date shall be 1.8.2015 i.e. the date from which seller started the supply.*

*(c) On account of force majeure, the Expiry date of the PPA shall be extended up to 31.3.2029 i.e. six months after the expiry date as per PPA.*

*(d) The first contract year tariff (2013-14) as per original dates in the Schedule 8 of the PPA shall now be the applicable tariff for 2015-16, i.e. the first year of power supply. Similarly, the second contract year tariff (2014-15) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for the 2016-17 i.e. the second year of power supply and so on.*

*(e) The Petitioner is entitled to recover the difference in tariff in terms of the above extended schedule delivery date and revised tariff for respective contract years.*

*(f) No interest will be payable for difference in bills for the past period. However, if the Respondent does not pay the differential tariff within 60 days of raising of bills, it shall be liable to pay late payment surcharge as per rates provided in the PPA.”*

**21.** On the basis of pleadings of the parties, the Central Commission upon consideration of each petition, formulated issues which are identical in the two matters, the foremost one being as to whether the delay in

operationalization of LTA is a *force majeure* event in terms of the PPA, the conclusion reached being in the affirmative. It may be mentioned here itself that TANGEDCO, the procurer under the PPAs, does not assail the said finding on facts in these two cases, it being its own plea that “non-availability of power ... is a *force majeure* event”, the claim for extension of SDD being on such account (ground ‘R’ in appeal no.91/2020 and ground ‘Q’ in appeal no.145/2021).

**22.** The procurer (TANGEDCO) had raised the objection of delay and laches. The same was repelled by the Central Commission, reference being made to the period prescribed by Limitation Act, 1963, and the ruling of the Supreme Court reported as *Andhra Pradesh Power Co-ordination Committee v. Lanco Kondapalli Power Limited* [(2016) 3 SCC 468]. Though some argument was raised reiterating the said objection before us in these appeals, we find no substance in the same, the claim for revised SDD and Expiry Date under the PPAs and consequent relief of tariff in its accord being within the period of three years, there being no element of laches.

**23.** Based on the invoices that statedly had been raised earlier for the period of commencement of supply corresponding to Contract Year-3, plea of acquiescence has also been pressed in the context of argument of laches. The *doctrine of estoppel* is also sought to be invoked with reliance on decisions reported as *R.N. Gosain v. Yashpal Dhir*, (1992) 4 SCC 683, *Krishna Bahadur v. Purna Theatre*, (2004) 8 SCC 229, and *B.L. Sreedhar v. K.M. Munireddy*, (2003) 2 SCC 355. We are not impressed with the said pleas as well for the simple reason that the initial invoices cannot be construed as option exercised by the supplier to forego its claim for relief, if properly made out, by recourse to remedies available under the contract and the law.



**24.** Similarly, we do not find any merit in the plea of waiver based on Article 15.5.2 of the PPA quoted earlier. There is no material placed before us whereby it could be construed even by implication, leave alone express choice made, that the generating company intended to forego the reliefs which were subsequently claimed by the petitions before the Commission, at the time of commencement of supply.

**25.** The prayer for invocation of the agreed tariff for the Contract Year-1 for purposes of the date from which the supply commenced (which corresponds to Contract Year-3) is dependent on the question as to whether the generator (DBPL/KSK) is entitled to shift the *Scheduled Delivery Date* under the PPA. The Central Commission has considered this issue in the case of DBPL, in light of relevant provisions of the PPA observing as under:

*“ 36. It is observed that Article 3.4.3 read with Article 3.4.6 of the PPA provides for extension of period for fulfillment of the Conditions Subsequent as mentioned in Article 3.1 thereby extending scheduled delivery date or the revised scheduled delivery date, as the case may be, by a period for which the Seller has been affected by force majeure event. We note that as per Article 3.1.1(c), obtaining LTA is a Condition Subsequent.*

...

*39. We note that the Article 4.7.1 provides that Revised scheduled delivery date, scheduled delivery date and expiry date shall be deferred to overcome the effects of the force majeure. In the instant petition, the Petitioner is affected by force majeure specified in Article 4.7.1(c) i.e. "Force Majeure Event affecting Seller" and is thus covered under the Article 4.7.3. Article 4.7.3 provides that if such Force Majeure Event continues even after the maximum period of six months, any of the parties may choose to terminate the Agreement as per the provisions of Article 11.5.*

*40. In the instant case, the force majeure event of non-availability of LTA continued for more than six months. However, neither the Petitioner nor the Respondent chose to terminate the agreement.*

41. Article 4.7.4 of this Article provides that if the parties have not agreed within thirty days after the performance has ceased to be affected by the relevant circumstance, on the time period by which the Revised Scheduled Delivery Date, Scheduled Delivery Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 14. In terms of the Article 4.7.4 of the PPA, the parties were required to agree on the extension of Revised Scheduled Delivery Date, Scheduled Delivery Date or the Expiry Date once the force majeure event was over. Though neither the Petitioner nor the Respondent have done so, we note from the submissions of the Respondent that the Respondent has no issue with the extension of scheduled delivery date till 1.8.2015 for 117 MW and till 5.10.2015 for 91 MW i.e. the dates from which actual supply started. However, the Respondent has contested the extension of the expiry date.

...

45. In our view, it was responsibility of both the parties to decide upon the Revised Scheduled Delivery Date, Scheduled Delivery Date and the Expiry Date once force majeure ceased to exist. We have already noted that the Petitioner kept the Respondent informed about the non-availability of the LTA through notices and by impleading it in Petitions before this Commission and APTEL. Now, the Respondent cannot shy away from its responsibility merely by stating that the Petitioner raising dispute after two years or so is an afterthought. In view of the above, prayer of the Petitioner needs to be given consideration and matter regarding the Revised Scheduled Delivery Date, Scheduled Delivery Date and the Expiry Date needs to be decided since the parties have not agreed to these dates within the stipulated period of 30 days as provided in Article 4.7.4 of the PPA even though the matter has been raised after almost 15 months of force majeure having ceased to exist.

...

47. In our view, a plain reading of Article 4.7.4 and Article 4.7.5 read with Article 4.7.1(c) of the PPA clearly provide for extension of expiry date on account of Force Majeure Events affecting the Seller. As such, we are not in agreement with the Respondent's submission that there is no provision of extending the expiry date under the PPA.

...

52. Neither of the parties chose to terminate the contract nor agreed to the duration of extension of the expiry date. Upon combined reading of Article 4.7.1 (that prescribes extension to be not less than day to day basis) and Article 4.7.3 (that gives options to the parties to decide on termination of agreement after six months of continuance of force majeure), we are of the view that the expiry date of the PPA shall be extended by six months. In terms of provisions of Article 4.7.4 of the PPA, the

parties were to agree to extension of Expiry Date which has not happened in the instant case. The Petitioner has raised a dispute vide its letter dated 17.1.2017 and when no response was received from the Respondent, the Petitioner has filed the instant Petition. Therefore, we are not inclined to consider extension of Expiry Date beyond six months. However, it is upto the parties to reach a settlement in this regard, if they so decide. Accordingly, the expiry date is re-fixed as 31.3.2029 i.e. six months from the Expiry Date as mentioned in the PPA (30.9.2028).

53. In view of the above, the Schedule Delivery Date of 1.10.2013 in Schedule 8 of the PPA (for Schedule Delivery Date) shall be substituted by 15.3.2015. Similarly, the Expiry Date of 30.9.2028 in the Schedule 8 of the PPA shall be substituted by 31.3.2029. Thus, the first contract year tariff (2013-14) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for 2014-15, even though the actual supply had not started during this period. Similarly, the second contract year tariff (2014-15) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for 2015-16 i.e. the first year of actual power supply and so on.

54. The Petitioner has prayed to direct the Respondent to pay the amount of Rs. 18,73,53,192/- towards shortfall in tariff for the period from 1.8.2015 to 31.3.2017. We are not inclined to decide on the exact amount to be paid by the Respondent. However, we direct the Petitioner to revise its bills for power supplied to the Respondent in terms of the Extended Scheduled Delivery Date as decided above. The Respondent shall make payment within 60 days of raising of bills by the Petitioner failing which it would be required to pay late payment surcharge in terms of the relevant provision of the PPA.

...

56. The Respondent has submitted that as per Schedule 6 of the PPA, energy charges are to be escalated from the bid deadline of 6.3.2013 with the escalation index issued from time to time by CERC. The Respondent has stated that though the supply of power started from 1.8.2015, the energy charges paid to the Petitioner on the commencement date was the escalated energy charge from 6.3.2013. This calculation will be adopted till 30.9.2028 (i.e. quoted energy charge at the time of bid is escalated from 6.3.2013 till 30.9.2028 with applicable escalation index for a period of 5478 days, nearly 15.5 years). The Respondent has contended that if the expiry date is extended up to 2030, the financial commitment for the Respondent is extended to a further period of about 2 years after the current expiry date of 30.9.2028 and the same is not acceptable to it.

...

58. In view of the above provision, we are of the view that payment of energy charges as per the CERC escalation index

*is unavoidable due to extension of Schedule Deliver Date. However, in this instant case, the expiry date has been extended only till 31.3.2029 which lies within the same financial year i.e. 2028-29 in which the original expiry date of 30.9.2028 lies. As such, the Respondent will have no additional financial burden in terms of escalable components of tariff.”*

**26.** The discussion on the petition of KSK leading to the impugned order being passed on 23.07.2019 is on similar lines.

**27.** As mentioned earlier, KSK had sought review of the above mentioned decision, the prayer made being that Delivery Date be treated as 05.10.2015 and the corresponding Expiry Date as 04.10.2030. KSK had also pressed for relief in the nature of *Late Payment Surcharge* (“LPS”). The review petition was disposed of by impugned order dated 30.08.2021. The Central Commission partly accepted the contention observing and directing as under:

*“17. We find force in the submissions of the Review Petitioner. The PPA defines the ‘Delivery date’ as the date on which the Seller commences supply of the ‘Aggregated Contracted Capacity’ to the Procurer. Also, the term ‘Aggregated Contracted Capacity’ has been defined as ‘the aggregate capacity in 500 MW contracted with the Procurer’ for supply at the interconnection point from the Power Stations Net Capacity. In terms of this, the date of supply of the ‘Aggregated Contracted Capacity’ of 500 MW to the Procurer is to be considered as the date of commencement of supply of power. Admittedly, the Review Petitioner had commenced the supply of ‘Aggregated Contracted Capacity’ of 500 MW power to the Procurer from 1.10.2015, after operationalization of LTA by PGCIL and, hence, the same is to be considered as the revised Scheduled Delivery Date, instead of 1.8.2015. The observations in order dated 23.7.2019 that if the revised start date of supply is considered as 1.10.2015, there would be issue regarding tariff for supply from 1.8.2015 to 1.10.2015 appears to be not in line with Article 4.6.1 under Schedule 4 (Tariff) of the PPA. In terms of this article of the PPA, the tariff for the period prior to the date of commencement of supply of power shall be the quoted tariff of the first contract year with escalation for relevant period only for energy charge. As the supply of power by the Review Petitioner to the Procurer has commenced from 1.10.2015, as stated above, the tariff for the part supply of power to Respondent TANGEDCO during the period from 1.8.2015 till 1.10.2015 will be governed by this provision. These aspects seem to have been overlooked by the Commission while passing the order dated 23.7.2019. This, according to us,*

*is an apparent error on the face of record and, therefore, the prayer of the Review Petitioner for review of order dated 23.7.2019 on this count, is allowed.*

*18. Accordingly, in modification of our findings in order dated 23.7.2019, we hold that the Scheduled Delivery Date, in Schedule 8 of the PPA (for Schedule Delivery Date), shall be substituted as 1.10.2015, in place of 1.8.2015. In respect of tariff for supply of power to the Respondent TANGEDCO for the period from 1.8.2015 till 1.10.2015, the same shall be governed by Article 4.6.1 under Schedule 4 (Tariff) of the PPA. The issue is decided accordingly.”*

**28.** The Central Commission has rejected the prayer for revision of the Expiry Date or for grant of relief in the nature of interest, the operative part of the review order being as under:

*“28. In view of the decision in (A) Extension of the Scheduled Delivery Date and (B) Extension of the Expiry Date as above, the Schedule Delivery Date of 1.10.2013 in Schedule 8 of the PPA (for Schedule Delivery Date) shall be substituted by 1.10.2015. However, the Expiry Date of 30.9.2028 in the Schedule 8 of the PPA shall be 31.3.2029. Thus, the first contract year tariff (2013-14) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for 2015-16. Similarly, the second contract year tariff (2014-15) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for 2016-17 i.e. the second year of actual power supply and so on. In view of the decision in (C) Non-grant of Interest as above, the late payment surcharge shall be applicable as per the provisions of the PPA.”*

**29.** It is the contention of TANGEDCO that tariff payable under the contracts is not dependent upon Scheduled Delivery Date, Article 3 being a complete code providing for rights and liabilities relating to conditions subsequent including on aspects such as operationalization of open access. The learned counsel argued that Article 4 has no applicability in the context of conditions subsequent, the error committed in the impugned orders being the invocation of Article 4.7 to extend the Expiry Date and by shifting the Contract Year specified in Schedule 8. It is the argument of TANGEDCO that the Central Commission has failed to bear in mind cardinal principle that all provisions of contract have to be harmoniously construed, such that the interpretation does not lead to absurdity, it being

impermissible to rewrite the terms of the contract, particularly when there is no ambiguity, reliance in this context being placed on judgments of the Supreme Court reported as *M. Arul Jothi v. Lajja Bai*, (2000) 3 SCC 723; *Rajasthan State Industrial Development and Investment Corporation and Anr vs. Diamond & Gem Development Corporation Ltd. And Anr* (2013) 5 SCC 470; *Nabha Power Ltd. V. Punjab SPCL*, (2018) 11 SCC 508; and *Adani Power (Mundra) Ltd. V. Gujarat ERC*, (2019) 19 SCC 9.

**30.** As already noted, the expression “Expiry Date” is defined in the PPAs to mean “*the date which is the 30.09.2028 (15<sup>th</sup>) anniversary of the Delivery Date*”. The learned counsel for TANGEDCO argued, *inter alia*, on the strength of ruling in *Dozco India (P) Ltd. V. Doosan Infracore Co. Ltd.*, (2011) 6 SCC 179, that the words in parenthesis cannot control the meaning of the main provision. It is the argument of TANGEDCO that the delay also occurred due to the fact that the dedicated transmission lines of the generating companies were not ready. In the case of DBPL, the submission is that the generating company has been allowed to take advantage of its own wrong which is improper. The learned counsel referred in this context to *Union of India v. Maj. Gen. Madan Lal Yadav*, (1996) 4 SCC 127 and *Kusheshwar Prasad Singh v. State of Bihar*, (2007) 11 SCC 447. The procurer also refers to Article 9.3.1 to contend that while non-availability of open access is treated as *force majeure*, it is specifically stated that it would be without liability on either side, the contention being that the terms of performance are rendered onerous, the shifting of the Expiry Date constituting a scenario where express covenants have been ignored which is impermissible, reliance being placed on *Alopi Parshad and Sons Ltd. V. Union of India*, AIR 1960 SC 588 and *Continental Construction Co. v. Madhya Pradesh*, (1988) 3 SCC 82.

**31.** The argument of TANGEDCO that the extension of time could be allowed only for the Scheduled Delivery Date and not for Expiry Date is contrary to the express provisions of the PPA. Article 4.7.1 read with Article 4.1.1 provides for deferment of the Expiry Date in addition to Scheduled Delivery Date once it is accepted that there is a revision required on account of *force majeure* event affecting the seller, Article 4.7.5 specifically referring to such revised Scheduled Delivery Date and the Expiry Date to be “newly determined”.

**32.** The attempt of TANGEDCO seems to be to read Article 3 and Article 4 in two separate water-tight compartments which, the facts at hand show, is erroneous approach. Article 3 relates to “conditions subsequent to be satisfied by the seller / procurer”. Article 3.4.3 permits extension of the period to the extent required for necessary permission for LTOA to be secured, such extension resulting in shifting of the Scheduled Delivery Date. The said provision cannot be construed as to restrict the extension permissible under Article 4, particularly in so far as it relates to the Expiry Date. Article 4, by contrast, relates to “supply of power” and also covers situation that may entail the need for “extension of time”, Article 4.7.5 specifically dealing with *force majeure* scenario. The relevant clause, Article 4.7.1, cannot be read as circumscribed by Article 3 as is thrust of submissions of TANGEDCO. We agree with submissions of the learned counsel for the generating companies that the provision permitting extension of time as incorporated in Article 4 is in addition to, being over and above, Article 3, covering revision not only of Scheduled Delivery Date but also of the Expiry Date. We reject the argument of TANGEDCO that Article 4.7.1 is applied only to the period after extended Scheduled Delivery Date.

**33.** We do not find any merit in the argument of TANGEDCO that the expression “15<sup>th</sup>” as appearing in parenthesis within the definition of the expression “Expiry Date” is inconsequential. The reference to “15<sup>th</sup> anniversary” has been made consciously and with a purpose and, therefore, the general rule laid down in the case of *Dozco India* (supra) will not apply. The initial Scheduled Delivery Date was intended to be 01.10.2013 and it was on that basis that the Expiry Date was identified as 30.09.2028. But the parties while executing the PPA were aware that the Delivery Date and the Expiry Date might get deferred for various reasons including on account of *force majeure* events supervening. In these circumstances, the date 30.09.2028 appearing in the definition clause of Expiry Date cannot be read as one cast in stone. The PPA was conceived as one for a term of 15 years. If the Delivery Date were to get deferred, as per clauses permitting such deferment, the Expiry Date would also get correspondingly deferred. Hence, the reference to “15<sup>th</sup> anniversary” of the Delivery Date. Any interpretation contrary to this would render the express clauses of PPA permitting extension and re-determination of Scheduled Delivery Date and Expiry Date otiose.

**34.** The grievance of TANGEDCO that by the impugned orders the Central Commission has shifted the quoted tariff in respect of a particular Contract Year applying it to a different Contract Year is misconceived. As noted earlier, the expression “Contract Year” is defined under the PPA to mean the period commencing on the “Effective Date” which was prescribed as 19.08.2013. Having regard to the meaning assigned to the expressions “Contract Year” and “Commencement Date” of the Contract Year, the first Contract Year envisaged was beginning on 19.08.2013 and ending with 31.03.2014. Since the PPA was to be for 15 years, the Expiry Date initially prescribed was 30.09.2028. In this view, the tariff was quoted by the generating companies in terms of requirement of bid document, in tabulated form, covering 16 Contract Years. Virtually, by the consent of the



parties and on account of *force majeure* event that had occurred, the Scheduled Delivery Date got shifted to 05.10.2015, the date from which the total contracted capacity (entire quantity) started being injected. The Contract Year-1, as stipulated in the tariff schedule, thus, cannot apply to any part of FY 2013-2014. Since the revision of the Scheduled Delivery Date would also result in the change of the Expiry Date, its ripple effect would be that the tariff for Contract Year-1 will apply, consequentially, to FY 2014-15. This is the logical outcome of the view correctly taken by the Central Commission in the impugned orders, any view other than this is likely to frustrate the clear understanding of the parties reflected by express provisions of the PPA and the intended working of Schedule 8.

**35.** It is not correct to argue that the Central Commission has taken liberty with the contract by adjusting or changing the tariff within the meaning of Article 3.4.3. Since the Commission has extended the Expiry Date limiting it to the period of six months so far as to restrict the contract up to 31.03.2029, it being the last Contract Year corresponding to FY 2028-29, it is wrong on the part of TANGEDCO to argue that a vacuum has been unauthorizedly filled or the contract rewritten. The tariff for FY 2028-29 was specified in Schedule 8 for Contract Year-16 which remains applicable, there being no alteration, revision or escalation therein.

**36.** We are not impressed with the argument of KSK that the Central Commission has erred by extending the Expiry Date by only six months. In our opinion, the Central Commission has taken a balanced view of the matter in as much as any extension beyond 31.03.2029 would take the PPA to Contract Year-17 for which there is no agreed tariff.

**37.** We are also not inclined to overturn the decision taken by the Central Commission to decline the award of interest on the differential of the

payments made prior to the impugned decision in as much as even the generating companies had earlier raised invoices on literal reading of the Schedule 8, the bills subsequently revised being unilateral without awaiting the adjudication on the dispute. The generating companies thus also must share the blame for delay in securing the appropriate tariff.

**38.** For the foregoing reasons, we do not find any substance in the three captioned appeals and the same are dismissed accordingly.

**Pronounced in open court this 25<sup>th</sup> Day of August 2022**

**(Sandesh Kumar Sharma)**  
Technical Member

**(Justice R.K. Gauba)**  
Officiating Chairperson

*tp*