

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

**Appeal No. 346 of 2023 &
IA No. 985 of 2022, IA No. 2110 of 2022**

Dated: 19th September, 2023

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

IN THE MATTER OF:

Kerala State Electricity Board Ltd.
Vydyuthi Bhavanam
Thiruvananthapuram,
Kerala – 695004

...Appellant(s)

Vs.

1. Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building, 36, Janpath,
New Delhi 110 001.
2. Bharat Aluminium Company Limited,
Core 6, 2nd Floor, SCOPE complex,
7, Lodhi Road, New Delhi-110003.
3. Tamil Nadu Generation and Distribution
Corporation Ltd.
10th floor, NPKKR Maaligai,
144, Anna Salai,
Chennai – 600 002.

...Respondent(s)

Counsel for the Appellant(s) : Mr. Prabhas Bajaj
Mr. Rangasaran Mohan
Mr. Ankit Roy
Mr. Aman Pathak

Counsel for the Respondent(s) : Mr. Hemant Singh
Mr. Lakshyajit Singh Bagdwal

Mr. Robin Kumar
Mr. Mridul Chakravarty
Mr. Biju Mattam
Ms. Ankita Bafna
Mr. Harshit Singh
Mr. Lavanya Kumar
Mr. Sindhuja Rastogi for R-2

Ms. Anusha Nagarajan
Ms. Mandakini Ghosh for R-3

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The Appellant, M/s. Kerala State Electricity Board Limited (in short "KSEBL"), has filed the captioned Appeal under Section 111 of the Electricity Act, 2003 assailing the order dated 31.12.2021 (in short "Impugned Order") passed by the Central Electricity Regulatory Commission (hereinafter referred to as "Central Commission") in Petition No. 317/MP/2019 to the extent that the Central Commission has directed re-computation of Fixed Charges at the end of every Financial Year, stating that the same is contrary to the provisions of the Agreement between the parties.

2. The matter was taken up for hearing the IA No. 985 of 2022 seeking stay of the Impugned Order passed by the Central Commission, however, after hearing the parties for some time, it was felt that there is only one issue which has to be adjudicated and the Appeal itself can be disposed of in terms of the decision in the IA.

3. The Appellant is the deemed Distribution licensee in the State of Kerala and is responsible for generation and purchase of power for the consumers in the entire State of Kerala.

4. The Respondent No. 1 is the Central Electricity Regulatory Commission, a statutory body constituted under section 76 of the Electricity Act, 2003 (in short “Act”) and is vested with the powers to adjudicate disputes between a Inter State Generating Station (in short “ISGS”) and the licensees in accordance with section 79 of the Act, thus is the Appropriate Commission under the provisions of the Act.

5. The Respondent No. 2 is Bharat Aluminium Company Limited (in short “BALCO”), a Generating Company as defined under section 2(28) of the Act and has set up a coal-based thermal power plant of 810 MW (4 x 67.5 MW and 4 x 135 MW) and 1200 MW at Balco Nagar, Korba in the State of Chhattisgarh.

6. The Respondent No. 3 is the distribution licensee in the State of Tamil Nadu and is a proforma Respondent and had been arrayed as one of the Respondents, by Respondent No.2 in its Petition before the Central Commission.

7. The Appellant has executed a long-term Power Supply Agreement (in short “PSA”) on 26.12.2014 with BALCO for supply of electricity of 100 MW for a period of 25 years, pursuant to a competitive bidding process conducted by it, under the Design, Build, Finance, Own and Operate (‘DBFOO’) guidelines issued by the Central Government.

8. The dispute in the captioned Appeal is regarding the interpretation of various provisions contained under Article 5 and Article 21 of PSA, the relevant provisions of the PSA are quoted as under for reference:

“Article 5: Obligations of the Supplier:

5.1.1 -----

5.1.4 The Supplier shall install and maintain the power station in accordance with the Specifications and Standards and the maintenance Requirements such that the Availability of the contracted capacity of the power stations is at least 90% (ninety per cent) thereof during each year of the Operation Period (the Normative Availability);

21.1 Tariff

21.1.1 The Utility shall pay to the Supplier tariff comprising the sum of Fixed Charge and Fuel Charge payable by the utility to the Supplier for Availability of electricity as the case may be, in accordance with the provisions of this Agreement. (the Tariff).

21.1.2 As a part of the Tariff, the utility shall pay to the Supplier an amount, determined, in accordance with the provisions of this Article 21, as the Fixed Charge for Availability of the Power Station to the extent of Normative Availability thereof (the Fixed Charge)

21.2 Base Fixed Charge;

21.2.1 *The parties agree that the Fixed Charge shall, in accordance with the offer of the Supplier for the base Year, be Rs 3.25 (Rupees Three and paise twenty five) per kWh, to which the amount, if any, determined in accordance with the provisions of Article 21.2.2 or 21.2.3, as the case may be, shall be added or deducted, as the case may be, and the sum thereof (the initial Fixed Charge) shall be revised annually in accordance with the provisions of Article 21.2.4 to determine the base fixed charge for the relevant Accounting Year (the base fixed charge)*

21.3 Indexed fixed Charge;

The Base Fixed Charge determined for each Accounting Year in accordance with provisions of Article 21.2 shall be revised annually to reflect 30% (thirty per cent) of the variation on WPI occurring between January 31 immediately preceding the Bid Date and January 31 immediately preceding the Accounting Year for which such Revision is undertaken (the Indexed Fixed Charge). For the avoidance of doubt and by way of illustration, if (a) the Bid date occurs in February 2015 (b) COD occurs in May 2019 and (c) WPI increases by 20% (twenty per cent) between January 31, 2015 and January 31, 2019, the Indexed Fixed Charge for the Accounting Year commencing from April 1, 2019 shall be 106% (one hundred and six per cent) of the Base Fixed Charge for that Accounting Year.

21.4 Computation of Fixed Charge;

21.4.1 *Subject to the provision of this clause 21.4, the Base Fixed Charge as corrected for variation on WPI Index in accordance with clause 21.3, shall be the Fixed Charge payable for Availability in each month of the relevant Accounting Year.*

21.4.2 *Upon occurrence of a shortfall in the Minimum Fuel Stock, Availability shall be deemed to be reduced in accordance with the provisions of Article 21.5.2 and the Non-Availability arising as a consequence thereof shall, for the purposes of payment of Fixed Charge, be deemed to be Availability to the extent of 70% (seventy per cent) of the Non-Availability hereunder. For the avoidance of doubt, the Parties expressly agree that if Fuel Shortage is caused by an action or omission attributable to the Supplier, it shall not be reckoned for the purposes of computing Availability hereunder. By way of illustration, the Parties agree that in the event the Non-Availability arising on account of shortfall in supply of Fuel is determined to be 50% (fifty per cent), the Supplier shall, with respect to the Non- Availability arising on account thereof in accordance with the provisions of Article 21.5.2, be entitled to a Fixed Charge as if the Availability is equivalent to 70% (seventy per cent) of such Non-Availability. For the avoidance of doubt, the Parties agree that the Supplier shall not be liable to pay the Damages specified in Article 21.6.2 if Non-Availability shall arise as referred to in this Article 21.4.2.*

21.4.4 *The obligations of the Utility to pay Fixed Charges in any Accounting Year shall in no case exceed an amount equal to the Fixed Charge due and payable for and in respect of the Normative Availability of 90% (ninety per cent) computed with reference to the entitlement of the Utility in Contracted Capacity (the “Capacity Charge)”. Provided, however, that in the event of Despatch of the Power Station beyond such [90% (Ninety per cent)], Incentive shall be payable in accordance with the provisions of Article 21.6.1. For the avoidance of doubt, the Capacity Charge referred to herein shall be equal to and computed with reference to the maximum Availability of [90% (Ninety per cent)] of the Contracted Capacity.*

21.4.5 *Pursuant to the provisions of Article 21.4.4, the Supplier shall not, for and in respect of any day, be entitled to receive payment of Fixed Charge for Availability exceeding [90% (Ninety per cent)] thereof and in the event it supplies electricity to the Utility in excess of such [90% (Ninety per cent)], such excess supply shall be eligible only for payment of Fuel Charge, save and except the payment of Incentive due under the provisions of Article 21.4.4.*

21. 5 Declaration of Availability;

21.5.1 *Unless otherwise notified by the Supplier, the declared Availability shall, subject to the provisions of Article 21.5.2, be deemed to be 100% (one hundred per cent) thereof at all times.*

21.5.2 *In the event Fuel stocks decline below the Minimum Fuel Stock, Availability shall be deemed to be reduced proportionate to the reduction in Minimum Fuel Stock, and shall be deemed as Non-Availability on account of Fuel Shortage. Provided that the Utility may, in its sole discretion, Despatch the Power Station for the full or part Non-Availability hereunder and to the extent of such Despatch, the Utility shall pay the full Fixed Charge due and payable in accordance with this Agreement. For the avoidance of doubt and by way of illustration, if the actual stock of Fuel is 80% (eighty per cent) of the Minimum Fuel Stock at the commencement of any day, the Availability for that day shall be deemed to be 80% (eighty per cent) and the Non-Availability on account of Fuel Shortage shall be notified by the Supplier to the Utility accordingly.*

21.5.3 *In the event that any shortfall in supply of electricity to the Utility occurs on account of any deficiency in transmission between the Point of Grid Connection and Delivery Point, the Availability shall be deemed to be reduced to the extent of reduction in transmission of electricity, and the reduction referred to hereinabove shall be deemed as Non-Availability on account of deficiency in transmission. For the avoidance of doubt and by way of illustration, the Parties agree that if such deficiency in transmission is equal to 20% (twenty per cent) of the entitlement of the Utility in the Contracted Capacity, the Availability shall be deemed to be 80% (eighty per cent) and the Non-Availability hereunder shall be notified by the Supplier to the Utility forthwith.*

21.5.4 *The Supplier shall notify, no later than 15 (fifteen) days prior to the commencement of a month, its maintenance schedule for that month and any reduction in Availability arising as a result thereof. The Supplier shall, as soon as may be, notify any modifications of its maintenance schedule and shall confirm, with or without modifications, the reduction in Availability no later than 48 (forty eight) hours prior to its occurrence.*

21.5.5 *In the event that the Availability at any time is determined to be lower than 100% (one hundred per cent) of the Contracted Capacity or the reduced Availability notified hereunder, an event of mis-declaration of Availability (the “Mis-declaration) ” shall be deemed to have occurred. In such an event, the Availability for the relevant month shall, for the purposes of payment of Fixed Charge, be deemed to be reduced by the same proportion that Availability bears to Mis-declaration, as if the Mis-declaration had occurred for a period of one month. For the avoidance of doubt, the Parties agree that deductions on account of Mis-declaration shall be made from the subsequent payments due to the Supplier under this Agreement.*

21.6 Incentive and Damages;

21.6.1 *In the event that the Availability in any month exceeds the Normative Availability, the Supplier shall, in lieu of a Fixed Charge, be entitled to an Incentive which shall be calculated and paid at the*

rate of 50% (fifty per cent) of the Fixed Charge for Availability in excess of Normative Availability. Provided, however, that any Incentive hereunder shall be due and payable only to the extent of Despatch of the Power Station. For the avoidance of doubt and by way of illustration, in the event the Availability in any month shall exceed the Normative Availability by 3% (three per cent) of the Contracted Capacity but the Despatch during that month shall exceed 1% (one per cent) of the entitlement of the Utility in the Contracted Capacity, the Incentive payable hereunder shall be restricted to such 1% (one per cent) only.

21.6.2 *In the event that Availability in any month is less than the Normative Availability, the Fixed Charge for such month shall be reduced to the extent of shortfall in Normative Availability and in addition, any reduction below the Availability of 85% (eighty five per cent) shall, subject to the provisions of Article 21.7, be multiplied by a factor of 0.25 (zero point two five) to determine the Damages payable for such reduction in Availability. For the avoidance of doubt, the Parties agree that the Damages to be deducted for any reduction below the aforesaid Availability of 85% (eighty-five per cent) shall be 25% (twenty-five per cent) of the Fixed Charge which is reduced on account of shortfall in Availability below such 85% (eighty-five per cent).*

21.6.3 *The Parties expressly agree that within 30 (thirty) days of the close of every Accounting Year, the cumulative monthly Availability*

for such year shall be determined and the Incentive or Damages, as the case may be, shall be computed with reference to the Normative Availability for that year. The amount so arrived at shall be adjusted against the Incentives or Damages determined for the respective months of the year and the balance remaining shall be adjusted in the following Monthly Invoice.

21.7 Scheduled Maintenance

The period of closure for Scheduled Maintenance shall be deemed as Non-Availability in accordance with the provisions of Article 15.4.2 and no Fixed Charge shall be due or payable for and in respect of such Non-Availability. For the avoidance of doubt, the Parties agree that the Damages specified in Article 21.6.2 shall not apply for and in respect of the Non-Availability hereunder.

Article 39: Definitions;

‘Accounting Year’ means the financial year commencing from the first day of April of any calendar year and ending on the thirty first day of March of the next calendar year;

‘Availability’ shall have the same meaning as set forth in clause 5.1.4 and the term ‘Available’ shall be construed accordingly;

‘Fixed Charge’ shall have the same meaning as set forth in Article 21.1.2;

‘Normative Availability’ shall have the same meaning as set forth in clause 5.1.4;

‘Tariff’ shall have the same meaning as set forth in clause 21.1.1;”

9. It is important to note here that the Article 5.1.4 read with Article 39 provides that the Normative Availability shall be 90% of the contracted capacity and the Supplier shall install and maintain the power station to at least achieve Normative Availability.

10. Further, Article 21.1 provides that the Tariff shall include Fixed Charges and Fuel Charges and the Fixed charges shall be determined for Availability of the Power Station, however, shall be limited to the extent of Normative Availability thereof in accordance with the provisions of the Article 21, additionally, Article 21.2 and 21.3 provide for the determination of the Base Fixed Charge and the Indexed Fixed Charge, respectively, which are not relevant in the present context.

11. Article 21.4 is the relevant Article for the computation of Fixed Charge, Article 21.4.1 *inter-alia* provides that the Base Fixed Charge as determined under Article 21.2 and 21.3 shall be the Fixed Charge which shall be payable for Availability in each month of the relevant year, further, as per Article 21.4.4 and 21.4.5, the Fixed Charges in any accounting year shall not exceed an amount equal to the Fixed Charges payable in respect of the Normative Availability of 90% of the contracted capacity, however, in case of despatch by the power station beyond 90%, the seller is entitled for an incentive as per Article 21.6, however, in case the Supplier supplies electricity beyond 90% in any day, it shall not be entitled to get Fixed Charges for such supply of electricity in excess of 90%. However, the Supplier shall get the fuel charges for such excess supply, if any.

12. The Article 21.6 pertains to Incentives and Damages, Article 21.6.1 specifies the determination process for the Incentive in case Availability exceeds the Normative Availability whereas Article 21.6.2 stipulates the process of determination of Damages, further, Article 21.6.3 provides for the re-determination of the Incentive and Damages with reference to Availability for the entire year and its adjustment with reference to the total Incentive and Damages determined on monthly basis.

13. The Appellant is aggrieved by the decision of the Central Commission directing the Appellant and the Respondent No. 2 for re-computation of Fixed Charges at the end of every Financial Year, claiming that such a direction is in violation of the provisions of the PSA, the relevant extract of the Impugned Order is quoted hereunder:

“Issue No. A: Whether the Petitioner is entitled for payment of fixed charges, considering normative availability achieved on annual basis?”

15. The Petitioner has submitted that on a combined reading of Article 5.1.4 and Article 21.1.2 of the PSA, it is clear that full fixed charges are payable by the Respondent KSEBL, if the Petitioner has been successful in maintaining the availability of the generating station to the extent of normative availability, which as per Article 5.1.4 of the PSA can only be determined at the end of every accounting year. It has also contended that Article 21.6.3 of the PSA makes it clear that within 30 days of the close of every accounting year, the cumulative monthly

availability for such year shall be determined and the fixed charges shall be reconciled with the 'availability' achieved at the end of the accounting year. Accordingly, the Petitioner has sought payment of Rs 13.27 crore by the Respondent KSEBL, towards fixed charges during 2017-19, by considering the normative availability on 'annual' basis instead of on 'monthly' basis.

16. Per contra, the Respondent KSEBL has submitted that as per provisions of the PSA (Article 21.4, 21.5 and 21.6), the fixed charges for a month are computed based on 'monthly' availability and the supplier (Petitioner herein) shall not be eligible to receive payment of fixed charges for availability, exceeding normative availability of 90%. The Respondent has also pointed out that 'incentive' is computed, if the monthly availability exceeds 'normative availability' and damages are levied if the monthly availability falls below 85%. It has further submitted that Article 21.6.3 of the PSA is clear and unambiguous in stipulating that the yearly reconciliation of availability with reference to normative availability for an accounting year is determined only for computation of 'incentives' and 'damages' and not for 'fixed charges', under the DBFOO framework laid down by MOP, GOI. The Respondent has contended that fixed charges are to be paid for availability in each month of the relevant accounting year and there is no provision in the PSA for computation of annual availability and reconciliation of fixed charges with respect to annual availability. Accordingly, Respondent KSEBL has submitted that the relief sought by the Petitioner may be rejected.

17. We have considered the matter. Some of the provisions of the PSA, which have been relied upon by the parties are extracted in paragraph 14 above for reference. Article 5.1.4 of the PSA mandates the Petitioner to install, operate and maintain its power station in accordance with the specification and standards, such that the 'normative availability' of the power station is at least 90%, during each year of the operation period. Article 39 (dealing with definitions) of the PSA provides that 'Availability' shall have the same meaning as set forth in clause 5.1.4 and the term 'Available' shall be construed accordingly. Definition also provides that 'Normative Availability' shall have the same meaning as set forth in clause 5.1.4. In our view, 'Availability' as well as 'Normative Availability' having been defined in Article 39 read with Article 5.1.4 of the PSA itself, any other meaning sought to be ascribed to these terms is not acceptable. It is clear from wording of Article 5.1.4 of the PSA that 'Availability' as well as 'Normative Availability' have to be on 'annual' basis contrary to the arguments of the Respondent KSEBL that these are on 'monthly' basis.

18. The Respondent KSEBL has relied upon provisions of Article 21.4, 21.5 and 21.6 to contend that 'availability' has to be on monthly basis. We note that Article 21 mainly deals with the fixed charges payable by the Respondent, KSEBL to the supplier of electricity, i.e. the Petitioner. Article 21.1.1 of the PSA specifies that the Respondent KSEBL shall pay to the Petitioner, the 'tariff' comprising of the sum of fixed charge for availability of the power station and fuel charge for the supply of electricity. Article 21.1.2 of the PSA provides that the Respondent

KSEBL shall pay to Petitioner an amount, determined in accordance with the provisions of Article 21 as fixed charges, for availability of power station, to the extent of normative availability thereof. While Article 21.4.4 of the PSA specifies that the Petitioner is not entitled for fixed charges for generation in excess of 90% of the availability, Article 21.4.5 of the PSA stipulates that the Petitioner is eligible to get incentive for the excess generation above 90% availability (as per Article 21.6.1 of the PSA). In terms of Article 21.6.1 of the PSA, the incentive rate shall be 50% of the fixed charge, but the incentive is limited to actual despatch and not for generation corresponding to availability. Further, Article 21.6.2 of the PSA stipulates for dis-incentive, when the actual availability falls below 85%. As per Article 21.6.3, the parties agree that within 30 days of the close of every counting year, the cumulative monthly availability for such year shall be determined and the incentive or damages, as the case may be, determined for the respective months of the year and the balance remaining shall be adjusted in the following monthly invoice.

19. Laying emphasis on provision of Article 21.4.1 that provides that “the Base Fixed Charge as corrected for variation on WPI Index in accordance with clause 21.3, shall be the Fixed Charge payable for Availability in each month of the relevant Accounting Year”, the Respondent KSEBL has contended that the fixed charges for a month are payable based on availability of the contracted capacity from the power station in the month and in the event the ‘availability’ in any month is less than the normative availability’, the fixed charge for such month

shall be reduced to the extent of shortfall in normative availability. In our view, this submission of the Respondent is misconceived. It is settled law that the provisions of the contract have to be given full effect to and cannot be read in a narrow and pedantic manner to deny any rightful claims under the contract. While Article 21.1.1 obligates the Respondent KSEBL to pay ‘tariff’ to the Petitioner comprising of fixed charges and fuel charge for supply of power in terms of the agreement, Article 21.1.2 of the PSA obligates the Respondent KSEBL to pay an amount determined in accordance with Article 21 as ‘fixed charge’ (as part of tariff) for availability of the power station, to the extent of ‘normative availability’, which, as per Article 5.1.4 of the PSA is 90% of the contracted capacity, during each year of the operating period. Thus, on a harmonious reading of the provisions of Article 21 of the PSA and Article 5.1.4 of the PSA, it becomes evident that the fixed charges payable for ‘availability’ in each month is with reference to the normative availability (90%) achieved during each accounting year. In short, the fixed charges payable for availability in each month is to be reconciled to the extent of the normative availability achieved by the Petitioner during the year.

20. Also, the submission (on basis of provision of Article 21.6.3 of the PSA) of the Respondent KSEBL, that the yearly reconciliation of availability, with reference to normative availability, is only for computation of incentives and damages and not for fixed charges, cannot be accepted considering the fact that the fixed charges determined in accordance with the provisions under Article 21 of the

PSA and payable for availability for each month, is with reference to the normative availability during year. More so, when the definition itself provides for annual 'Availability' in terms of Article 5.1.4 of the PSA, It cannot be that the PSA only provides for annual reconciliation of incentives and damages, as the case may be, with reference to the normative availability achieved during the year, and not for determination of fixed charges. As pointed out by the Petitioner, in the various judgments furnished, the provisions of the contract have to be harmoniously construed and purposive interpretation be given, in order to prevent it from being frustrated.

21. In the circumstances, we reject the submissions of the Respondent KSEBL and hold that the Petitioner is entitled for payment of fixed charges, with reference to the normative availability achieved on annual basis. Accordingly, the Respondent KSEBL shall undertake the reconciliation of the fixed charges and make the differential payment for 2017-18 and for 2018-19 as sought by the Petitioner, within 60 days from the date of this order.

22. Issue No. A is answered accordingly."

14. The Appellant argued that the Article 21.4.1 of the PSA provides that the Fixed Charges for a month are payable based on the Availability of the Contracted capacity in that month, further, as per the Article 21.4.5, the Supplier shall not be entitled to receive payment of Fixed Charge for Availability exceeding 90% for any day, however, in case it supplies electricity to the Utility in excess of such 90%

(ninety per cent), such excess supply shall be eligible only for payment of Fuel Charge, also, as per Article 21.6.1, the Supplier shall additionally be entitled to an Incentive at the rate of 50 % of the Fixed Charge for Availability in excess of Normative Availability subject to the extent of Despatch of the Power Station.

15. Further argued that the Article 21.6.2 of the PSA provides that in case the Availability in any month is less than the Normative Availability, the Fixed Charge for such month shall be reduced to the extent of shortfall in Normative Availability and in addition, any reduction below the Availability of 85% (eighty five per cent) shall, subject to the provisions of Article 21.7 be multiplied by a factor of 0.25 (zero point two five) to determine the Damages payable for such reduction in Availability, also, the Parties agree that within 30 (thirty) days of the close of every Accounting Year, the cumulative monthly Availability for such year shall be determined and the Incentive or Damages, as the case may be, shall be computed with reference to the Normative Availability for that year and the amount so arrived at shall be adjusted against the Incentives or Damages determined for the respective months of the year and the balance remaining shall be adjusted in the following Monthly Invoice with reference to Article 21.6.3.

16. On the contrary, the Respondent No.2, has submitted that the Explanation to Article 5.1.4 of the PSA clarifies the entire issue, the relevant explanation is quoted hereunder:

“EXPLANATION

Availability of the Power Station to its full capacity shall, in respect of any hour, mean the capacity of the power station to the extent it is

offered by the Supplier for producing and supplying electrical energy equal to 950 (nine hundred and fifty) kWh per mega watt of contracted capacity over a period of one hour, after accounting for auxiliary consumption, and transmission losses upto the Point of Grid Connection, and **for any month or year, as the case may be, the hour during that month or year when the contracted capacity of the Power Station is fully available for production of electricity shall be expressed as a percentage of total hours in that month or year**, as the case may be, and shall include the deemed availability for and in respect of the events described in Article 15.8 (the “**Availability**”). For the avoidance of doubt, the Parties agree that Availability shall, during the months when COD or the Transfer Date occurs, be determined with reference to the number of days when the power station was in operation, and shall be determined likewise for any single day of operation. The parties further agree that if the Contracted Capacity of the Power Station is not Available for production of electricity to its full capacity during any hour, or part thereof, not being less than a quarter of an hour, such hour or part thereof shall, in the computation of Availability, be reduced proportionate to the Non-Availability during that hour. The Parties also agree that the determination of Availability hereunder shall be solely for the purposes of this Agreement and shall not in any manner affect the rights and obligations of the Supplier for and in respect of scheduling and dispatch of electricity under Applicable Laws and the rules and regulations thereunder.”

17. It was further argued that in case the fixed charges are limited to 90% at all time for entire 365 days a year, then no generator can ever claim its fixed cost, as also there are always possibilities of forced outages, accordingly, the PSA specifically provided for the explanation as quoted above to average out the availability, further, added that availability for any year is to be computed by taking together all the hours in that year and the availability is then computed in percentage terms i.e. the percentage of availability is computed on average terms by taking together all the hours in a year, accordingly, reading with Article 5.1.4 and 21.1.2, the Normative Availability can only and only mean that once all the hours of a year are considered where BALCO has declared availability, the percentage of all the said hours has to be a minimum of 90%, the Article 21.1.2 further contemplates that in the event the above is complied, then KSEB has to make payment of full Fixed charges, further, submitted that the intent of the PSA is different accordingly, the phrase 'during a year' has been contemplated, reliance was placed by BALCO on the following judgments stating that it is a settled position of law that each word of a contract has to be given effect to:

a. M. Arul Jothi & Another v. Lajja Bal & Another, reported in (2000)3 SCC 2003;

“10. Having heard learned counsel for the parties in our considered view the cases cited on behalf of the appellants were all those where there was no specific clause restricting the use of the tenanted accommodation. On the other hand, in the case in hand, there is a specific prohibition clause in the rent deed. In the present case there is a specific clause which states “shall be used by the tenant only for carrying on his own business ... and the tenant shall not carry on any other business than the abovesaid business”. By the use of the word “only” with reference to the tenant doing business coupled with the last three lines, namely, “the tenant shall

not carry on any other business than the abovesaid business”, clearly spells out the intent of the parties which restricts the user of the tenanted premises, only for the business which is stated therein and no other. In order to meet this, learned counsel for the appellant referred to Section 108(o) of the Transfer of Property Act and the language of Section 10(2)(ii)(b) which is similar hence he submits interpretation has to be given in a broader perspective, that is the use of the building by the tenant should not be such as to damage it or diminish its value and restriction if any could be that if it was given for business it should not be used for residential purpose and vice versa. We have no hesitation to reject this. If such an interpretation is given, it would make any specific term of a valid agreement redundant. **Once parties enter into a contract then every word stated therein has to be given its due meaning which reveals the rights and obligations between the parties. No part of the agreement or words used therein could be said to be redundant.** Such restriction could only be if any statute or provision of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 specifies, which is none. Nor do we find any restriction by Section 108 of the Transfer of Property Act. In fact, Section 108 of the Transfer of Property Act starts with the words “in the absence of a contract or local usage to the contrary”. In other words, it permits contract to the contrary mentioned under that section.”

b. Ramkishorelal v. Kamal Narayan, AIR 1963 SC 890

“12. The golden Rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court had to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has to a trained conveyancer a clear and definite significance and one can be sure about the sense in which such conveyancer

would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of convincing. Sometimes it happens in the case of documents as regards disposition of properties, whether they are testamentary or non-testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. (See Sahebzada Mohd. Kamgar Shah v. Jagdish Chandra Deo Dhabal Deo) [(1960)(3) SCR 604 at p. 611] . It is clear, however, that an attempt should always be made to read the two parts of the document harmoniously, if possible; it is only when this is not possible, e.g., where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void."

18. It cannot be disputed that the provisions of a contract are to be read harmoniously, however, there is no ambiguity in the present contract, the Normative Availability is well defined as 90% of the Contracted Capacity, however, the Availability may vary on 15 minutes time block, therefore the average availability can be defined for a day or for a month or for the entire years for the purpose of various provisions contained therein, in the present case even if Availability is to be aggregated for the entire year, under the relevant provisions, it has to be construed accordingly.

19. Further, the Explanation quoted above is with reference to uncontrollable parameters affecting the generation and has no application in the present context.

20. The relevant provision for computation of Fixed Charges is Article 21.4 and therefore, Fixed Charges must be determined in accordance with such provision, there is no provision of its re-determination on the basis of annual Availability as claimed by the Respondent No. 2, even, there is no ambiguity or conflict with Article 5.1.4.

21. BALCO further argued that the reference to 21.4 by KSEB is fundamentally flawed and without construing the correct meaning and interpretation of the aforesaid clauses, stating that Article 21.4.4 specifically provides that the utility is obligated to pay Fixed Charges in any 'Accounting Year', however, the said provision has to be harmoniously construed with Article 5.1.4, the Explanation to Article 5.1.4 and Article 21.1.2 shall mean that the fixed charges are payable based on the normative availability (90%) which is to be achieved by the supplier (i.e., BALCO) during the year, further, Article 21.4.5 merely contemplates that the maximum capped tariff (fixed cost) of BALCO for each day, is such tariff computed at Normative Availability and it has no quarrel with the said interpretation, and that BALCO has never claim fixed cost beyond Normative Availability.

22. We find no merit in the above contention of BALCO as computation has to be carried strictly in accordance with Article 21 and there is no conflict with Article 5.1.4 of the PSA, further, we decline to accept the argument of BALCO that Article 21.6.3 is an exception which is carved out for computing incentives because unlike fixed cost entitlement (which is computed merely on achieving Normative Availability, i.e., without actual scheduling of power), for claiming the incentives

under the above Article, alongwith the Normative Availability, it is the actual despatch/ scheduling of power is to be considered as per Article 21.6.1.

23. It is important to note here the provision made under the relevant clauses as quoted in the preceding paragraphs and referred by the Appellant and the Respondent No. 2, as per clause 21.4.1 and 21.4.5, **the Base Fixed Charge, shall be the Fixed Charge payable for Availability in each month of the relevant Accounting Year and the Supplier for any day shall not be entitled to receive payment of Fixed Charge for Availability exceeding [90% (Ninety per cent)]** and in the event it supplies electricity to the Utility in excess of such [90% (Ninety per cent)], such excess supply shall be eligible only for payment of Fuel Charge and also the payment of Incentive due under the provisions of Article 21.4.4 in accordance with Article 21.6.1, with a note that the Capacity Charge referred to herein shall be equal to and with reference to the maximum Availability of [90% (Ninety per cent)] of the Contracted Capacity.

24. It is also clear that the payment made for any day is limited to Normative Availability of 90% and in case the Availability is less than 90%, the Fixed Charge will be reduced accordingly, there is no provision by which the Seller is entitled to get adjustment in the reduction of Fixed Charge for that day by supplying electricity more than 90% on some other day.

25. It is thus clear that the Fixed Charges shall be calculated on per day basis and then added together for the entire calendar month and paid, further, in addition to Fixed Charge, the supplier shall be entitled to Fuel Charges also to be calculated on daily basis limited to the supply exceeding the normative availability of 90% and

then added together for the corresponding calendar month, separately, the incentive/ damages have also to be calculated as per Article 21.6.

26. Separately, the incentive and damages have to be calculated based on the total monthly of availability in a calendar month, in case, the availability in any month exceeds the Normative Availability, the Incentive shall be calculated at the rate of 50% (fifty per cent) of the Fixed Charge for Availability in excess of Normative Availability but to the extent of actual Despatch of the Power Station which is illustrated with an example i.e. *“in the event the Availability in any month shall exceed the Normative Availability by 3% (three per cent) of the Contracted Capacity but the Despatch during that month shall exceed 1% (one per cent) of the entitlement of the Utility in the Contracted Capacity, the Incentive payable hereunder shall be restricted to such 1% (one per cent) only”*.

27. Further, in case the Availability in any month falls short of Normative Availability, the Fixed charges will get reduced to the extent of shortfall in Normative Availability, additionally, in case the Availability below 85% shall be multiplied by a factor of 0.25 to determine the corresponding Damages payable as result of such reduction, however, the period under scheduled maintenance shall be counted for such damages as per Article 21.7.

28. However, it was also agreed under Article 21.6.3 that the cumulative monthly Availability for such year shall be determined and the Incentive or Damages, as the case may be, shall be computed with reference to the Normative Availability for that year which shall be adjusted against the Incentives or Damages

determined for the respective months of the year and the balance remaining shall be adjusted in the following Monthly Invoice.

29. The Central Commission while referring to Article 5.1.4 and Article 39 of the PSA held that the 'Availability' as well as 'Normative Availability' have to be on 'annual' basis contrary to the arguments of the Respondent KSEBL that these are on 'monthly' basis, as already clarified about, the Normative Availability cannot vary from year to year, as per the definition it is equal to 90% of the contracted capacity for the entire period of the contract, however, Availability is the actual Availability as declared for the specified period.

30. The Central Commission has erred in interpreting the Article 21.4 which undoubtedly provides that the Base Fixed Charge as determined under Article 21.2 and 21.3 shall be the **Fixed Charge which shall be payable for Availability in each month of the relevant year**, further, as per Article 21.4.4 and 21.4.5, the Fixed Charges in any accounting year shall not exceed an amount equal to the Fixed Charges payable in respect of the Normative Availability of 90% of the contracted capacity, additionally, **in case the Supplier supplies electricity beyond 90% in any day**, it shall not be entitled to get Fixed Charges for such supply of electricity in excess of 90%.

31. From the relevant provisions, it is clear that the Supplier is not entitled to receive Fixed Charges for the supply of electricity in excess of Normative Availability i.e. 90% of the Contracted Capacity for any day of the year, if we agree with the findings of the Central Commission, then in case the Supplier supplies electricity to the tune of aggregate of 90% in the year by making shortfall of supply

on certain days by supplying electricity in excess of 90%, it will be entitled to payments contrary to the payment terms as stipulated under Article 21.4 i.e. for the days of excess supply beyond 90% for compensating the short supply for the other days, it will receive Fixed Charges for the electricity in excess of 90% or getting full Fixed Charges for 90% for the days in which short supply is made, which is contrary to the express provisions of the PSA.

32. Further, the direction of the Central Commission rejecting the submissions of the Appellant and directing re-determination of Fixed Charges on the basis of Normative Availability for the entire year is not only contrary to the provisions of the PSA which only stipulates re-determination of Incentives and Damages as per Article 21.6.3 but also unjust and unreasonable.

33. The recovery of Fixed Cost for electricity supplied in excess of 90% shall be compensated in terms of Incentive payable in terms of Article 21.6, the PSA has been signed by the contesting parties with open eyes, therefore, they cannot dispute the provisions contained therein, the submission of BALCO that it may not be possible to recover the entire Fixed Cost, if computation is carried out in terms of Article 21.4 cannot be accepted at this stage.

34. Thus, the Appeal has merit and is allowed in terms of the above.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 346 of 2023 filed by the KSEBL has merit, accordingly, the

Impugned Order dated 31.12.2021 passed by the Central Commission is set aside to the extent that the Central Commission has directed re-computation of Fixed Charges at the end of every Financial Year.

The pending IAs, if any shall stand disposed of accordingly.

PRONOUNCED IN THE OPEN COURT ON THIS 19th DAY OF SEPTEMBER, 2023.

pr/mkj
(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson