IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 19 OF 2018 & IA No.89 OF 2018
AND
APPEAL No. 382 OF 2018

Dated: 17 January, 2024

Present: Hon`ble Mr. Sandesh Kumar Sharma, Technical Member
Hon`ble Mr. Virender Bhat, Judicial Member

In the matter of:

APPEAL No. 19 OF 2018

1. **GURHA THERMAL POWER COMPANY LIMITED**
A Company registered under the provisions of the Companies Act, 1956
having its registered office at:
6th Floor, K. J. Tower City,
Ashok Marg, P-Scheme,
Jaipur – 302001

2. **SPML INFRA LIMITED**
A Company registered under the provisions of the Companies Act, 1956
having its registered office at:
F-27/2, Okhla Industrial Area Phase II,
New Delhi-110020

3. **OM METALS INFRAPROJECTS LIMITED**
A Company registered under the provisions of the Companies Act, 1956
having its registered office at:
Om Tower, Church Road,

M.I. Road, Jaipur -302 001 … Appellant(s)

Versus

1. **JAIPUR VIDYUT VITRAN NIGAM LIMITED**
A Company registered under the provisions of the Companies Act, 1956
(Through its Chairman & Managing Director)
having its Corporate office at:
Vidyut Bhawan, Jyoti Nagar,
Jaipur -302 005

2. **AJMER VIDYUT VITRAN NIGAM LIMITED**
A Company registered under the provisions of the Companies Act, 1956
(Through its Managing Director)
having its registered office at:
Vidyut Bhawan, Panchsheel Nagar,
Makarwali Road,
Ajmer -305004

3. **JODHPUR VIDYUT VITRAN NIGAM LIMITED**
A Company registered under the provisions of the Companies Act, 1956
(Through its Managing Director)
having its Corporate office at:
New Power House, Industrial Area
Jodhpur-342003

4. **RAJASTHAN RAJYA VIDYUT PRASARAN NIGAM LIMITED**
A Company registered under the provisions of the Companies Act, 1956
(Through its Chairman)
having its Corporate office at:
Vidyut Bhawan, Jyoti Nagar
Janpath, Jaipur

5. **RAJASTHAN ELECTRICITY REGULATORY COMMISSION**
Through its Secretary/Registrar
Jaipur, Rajasthan … Respondent(s)

Counsel for the Appellant(s)	:	Amit Kapur Roohina Dua Randeep Sachdeva Dhanakshi Gandhi Mansi Gupta Cheitanya Madan
Counsel for the Respondent(s)	:	M G Ramachandran, Sr. Adv. Poorva Saigal Shubham Arya Shikha Sood Reeha Singh Ravi Nair Anushree Bardhan Arvind Kumar Dubey for R-1 to 4 Raj Kumar Mehta for Res. 5

APPEAL No. 382 OF 2018

1. **AJMER VIDYUT VITARAN NIGAM LIMITED**
Hathi Bhata, Old Power House
Ajmer -305001,
Rajasthan

2. **JAIPUR VIDYUT VITARAN NIGAM LIMITED**
Vidyut Bhawan, Janpath
Jaipur -302 005,
Rajasthan

3. **JODHPUR VIDYUT VITARAN NIGAM LIMITED**
New Power House, Industrial Area
Jodhpur-342003,

Rajasthan … Appellant(s)

Versus

1. **GURHA THERMAL POWER COMPANY LIMITED**
Through its Managing Director,
6th Floor, K. J. City Tower, Ashok Marg
C-Scheme, Jaipur – 302001,
Rajasthan

2. **SPML INFRA LIMITED**
Through its Managing Director
F-27/2 Okhla Industrial Area Phase II
New Delhi-110020

3. **OM METALS INFRAPROJECTS LIMITED**
Through its Managing Director
J-28 Subhash Marg
C Scheme, Jaipur -302 001
Rajasthan

4. **RAJASTHAN RAJYA VIDYUT PRASARAN NIGAM LIMITED**
Through its Managing Director
Vidyut Bhawan, Jyoti Nagar
Janpath, Jaipur -302 005
Rajasthan

5. **RAJASTHAN ELECTRICITY REGULATORY COMMISSION**
Through its Secretary
VidhyutViniyamak Bhawan
Sahakar Marg, Near State Motor Garage
Jaipur – 302001,
Rajasthan … Respondent(s)

Counsel for the Appellant(s)	:	M G Ramachandran, Sr. Adv. Poorva Saigal Shubham Arya Shikha Sood Reeha Singh Ravi Nair
Counsel for the Respondent(s)	:	Amit Kapur Roohina Dua Randeep Sachdeva Dhanakshi Gandhi Mansi Gupta Cheitanya Madan for R-1 to 3 Raj Kumar Mehta for Res. 5

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. In this batch of appeals the appellants in first captioned appeal (No.19/2018) have impugned the order dated 09.01.2018passed by the 5th Respondent *Rajasthan Electricity Regulatory Commission* (RERC)in petition no.879 of 2016 filed by the appellants whereby the said petition has been dismissed. The second captioned appeal (No.382/2018) is a cross appeal filed by the Rajasthan discoms, assailing the impugned order dated 09.01.2018 and claiming liquidated damages as per Article 3.3.2 of the PPA.

2. The appellant nos.2&3 (respondent nos.2&3 in the cross appeal) are two separate companies incorporated under the Companies Act, 1956, and are engaged in construction of infrastructural projects. The appellant no.1 (respondent no.1 in the cross appeal) also is a company incorporated under the provisions of the Companies Act, 1956, and had been a wholly owned

subsidiary of respondentno.4 i.e. *Rajasthan Rajya Vidyut Prasaran Nigam Limited* (RRVPNL), but is now owned as well as managed by appellant nos.2&3 in pursuance of the Share Purchase Agreement dated 30.05.2013 entered into between appellant nos.2&3 on the one hand and respondent no.4 on the other. The respondent nos.1 to 3 (appellants in the cross appeal) are distribution licensees envisaged under the Electricity Act, 2003, and operating in the state of Rajasthan. The respondent no.4 is a public sector undertaking established by the Government of Rajasthan under the provisions of Rajasthan Power Sector Reforms Act, 1999 and has been declared as State Transmission Utility (STU) with effect from 10.06.2003 and is discharging the function of wheeling of power / transmission of electricity only.

3. Facts of the case, shorn of unnecessary details, are as under: -
(For the sake of convenience, we will be referring to the parties as per the memorandum of parties in the main appeal i.e. Appeal No.19 of 2018).

i) While the 1st appellant company was the subsidiary company of 4th Respondent and was acting as the authorised representative of 1st to 3rd respondents, issued a Request for Qualification (RFQ) on 07.07.2009 for selection of developer on build, own, operate and maintain (BOOM) basis through tariff based bidding process for procurement of power on long term basis from 70MW lignite based thermal power station linked to Gurha (West) mines to be set up in district Bikaner in State of Rajasthan. On 07.04.2010, a Request for Proposal (RFP) was

issued by appellant no.1 to the joint venture/consortium formed by the appellant nos.2&3 viz. SPML-Om Metal Consortium on being shortlisted by dint of their responses to the aforesaid RFQ.

ii) After issuance of the RFP and upon conclusion of the competitive bidding process envisaged thereunder, the SPML-Om Metal Consortium was identified as the selected bidder for the project on build, own, operate and maintain (BOOM) basis and accordingly Letter of Intent (LoI) dated 15.12.2011 was issued to the Consortium by respondent no.4 which, at that point of time, was the holding company of appellant no.1. In pursuance to the terms of RFP and as the condition precedent for execution of Power Purchase Agreement (PPA), the selected bidder Consortium submitted six separate bank guarantees aggregating to Rs.5.25 crores in favour of respondent nos.1 to 3. Thereafter, a Share Purchase Agreement (SPA) dated 30.05.2013 was executed between the respondent no.4 and appellant no.1 on the one hand and appellant nos.2&3 on the other (being a members of the successful bidder consortium) whereby shares of appellant no.1 company were transferred to appellant nos.2&3 alongwith its control and management.

iii) By virtue of the said SPA dated 30.05.2013, the appellant no.1 became a joint venture company of appellant nos.2&3 and the project work was intended to be executed through the said newly formed joint venture company i.e. appellant no.1.

iv) On 26.06.2013, the appellant no.1 (now acting under the control and management of appellant nos.2&3) entered into a PPA with the respondent nos.1 to 3 for supplying power on long term basis from 70 MW lignite based thermal power plant linked to Gurha (West) mines to be constructed in district Bikaner in the State of Rajasthan.

v) The RFQ, RFP and PPA envisage prior execution of a fuel supply agreement (FSA) between the appellant no.1 and the fuel supplier i.e. *Rajasthan State Mines and Minerals Limited* (RSMML) to provide for the essential coal linkage for the proposed thermal power plant. However, the same as remained to be executed, for which the parties are blaming each other.

4. As per the case of the appellant set-up before the Commission i.e. the respondent no.5, the respondent nos. 1 to 4 failed to discharge their contractual obligations which arose between the parties upon issuance of the RFP as well as upon execution of the SPA and PPA. It was stated that the respondents have conducted breach of the terms of PPA on account of which the appellant no.1 was left with no other alternative but to terminate the said agreement as its performance had become impossible due to these failures / inactions on the part of the respondents. It was contended that the respondents failed to: -

a) Execute the Fuel Supply Agreement;
b) Deliver the land required for the execution of the project within stipulated time under the contract;

c) Issue irrevocable letters to the lenders;

d) Execute all the required RFP project documents such as agreement to hypothecate-cum- deed of hypothecation and default escrow agreement.

5. Accordingly, the appellants had prayed for orders / directions from the Commission in the following terms: -

i) Restraining the respondents forthwith from taking any steps and /or further steps and /or acting upon the already issued demands for encashment of Bank Guarantees submitted and / or extended by the appellant no.2&3 in favour of the respondents;

ii) Directing the respondents to forthwith pay an amount of Rs.9,84,33,626.50/- to the appellant nos.1&2;

iii) Directing the respondents to release and / or return forthwith the aforesaid Performance Bank Guarantees worth Rs.5,25,00,000/-;

iv) Directing the respondents to forthwith pay an amount of Rs.5,98,07,879/- to appellant nos.1&2 towards interest calculated @ 18% per annum for the period till 15.09.2016 on the investment made by them for execution of the project work;

v) Directing the respondents to pay further interest to appellant nos.2&3 @ 18% per annum on the aforementioned investments with effect from 16.09.2016 till the date of order or date of actual payment;

vi) Directing the respondents to forthwith pay an amount of (Rs.2,97,30,135.15/-) being the sum total of expenses incurred by them alongwith interest in conducting the day-to-day operations by appellant no.1 till 15.09.2016; and

vii) Directing the respondents to forthwith pay an amount of Rs.18.04 crores to appellant nos.1&2 being a loss of profit suffered by them on account of failures of the respondents.

6. The respondent discoms refuted the contentions of the appellants and alleged breach / non-fulfilment of conditions of the contract by appellant no.1. It was stated that the respondents had duly made available the initial consent provided for in Schedule-II of the PPA, and therefore, it was for the appellants to apply for and obtain all the necessary consents for the establishment of the generation project. It was further stated that clause 2.1.3 of the RFP provides for signing of the FSA by the authorised representative, which has been defined as M/s Gurha Thermal Power Company Limited i.e. appellant no.1 and thus, it was envisaged that FSA will be executed between appellant no.1 and the fuel supplier and there was no requirement for the FSA to be signed by any of the respondents or any other utility. According to the respondents, it was for the appellants to take appropriate steps for their execution of the FSA as stipulated in the bidding documents including the PPA and after the transfer of shareholding in appellant no.1 by *Rajasthan Rajya Vidyut Prasaran Nigam Limited* (RRVPNL) on 30.05.2013, there was no obligation upon respondents to arrange for the signing of the FSA, and accordingly vide letter dated

27.09.2013, the appellant no.1 was asked to approach the RSMML directly for giving necessary clarifications and for the execution of FSA. It was stated that the FSA was ready at the time of the bidding itself and the terms regarding price, schedule of lifting of lignite etc. only were to be finalised, which could have been finalised only when the appellant no.1 was under the control of appellant no.2&3, and could give a firm commitment regarding the date of commencing supply, quantity required, monthly/yearly schedule of the quantity as well as other relevant aspects.

7. Regarding the allegation of failure to deliver the land required for the execution of the project, it was submitted by the respondents that RFP had provided for handing over of 100 acres of land for the power station from the mine area of RSMML and in pursuance to the same, RSMML had transferred 50 hectares (more than 100 acres) of land on 12.12.2012 and registered lease deed was also executed on 08.01.2013. Additionally, it was further stated that the delay in the availability of land could have only led to an extension of time for completion of the project and did not entitle the appellant no.1 to terminate the PPA.

8. With regards to the allegation of failure to issue irrevocable letters to the lenders, it was stated that as per article3.1.2(A)of the PPA, letters to the lenders were to be issued on or prior to the date of Notice to Proceed (NTP) which meant the date on which the seller shall fulfill the condition as contained in article 3.1.2 (iii) of the PPA and therefore, in the absence of fulfilment of these conditions there was no requirement for the discoms to issue such irrevocable letters to lenders. It was further stated that the discoms were always ready and willing to execute the default escrow

agreement as well as the agreement to hypothecate as envisaged in the PPA and the same was duly informed to the appellants who have also acknowledged the same in the communication dated 04.05.2015 sent to RSMML.

9. It was further contended that actually the appellants, having committed the breach of the terms of the PPA, are liable to pay liquidated damages along with interest to the discoms in terms of article 3.3 of the PPA and the discoms are entitled to encash the Performance Bank Guarantees issued by the appellant nos.2&3 towards part adjustment of such liquidated damages. It was stated that the Bank Guarantees amounting to Rs.2.61 crores have already been encashed and appropriated towards such liquidated damages and the discoms are entitled to retain the same.

10. The Commission, in impugned order, has held that there was no breach of contract by the respondents, and therefore, appellants are neither entitled to terminate the PPA nor to claim any relief based on the same. Accordingly, the petition filed by the appellants was dismissed.

11. We have heard the Learned Counsels for the parties at length. We have also perused the impugned order of the Commission, the entire material on record and the written submissions filed by the Learned Counsels.

12. The Learned Counsel for the appellants vehemently argued that events of the default in this case have occurred not because of any inaction on the part of the appellants but because of the failure on the part of the

respondents to discharge their contractual obligation under the PPA and therefore, they cannot be permitted to take advantage of their own wrongs by encashing the bank guarantees furnished by the appellants. His detailed arguments can be summarized as under: -

(i) The Fuel Supply Agreement (FSA), which stipulated the long term coal linkage for the thermal power plant in question, was the most important agreement to be signed between the parties to effectuate the purpose of setting up the Special Purpose Vehicle (SPV) i.e. appellant no.1 and in essence, by incorporating the appellant no.1 as SPV of the respondent no.4, the respondent had represented to the bidders that FSA will be their responsibility to ensure continuous fuel supply for running of the thermal power plant;

(ii) Under the heading “tasks completed” in the RFQ with respect to the fuel arrangements, it is stated that RSMML will provide fuel linkage for the power station and in-principle commitment from RSMML is available;

(iii) With respect to the clarifications to queries attached to RFQ, it was clarified by the respondents that the fuel type and land acquisition is the responsibility of the authorized representative / procurer and the FSA will be signed in due course;

(iv) In the RFQ, the authorized representative has been defined to mean the *Gurha Thermal Power Company Limited* and the

procurer has been defined to mean the distribution licensees of Rajasthan who have undertaken to purchase entire power generated at the power station;

(v) Similarly, in the RFP also, the authorized representative has been defined to mean *Gurha Thermal Power Company Limited* and its clause 2.1.3 provides that a Fuel Supply Agreement should be signed between the authorized representative and the fuel supplier which shall be provided to the selected bidder alongwith the transfer of the SPV;

(vi) Clause 2.1.3.2 of the RFP provides that after the date of acquisition of 100% of equity shareholding of *Gurha Thermal Power Company Limited* by the selected bidder, the authority of the authorized representative in respect of the bid process shall forthwith cease and any action to be taken thereafter shall be undertaken by the procurer themselves or through any other authorized representative of the procurer. It also states that all the rights and obligations of the authorized representative in its capacity as an authorized representative of the procurer shall be that of the procurer;

(vii) The above clauses in the RFQ and RFP make it clear that even after the execution of the SPV and the PPA, the obligation to execute the FSA lied with the procurer and the intention of the parties was always that FSA shall be signed between the procurer and the RSMML and for this reason the term “authorized

representative" has been used interchangeably with the procurer i.e. respondent discoms.

(viii) Article 4.1.1(a) read with article 5.5 of the PPA also envisaged that initial consent which included long term coal linkage i.e. execution of FSA as mandated in article 2.1.3 of RFP, is the obligation of the respondents;

(ix) It is manifest that the supply of fuel was paramount in deciding the continuous operation of the thermal plant once it was constructed and it was misrepresented to the appellants that a valid FSA between appellant no.1 (which was formerly acting as the authorized representative of respondent nos.1 to 3 and as a subsidiary of respondent no.4) and RSMML existed. The appellants were falsely lured in this project by the respondents who were aware right from the beginning about the fact that no such FSA had been executed;

(x) The execution of the FSA within the stipulated time was one of the fundamental terms of the PPA and any breach of the said fundamental term of the main contract would necessarily result in total breach of the obligations on the part of the respondents and the respondent have still not executed the FSA despite being called upon to do so several times by the appellants.

13. With regards to the allegation of failure on the part of the respondents to issue irrevocable letters to the lenders of the appellants, it was argued by the Learned Counsel that article 3.1.2A was inserted in the PPA to ensure

that the respondents shall issue irrevocable letters to the lenders duly accepting and acknowledging the rights provided to the lenders under the agreement and assuring them about the security prospect of investment in the project. It is submitted that in the absence of such irrevocable letters to the lenders it became impossible for the appellants to reach any agreement with them for the financial assistance and to arrange for necessary finances required for execution of the said project. On the aspect of non-execution of agreement to hypothecate cum deed of hypothecation and default escrow agreement, it was argued by the Learned Counsel that article 2.1.3.2 read with article 2.9.2 of the RFP clearly mandated that all these documents shall be executed within the bid validity period of the relevant tendering process, but the respondents failed to execute these documents despite repeated requests from the appellant. In this regard, the Learned Counsel referred to letters dated 09.07.2014 and 01.08.2014 written by the appellants to the respondents.

14. Referring to article 3.1.2A along with schedule-II of PPA, the Learned Counsel argued that the respondents were obliged to handover possession of land measuring 50 hectare (125 acres) to the appellant no.1 within three months of execution of the PPA i.e. by 26.09.2013, but the same was handed over to the appellant no.1 after about six months from the date of execution of the PPA, which default also entitled the appellants to terminate the PPA.

15. The Learned Counsel also invoked the principle of *Contra Proforentem* which provides that in case of any ambiguity in the terms of contract or two possible interpretations of these terms, the court will prefer

that interpretation which is more favorable to the party which has not drafted the contract. He submitted that in the present case, the project documents i.e. RFQ, RFP etc. are standard documents prepared by respondent no.4 RRVPNL, and therefore, the terms of these documents have to be read as well as understood in the manner favorable to the appellants, and if done so, it would be evident that the responsibility of procuring fuel by executing the requisite Fuel Supply Agreement with RSMML was upon the respondents and not of the appellants. The Learned Counsel also referred to *doctrine of election* to argue that once the parties have chosen a certain route for fulfillment of the terms of the contract, the same cannot be changed midway by insisting upon some alternate route. It is argued that the appellant no.1 through RRVPN, chose the route of competitive bid for the procurement and supply of power whereby it was a liability of procurers through their authorized representatives to sign the FSA, the respondent discoms cannot be permitted to now depart from such terms enumerated in the bidding documents to say that the appellant no.1 was to get the FSA signed and executed.

16. According to the Learned Counsel, the Commission has erred in not holding the respondents guilty of committing breach of the essential terms of the PPA and, therefore, the impugned order cannot be sustained either on facts or in law.

17. On the contrary, the Learned Counsel on behalf of respondent nos.1 to 3, the distribution licensees of Rajasthan, argued that the impugned order of the Commission is legally as well as factually sound and no infirmity can be found in the same. He argued that once the PPA was

executed between the parties, their rights and obligations were governed by the terms of the PPA. He pointed out article 18.4 of the PPA in this regard which provides that the PPA is the final expression of the agreement between the parties and is complete and exhaustive statement of the terms agreed between them which supersedes prior written or oral understanding between the parties. He cited the judgments of this Tribunal dated 17.05.2018 in Appeal No.283 of 2015 *Nabha Power Limited v. Punjab State Power Corporation Limited* and dated 13.04.2018 in Appeal No.210 of 2017 *Adani Power Limited v. Gujarat Electricity Regulatory Commission and Ors. w*herein it has been held that once the competitive bidding is concluded and the PPA is signed, the rights and obligations of the parties get crystalized through the PPA and it emerges to be a binding instrument for the parties. It is his argument that upon execution of the PPA, reference to the terms of the RFP is totally misplaced. He further submitted that the PPA provides that except for initial consent as provided in schedule-II, all other consents and approvals were the obligation of the seller, i.e. appellant no.1. It is his submission that the signing of FSA is not a final consent provided under schedule-II of the PPA and, therefore, it was not the responsibility of the respondents. He argued that even the RFP also provides for signing of the FSA by the authorized representative, which has been defined as appellant no.1 and not the respondents. He submitted that upon execution of the Share Purchase Agreement (SPA), the rights and obligations in appellant no.1 came to be vested on the consortium owned by appellant nos.2&3 to whom its 100% shareholding was transferred, and therefore, the execution of the FSA also was the responsibility of the appellants. It is argued that the model FSA had been provided to the

appellants on 11.03.2011 i.e. prior to the bid submission date and once the appellant no.1 came under the ownership and control of the consortium, it was their responsibility to take appropriate steps for execution of the FSA.

18. On the aspect of providing land to the appellants for the project, it was pointed out by the Learned Counsel that about 50 hectares (being more than 100 acres) were handed over to the appellants on 12.12.2012 and the registered lease deed was also executed on 08.01.2013. It is submitted that after demarcation and pillaring was done on 26.04.2013, the coordinates of the pillars were verified in the presence of the representative of appellant nos.2&3 but they refused to sign the joint report and hence, the delay was caused due to the conduct of the appellants. It is further argued that even if there was any delay on the part of the respondents to handover the possession of the land to the appellants, it would entitle, at best, the appellants only for extension of time for completion of project and did not empower them to terminate the PPA.

19. With regards to the allegation of failure to provide irrevocable letters to the lenders and in execution of documents like default escrow agreement and deed of hypothecation, it was submitted by the Learned Counsel that there was no requirement for the respondents to issue these letters or to execute these documents as the appellants had failed to fulfill the conditions laid down in article 3.1.2(iii) of the PPA. It is pointed out that the appellants themselves had failed to identify the lenders or to write to the respondents for issuance of such letters to the lenders. It was argued that no breach, whatsoever, has been caused to the appellants on account of delay, if any, in the finalization of default escrow agreement as well as

agreement to hypothecate for the reason that these were relevant only after the appellant no.1 commenced generation and supply of electricity. It is submitted that the Commission has rightly observed in the impugned order that in the absence of commissioning of the plant and supply of electricity, there was no purpose of executing these documents.

20. On the basis of these submissions, the respondents have sought dismissal of appeal no.19/2018 and award of liquidated damages to them as per article 3.3.2 of the PPA, as claimed by them in the cross-appeal no.382/2018.

21. We have given thoughtful consideration to the rival claims of the parties and the rival submissions made on their behalf by their respective counsels.

22. Following four issues arise for consideration in this batch of Appeals:

(a) Whether it was the responsibility of the respondent nos.1 to 3 to execute Fuel Supply Agreement with RSMML and, if so, whether they have failed to do so, thereby committing breach of the terms of PPA?

(b) Whether the respondents have failed to deliver the possession of the land to the appellants required for execution of the project in question?

(c) Whether the respondent nos.1 to 3 have failed / defaulted in issuing irrevocable letters to the lenders of the appellants?

(d) Whether the respondents have failed to execute the necessary RFP project documents viz. agreement to hypothecate cum deed of hypothecation and default escrow agreement?

Issue No.(a):

23. It is contended on behalf of the appellants that execution of the FSA with RSMML for continuous fuel supply to the thermal power plant was the responsibility of the respondents and they have failed to do so despite repeated requests of the appellants.

24. Clause 2.1.3 of the RFP document provides that a FSA will be signed between the authorized representative and the fuel supplier which would be provided to the selected bidder along with the transfer of SPV. This Request For Proposal (RFP) was issued on 07.04.2010 by appellant no.1 company for selection of developer on Build, Own, Operate and Maintain (BOOM) basis through tariff based bidding process for procurement of power on long term basis from 70MW lignite based thermal power station linked to Gurha (West) mines to be setup in district Bikaner in the State of Rajasthan, India. At that time, the appellant no.1 was a wholly owned subsidiary of respondent no.4 RRVPNL. The term "authorized representative" has been defined in this very document to mean *Gurha Thermal Power Company Limited* (i.e. appellant no.1), the body corporate authorized by the procurer (i.e. the distribution licensees of Rajasthan being the respondent nos.1 to 3 herein) to carry out the bid process for selection of successful bidders on their behalf.

25. It is, thus, clear that while issuing the said RFP, the appellant no.1 was acting as authorized representative of the respondent nos.1 to 3 and the FSA was to be executed by it with the fuel supplier RSMML.

26. The definition of the term "seller" in the RFP is also material and is reproduced hereunder: -

> *" "Seller" shall mean 'Gurha Thermal Power Company Limited', a company incorporated under the Companies Act, 1956 and having its registered office at Vidyut Bhawan, Janpath, Jyoti Nagar, Jaipur-302005 (Rajasthan) for the purposes of development, finance, ownership, design, engineering, procurement, construction, commissioning, operation and maintenance of the Project in accordance with the RfP; Gurha Thermal Power Company Limited shall act as the Authorised Representative till acquisition of its 100% equity shareholding by the Selected Bidder."*

27. Hence, the appellant no.1 i.e. *Gurha Thermal Power Company Limited* was to act as authorized representative of the respondent nos.1 to 3 only till acquisition of its 100% equity shareholding by the selected bidders.

28. The second proviso attached to clause 2.1.3.2 provides that after the date of acquisition of 100% equity shareholding of *Gurha Thermal Power Company Limited* by the selected bidder, (a) the authority of the authorized representative in respect of the bid process shall cease forthwith and any actions to be taken thereafter will be undertaken by the procurer themselves or through any other authorized representative of the procurer, (b) all rights and obligations of the authorized representative in its capacity as an authorized representative of the procurer shall be of the procurer,

(c)all other rights and obligations of *Gurha Thermal Power Company Limited* shall be of the seller and (d) any decision taken by *Gurha Thermal Power Company Limited* as the authorized representative prior to the effective date, shall continue to be binding on procurer.

29. This clearly indicates that upon acquisition of 100% shareholding of *Gurha Thermal Power Company Limited* by the selected bidder, its authority to act as authorized representative of the procurer i.e. the respondent nos.1 to 3 in respect of bid process shall cease forthwith and any further actions to be taken thereafter were to be taken by the procurer themselves or through any other authorized representative.

30. Upon conclusion of the competitive bidding process envisaged under RFP, the *SMPL-Om Metals Consortium* formed by appellant nos.2&3 was identified as selected bidder for the project and accordingly Letter of Intent (LoI) dated 15.12.2011 was issued to the Consortium by respondent no.4. It is not in dispute that in pursuance to the terms of RFP and as a condition precedent for execution of Power Purchase Agreement (PPA), the selected bidder consortium submitted six separate bank guarantees aggregating to Rs.5.5 crores in favour of respondent nos.1 to 3. Thereafter, a Share Purchase Agreement (SPA) dated 30.05.2013 was executed between respondent no.4 and appellant no.1 on the one hand and appellant nos.2&3 on the other (being members of successful bidder consortium), whereby entire shareholding of appellant no.1 company was transferred to the consortium owned by appellant nos.2&3 along with its control and management.

31. Thus, the appellant no.1 company, by virtue of the said SPA dated 30.05.2013, became a joint venture company of appellant nos.2&3 and ceased to be authorized representative of the procurers i.e. respondent nos.1 to 3 with effect from the said date. In view of the second proviso attached to clause 2.1.3.2 of RFP, already noted hereinabove, all the actions to be taken after 30.05.2013 on the part of the procurers i.e. respondent nos.1 to 3 were to be undertaken by them on their own or through any other authorized representative.

32. It is an admitted position that even though as per clause 2.1.3 of the RFP the FSA was to be provided to the selected bidder along with the transfer of SPV i.e. 100% shareholding in appellant no.1 company but the FSA had not been executed till 30.05.2013 when the SPV (appellant no.1) was transferred to the selected bidder i.e. Consortium owned by appellant nos.2&3. Since the appellant no.1 ceased to remain authorized representative of the procurers i.e. respondent nos.1 to 3 with effect from 30.05.2013, it was not competent to execute the FSA thereafter with the RSMML on behalf of these respondents, and therefore, the execution of the said FSA was to be undertaken by these respondents themselves or through any other authorized representative.

33. What is clearly discernable from the meaningful reading of the relevant clauses of the RFP, noted hereinabove, is that the FSA had to be executed between appellant no.1 (acting in the capacity of authorized representative of the procurers i.e. respondent nos.1 to 3) and the fuel supplier i.e. RSMML before the transfer of equity shareholding of appellant no.1 to the selected bidder i.e. before 30.05.2013 in the present case but

the same had not been executed by that date for which the respondent nos.1 to 3 only can be held responsible. After 30.05.2013 also, it was responsibility of the respondent nos.1 to 3 to get the FSA executed with the fuel supplier either themselves or through some other authorized representatives but they have again failed / neglected to do so.

34. Subsequently, the requisite PPA came to be executed between the respondent nos.1 to 3 (i.e. procurers) on the one hand and the appellant no.1 (i.e. seller) on the other, on 26.06.2013. Article 3.1.2 is relevant for the present discussion and is reproduced hereunder: -

> "*The Seller agrees and undertakes to duly perform and complete the following activities within (i) six (6) Months from the Effective Date or (ii) Eight (8) Months from the date of issue of Letter of Intent, whichever is later, unless such completion is affected due to the Procurers' failure to comply with their obligations under Article 3.1.2A of this Agreement or by any Force Majeure event or if any of the activities is specifically waived in writing by the Procurers jointly:*
>
> *i) the Seller shall have received the Initial Consents as mentioned in Schedule 2, either unconditionally or subject to conditions which do not materially prejudice its rights or the performance of its obligations under this Agreement;*
>
> *ii) Omitted;*
>
> *iii) the Seller shall have*
>
> *a) awarded the Engineering, Procurement and Construction contract ("EPC contract) or main plant contract for boiler, turbine and generator ("BTG"), for the Project and shall*

have given to such contractor an irrevocable notice to proceed; and

b) The Seller shall have sent a written notice to all the Procurer(s) indicating the Contracted Capacity and Gross Capacity for the each Unit and for the Power Station as a whole expressed in MW and furnished the undertaking as per Article 3.1.1A.

c)

1) in case the Project is proposed to be developed on the books of the Bidder, he shall have completed the execution and delivery of the Financing Agreements for at least twenty five percent (25%) of the debt required for the Project as certified by the Lender/Lead Lender; or

2) in case the Seller develops the Project on a non recourse basis, Seller shall have achieved Financial Closure;

iv) the Seller shall have made available to the Procurer the data with respect to the Project for design of Interconnection Facilities and Transmission Facilities, if required;

v) the Seller shall have finalized the specific delivery point for supply of power in consultation with the Procurer;

vi) the Seller shall have taken the possession of the land for the Power Station and have paid the remaining Declared Price of the Land, if any to the State government authority acquiring the land;

vii) The Seller shall have provided an irrevocable letter to the Lenders duly accepting and acknowledging the rights provided to the Lenders under the terms of this Agreement and all other RFP Project Documents.

viii) where the Seller has not exercised its option to change Unit configuration the Seller shall have sent a written notice to all the Procurer(s) indicating that

a) the Scheduled COD shall be as per the original Scheduled COD i.e. (i) for the first Unit, [Insert Date]; (ii) for the second Unit, [Insert Date] and so on till last Unit or

b) that it intends to prepone the Scheduled COD to be (i) for the first Unit, [Insert Date]; (ii) for the second Unit, [Insert Date] and so on till last Unit] (hereinafter referred to as "Revised Scheduled COD"). Provided that, the Revised Scheduled COD of any Unit shall not be earlier than Twenty six (26) months from the NTP.

ix) In case where the Seller has exercised its option to change Unit configuration, the Seller shall have sent a written notice to all the Procurer(s) indicating the Scheduled COD of each Unit and Power Station. Provided that, the Scheduled COD of any Unit so intimated shall not be earlier than Twenty six (26) months from the NTP. Provided further that the Scheduled COD of the Ist Unit and Scheduled COD of the Power Station shall not be later than the Scheduled COD given in the Selected Bid."

(Emphasis supplied)

35. Article 5.5 of the agreement is also relevant and is reproduced hereunder:-

*"**Consents***

The Seller shall be responsible for obtaining all Consents (other than those required for the Interconnection and Transmission Facilities and the Initial Consents) required for developing, financing, constructing, operating and maintenance of the Project and maintaining / renewing all such Consents in order to carry out its obligations under this Agreement in general and this Article 5 in particular and shall supply to the Lead Procurer (or Procurer, as applicable) promptly with copies of each application that it submits, and copy/ies of each consent/approval/license which it obtains. For the avoidance of doubt, it is clarified that the Seller shall also be responsible for maintaining/renewing the Initial Consents and for fulfilling all conditions specified therein."

(Emphasis supplied)

36. Further, the obligations of the seller i.e. appellant no.1 to build, own and operate the project have been specified in article 4.1 of the PPA which is reproduced hereunder: -

"4.1 The Seller's obligation to build, own and operate the Project

4.1.1 Subject to the terms and conditions of this Agreement, the Seller undertakes to be responsible, at Seller's own cost and risk, for:

a) obtaining (other than Initial Consents) and maintaining in full force and effect all Consents required by it pursuant to this Agreement and Indian Law;

b) executing the Project in a timely manner so as to enable each of the Units and the Power Station as a whole to be Commissioned no later than its Scheduled Commercial

Operations Date and such that as much of the Contracted Capacity as can be made available through the use of Prudent Utility Practices will be made available reliably to meet the Procurers' scheduling and dispatch requirements throughout the term of this Agreement but under no event earlier than 30 months from NTP;

c) *owning the Project throughout the term of this Agreement free and clear of encumbrances, except those expressly permitted by Article 16;*

d) *procure the requirements of electricity at the Project (including construction, commissioning and start-up power) and to meet in a timely manner all formalities for getting such a supply of electricity;*

e) *provide on a timely basis relevant information on Power Station specifications which may be required for interconnecting system with the transmission system;*

f) *fulfilling all other obligations undertaken by him under this Agreement.*

37. Bare perusal of these material articles of the PPA would indicate that the seller i.e. appellant no.1 was responsible for obtaining of consents other than initial consents as stated in schedule-II attached to the agreement. As per the said schedule-II, the initial consents mean environmental clearance, long term coal linkage, NOC in respect of no authorized area being involved, water linkage and tasks mentioned in clause 3.1.2A of the agreement. Therefore, the responsibility of making available the long term

coal linkage for the power project was not upon the seller i.e. appellant no.1 but upon the procurers i.e. respondent nos.1 to 3.

38. While rejecting the contentions of the appellants on the aspect under consideration, the Commission has relied upon the Letter of Intent (LoI) dated 15.12.2011 issued to the appellants, wherein it has been sated as under: -

> *"The supply of fuel (lignite) for the above project shall be made by RSMML as per final Fuel Supply Agreement (FSA) to be executed by you with RSMML as per format sent to you vide letter dated 11.02.2011."*

39. The above noted contents of the said letter are clearly in contravention of the terms of the previous documents like RFP etc. executed between the parties and no explanation for such deviation in the obligations of the parties as per the previous documents has been given. In these circumstances, the said LoI seems to have been issued without reference to the previous documents executed between the parties and thus, cannot be considered or made basis for shifting of the obligations to execute the FSA from the respondent nos.1 to 3 to the appellants.

40. We feel in agreement with the arguments put forward on behalf of the respondents that upon execution of the PPA on 26.06.2013 between the parties, their rights and obligations got crystalized through its terms and it became the binding instrument between them. However, we do not find any clause in the entire PPA which places the obligation of executing the

FSA with the fuel supplier RSMML upon the appellants. In case, the intention of the parties at the time of executing the PPA had been that the appellants were to execute the FSA with the fuel supplier, which would have been contrary to the terms of RFP, it would have been stated specifically in the PPA, however, that has not been done. It was for the procurers i.e. respondents to incorporate a clause in the PPA to the effect that obligation of executing the FSA would be upon the appellants.

41. The Commission has also relied upon the definition of Fuel Supply Agreement (FSA) in the PPA for fixing the responsibility of executing the same by the appellants. We find it apposite to reproduce the definition of FSA given in the PPA as under:

> *"Fuel Supply Agreement" Means the agreement(s) entered into between the Seller and the Fuel Supplier for the purchase, transportation and handling of the Fuel, required for the operation of the Power Station. In case the transportation of the Fuel is not the responsibility of the Fuel Supplier, the term shall also include the separate agreement between the Seller and the Fuel Transporter for the transportation of Fuel in addition to the agreement between the Seller and the Fuel Supplier for the Supply of the Fuel;"*

42. It is true that the said definition of FSA given in the PPA indicates that this agreement was to be executed between the seller i.e. the appellant no.1 and the fuel supplier. However, as already noted hereinabove, there is no other specific article or term in the entire PPA fixing the responsibility of executing the FSA with the fuel supplier upon the appellants. On this aspect, we note that the term "Fuel Supply Agreement" has been defined

very loosely in the PPA and also in total disregard to the all other articles contained in the PPA including the default clauses. It is an established principle of interpretation of contracts that where there is contradiction or anomaly between the definition part of the agreement and the main terms of the agreement, the courts should always go with what is expressly stated in the body of the contract and not with the definition clause only. We find it relevant to refer on this issue to the judgment of the Hon'ble Supreme Court in *Nabha Power Limited v. Punjab State Power Corporation Limited* (2018) 11 SCC 508, wherein the apex court had the occasion to interpret the terms of the commercial contract by looking *inter alia* into the definition clause and has laid down guiding principles on how the terms of commercial contracts should be interpreted. It has been held:-

> *"It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it."*

43. The "Penta-test" as referred by the Hon'ble Supreme Court in the above judgment to ascertain implied terms while interpreting commercial contracts is as under: -

"(1) it must be reasonable and equitable;
(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
(3) it must be so obvious that "it goes without saying";
(4) it must be capable of clear expression;
(5) it must not contradict any express term of the contract."

44. In the instant case, since the definition of FSA in the PPA is not in consonance of its express terms and also is contrary to how the same was explained in the previous documents between the parties, it cannot be said to be reasonable or equitable or capable of clear expression. Thus, it does not fulfill the Penta-test and deserves to be discarded. We are, therefore, of the opinion that the responsibility of executing the FSA cannot be put upon the appellants merely on the basis of the definition of the FSA in the PPA without there being specific article / clause in the entire body of the PPA.

45. The issue with regard to interpretation of a commercial contract had come up before the Hon'ble Supreme Court in *Transmission Corporation of Andhra Pradesh Limited and Others versus GMR Vemagiri Power Generation Limited and Another* (2018) 3 SCC 716 wherein it has been held that a commercial document cannot be interpreted in a manner to arrive at complete variance with what may originally had been the intendment of the parties. We find it pertinent to reproduce relevant paragraph of the said judgment: -

"*26. A commercial document cannot be interpreted in a manner to arrive at a complete variance with what may originally have*

been the intendment of the parties. Such a situation can only be contemplated when the implied term can be considered necessary to tend efficacy to the terms of the contract. If the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties it will not be prudent to read implied terms on the understanding of a party, or by the court, with regard to business efficacy as observed in Satya Jain v. Anis Ahmed Rushdie, as follows: (SCC pp.143-44, paras 33-35)

> *"33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in Moorcock. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied – the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. In the Moorcock sums up the position: (PD p.68)*
>
> > *'… In business transactions such as this, what the law desires to effect by the implications is to give such*

business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impost on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.' "

46. A meaningful perusal of all the RFP project documents in the instant case including the PPA leads to an inevitable conclusion that the intention of the parties was always that the Fuel Supply Agreement was to be executed by the procurers i.e. respondent nos.1 to 3 with the fuel supplier. We see nothing on record either in any of the documents executed between the parties or in any correspondence exchanged between them to show or suggest that it was the responsibility of the appellants to execute the FSA with the fuel supplier and to ensure the supply of fuel to the upcoming power project. Rather, the terms of the RFP as well as the PPA clearly envisage that the execution of the FSA was responsibility of the procurers i.e. respondent nos.1 to 3, which they could have got executed through appellant no.1 before 30.05.2013 and thereafter, either themselves or through any other authorized representative. Not having done so, the logical conclusion which can be drawn is that the respondent nos.1 to 3 have clearly committed breach of the relevant terms / clauses of the RFP as well as the PPA, thereby providing good ground to appellant no.1 to

terminate the PPA by way of 7 days' notice in terms of clause 14.4 of the agreement.

Issue No.(b):

47. The contention of the appellants in this regard is that the respondents failed to deliver to them 125 acres of land for construction of the power plant within the time prescribed under the PPA, which was the basic requirement for execution of the project and therefore, the respondents have committed flagrant breach of the terms of PPA on this count also. It is pointed out that the respondents ought to have handed over the possession of the land for the power project to appellant no.1 within three months of the execution of the PPA i.e. on or before 26.09.2013 but the land was actually handed over to appellant no.1 in the month of January, 2014 and therefore, the respondents have committee default of the terms of article 3.1.2A of the PPA which clearly entitled the appellants to terminate the PPA.

48. It is submitted on behalf of the respondents that in pursuance to the RFP, 50 hectares of land was transferred by RSMML on 12.12.2012 and registered sale deed was also executed regarding said land on 08.01.2013, and therefore, there was no delay or default in handing over the possession of land required for the project. It is further argued that even if it is assumed that possession of the land had been given to the appellants in January, 2014, same was well before the expiry of six months envisaged in the PPA which do not entitle the appellants to terminate the PPA and has

only given them a right to seek extension of time for completion of the project as per article 3.3.3 of the PPA.

49. Article 3.1.2A of the PPA provides three months from the effective date for handing over of the possession of the land for the power station. The term “effective date” has been defined in the PPA itself to be the date of signing of the PPA by the parties i.e. 26.06.2013. Therefore, the appellants should have been put in possession of the requisite piece of land admeasuring 125 acres on or before 26.09.2013. The contention of the respondents that the possession of the land was transferred to the appellants on 12.12.2012 is not borne out from the records. The document upon which reliance is placed in this regard by the respondents (page 199 of the reply) would only reveal that 50 hectares of land in village *Bheethnok* was acquired by the Government of Rajasthan and placed at the disposal of RSMML. A copy of the sale deed dated 08.08.2013 executed between RSMML and appellant no.1 regarding the said chunk of land has also been annexed to the reply. However, there is no clause in the sale deed saying that actual possession of the said land had been handed over to the appellants. A copy of the site report dated 26.04.2013 annexed to the reply (at page no.205) would show that the demarcation of the land and its pillaring was still in progress, which indicates that the possession of land could not have been handed over to the appellants at least till the said date i.e. 26.04.2013. In these circumstances, we feel constrained to accept the contentions on behalf of the appellants that the land in question had actually been handed over to them in the month of January, 2014.

50. We find clause 3.3.3A of the PPA relevant on this aspect and the same is reproduced hereunder: -

> *"3.3.3A In case of inability of the Procurers to perform the activities specified in Article 3.1.2A within the time period specified therein, otherwise than for the reasons directly attributable to the Seller or Force Majeure event, the Condition Subsequent as mentioned in Article 3.1.2 would be extended on a 'day for day' basis, equal to the additional time which may be required by the Procurers to complete the activities mentioned in Article 3.1.2A, subject to a maximum additional time of six (6) Months. Thereafter, this Agreement may be terminated by the Seller at its option, by giving a Termination Notice of at least seven (7) days, in writing to the Procurers. If the Seller elects to terminate this Agreement, the Procurers shall, within a period of thirty days, purchase the entire shareholding in the Seller for the following amount. Provided such purchase of shares shall be undertaken by the Procurers in the ratio of their then existing Allocated Contracted Capacity:*
>
> *a) total amount of purchase price paid by the Successful Bidder to the shareholders of the Seller to acquire the equity shares of the Seller as per the RPF; plus*
>
> *b) total amount of the Declared Price of Land to the extent paid by the Seller after the acquisition of its 100% shareholding by the Selected Bidder; plus*
>
> *c) an additional sum equal to ten percent (10%) of the sum total of the amounts mentioned in sub-clauses (a) and (b) above.*
>
> *In addition, the Performance Guarantee of the Seller shall also be released forthwith."*

51. Perusal of the said clause of the PPA indicates that in case of inability of the procurers i.e. respondents to perform the obligations under article 3.1.2A which include handing over the possession of land for the power station, the time prescribed for the same had to be extended on a day-to-day basis subject to maximum additional time of six months and if the said obligation is not performed by the procurers within the said extended time period, the appellant no.1 was empowered to terminate the agreement by giving 7 days prior notice. In the instant case, as per the time period prescribed under article 3.1.2A of the PPA, the respondents were bound to handover the possession of the land to the appellants for the power project on or before 26.09.2013. Since the same was not done, the respondents were entitled to extension of time by further six months i.e. upto 26.03.2014 in terms of clause 3.3.3A of the PPA, and thereafter only was the PPA terminable at the option of the appellants by giving 7 days prior notice. It is the case of the appellants themselves that the possession of the land was handed over to them in the month of January, 2014, i.e. much before the expiry of the extended time period of six months provided in clause 3.3.3A and therefore, they were not entitled to terminate PPA on the basis of such default but only could have claimed extension of time for completion of the project.

52. Hence, on this issue, no fault can be found with the findings of the Commission.

Issue No.(c):

53. Referring to article 3.1.2A of the PPA, it has been argued on behalf of the appellants that the respondents were obliged to issue irrevocable letters to the lenders duly accepting and acknowledging their rights provided under the terms of the PPA and other RFP project documents. It is submitted that by not issuing such irrevocable letters to the lenders, the respondents have prevented the appellants from obtaining requisite financial assistance from the lenders and have thereby impeded the works contemplated in article 3.1.2(iii) of the PPA, and therefore, on account of such defaults of the respondents, they were entitled to terminate the PPA in terms of article 3.3.3A.

54. On behalf of the respondents, it was argued that as per article 3.1.2A of the PPA, letter of credit to the lenders were to be issued on or prior to the date of Notice to Proceed (NTP). It is stated that as per the PPA, NTP means date on which the seller i.e. appellant no.1 shall fulfill the condition as contained in article 3.1.2(iii) of PPA and in case of the failure of the seller in fulfilling these conditions, there was no requirement for the respondent discoms to issue such irrevocable letters to the lenders. It is further argued that the appellants had neither identified the lenders nor had sent any communication to the discoms for issuance of such irrevocable letters to the lenders and therefore, the delay in this regard cannot be attributed to the respondent discoms.

55. We find that the letter of credit to the lenders was required to be furnished by the procurers i.e. respondents on or prior to the date of NTP as per article 3.1.2A of the PPA. The conditions precedent for the same have been spelt out in article 3.1.2(iii) of the PPA which are as under:-

"(iii) the Seller shall have

a) Awarded the Engineering, Procurement and Construction contract ("EPC contract) or main plant contract for boiler, turbine and generator ("BTG"), for the Project and shall have given to such contractor an irrevocable notice to proceed; and

b) The Seller shall have sent a written notice to all the Procurer(s) indicating the Contracted Capacity and Gross Capacity for the each Unit and for the Power Station as a whole expressed in MW and furnished the undertaking as per Article 3.1.1A.

c)

1) In case the Project is proposed to be developed on the books of the Bidder, he shall have completed the execution and delivery of the Financing Agreements for at least twenty five percent (25%) of the debt required for the Project as certified by the Lender/Lead Lender; or

2) In case the Seller develops the Project on a non recourse basis, Seller shall have achieved Financial Closure;"

56. It is nowhere the case of the appellants that they had fulfilled all these conditions, and therefore, the question of issuing irrevocable letters of credit by the respondent discoms do not arise at all. On this count also we

do not find any infirmity in the findings of the Commission contained in the impugned order.

Issue No.(d):

57. On this issue, it is argued on behalf of the appellant that these documents, which have been unambiguously designed as essential RFP project documents, ought to have been executed simultaneously with each other as per the time schedule embodied in the recitals of the RFP but same have not been executed by the respondents even after more than 3 years of execution of the PPA and the SPA despite repeated requests of the appellants. It is argued that the project could have executed only when all these project documents were executed within the stipulated period in order to give a sense of security to the prospective investors and by defaulting in fulfilling such obligation the respondents have clearly committed breach of the terms of the PPA which entitled the appellant to terminate the contract.

58. To the contrary, it is argued on behalf of the respondents that they were willing to execute these documents and also informed the appellants about the same, but these documents would have become relevant only when the appellant no.1 commenced generation and supply of electricity and not before.

59. Admittedly, no clause in the PPA provides for any specific time period for execution of these documents. Even the article 14.2 of the PPA which spells out the events of default on the part of the procurers i.e. respondents

do not recognize non-execution of these documents as an event of default entitling the appellants to terminate the agreement. Even otherwise also, we feel in agreement with the observations of the Commission in this regard that these documents could have become relevant only when the appellant no.1 commenced generation and supply of electricity. Hence, we do not find any error in the impugned order on this issue also.

Conclusion of the Tribunal:

60. Having regard to the above discussion, particularly on Issue no.(a) hereinabove, it is manifest that the procurers i.e. respondent nos. 1 to 3 have committed default / breach of the terms of the RFP project documents including the PPA as envisaged in article 14.2 (iii) of the PPA, and thus, the appellants have legally and validly terminated the PPA vide notice dated 19.07.2015. No events of default can be attributed to the appellants herein.

61. Hence, the findings of the Learned Commission in this regard cannot be sustained. Accordingly, we hold that the respondent nos.1 to 4 have failed to discharge their contractual obligations towards the appellant arising between the parties in terms of the RFP project documents as well as the PPA, and have committed flagrant breach of the terms of the PPA on account of which the appellants were left with no other option but to terminate the PPA. As a necessary corollary, we also hold the respondents liable to return the amounts of money received by them from the appellants either on account of Performance Bank Guarantees or towards acquisition of equity share of *Gurha thermal Power Company Limited*, towards the price of land acquired for setting up of power project, towards the

investments made by appellants and also to compensate the appellants for the expenses incurred by them for running, operating and maintaining the appellant no.1 company.

62. In view thereof, the appeal no.19/2018 is hereby allowed, whereas cross-appeal no.382/2018 filed by the procurers, i.e. respondent nos.1 to 3, is hereby dismissed. The pending application is also disposed of accordingly along with the appeal.

63. The claims of the appellants in appeal no.19/2018 are:-

i) Release / return of the Performance Bank Guarantees worth Rs.5,25,00,000/-.

ii) Rs.6,56,93,787/- paid by them for acquisition of equity shares in Gurha Thermal Power Company Limited.

iii) Rs.4,63,07,436/- paid by them towards price of land acquired for setting up of the power project.

iv) Rs.6,69,69,007/- towards investment made by them in the project.

v) Rs.8,73,26,399/- which was invested by the appellant nos. 2&3 in the project.

vi) Rs.1,64,66,946.45 stated to have been incurred by appellant nos.1&2 towards expenses for running, operating and maintaining the appellant no.1.

64. On the basis of the material on record and having regard to the rival contentions of the parties, we have no hesitation in allowing the claim nos. i), ii) & iii) hereinabove in favour of the appellants. So far as claim nos. iv), v) & vi) are concerned, these are not supported by any documentary evidence, and therefore, are hereby rejected.

65. Consequently, we hereby pass further following directions in favour of the appellants and against the respondents in appeal no.19/2018. We;

i) Direct the respondents to release / return forthwith to the appellants, the Performance Bank Guarantees worth Rs.5,25,00,000/- (Rupees five crores and twenty-five lakhs only);

ii) Direct the respondents to repay to the appellant nos.2&3 an amount of Rs.6,56,93,787/- (Rupees six crores fifty-six lakhs ninety-three thousand seven hundred and eighty-seven only - paid by them for acquisition of equity shares in *Gurha Thermal Power Company Limited*) along with Carrying Cost at the rate of Late Payment Surcharge;

iii) Direct the respondents to repay the amount of Rs.4,63,07,436/- (Rupees four crores sixty-three lakhs seven thousand four hundred and thirty-six only – paid by them towards price of land acquired for setting up of power project) along with Carrying Cost at the rate of Late Payment Surcharge and with further

directions that the acquired land shall be taken over back either by the respondents or by the Government of Rajasthan, as the case may be.

Pronounced in the open court on this Seventeenth Day of January, 2024.

(Virender Bhat) Judicial Member	(Sandesh Kumar Sharma) Technical Member (Electricity)

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