IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO.161 OF 2018

Dated: 30th May, 2024

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

In the matter of:

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED
G-9, Prakashgadh,
Anand Kanekar Marg,
Bandra (E), Mumbai - 400051 … Appellant(s)

VERSUS

1. **MAHARASHTRA ELECTRICITY REGULATORY COMMISSION,**
Through the Secretary
Centre 1, 13th Floor,
World Trade Centre, Cuffe Parade,
Mumbai – 400005. ... Respondent No.1

2. **LANCO VIDARBHA THERMAL POWER LIMITED,**
Through the Director and Chief Operating Officer,
Lanco House, Plot No.4,
Software Units Layout Hitech City,
Madhapur, Hyderabad – 500081 ... Respondent No.2

Counsel on record for the Appellant(s)	:	Udit Gupta Anup Jain Vyom Chaturvedi Prachi Gupta for App. 1
Counsel on record for the Respondent(s)	:	Sakya Singha Chaudhuri Avijeet Lala Astha Sharma

Shreya Dubey
Nameeta Singh
Karan Jaiswal
Aryaman Singh
Ravish Kumar
Aparna Tiwari
Shriya Gambhir
Shreevidya Nargolkar
Shubham Hasija for Res. 2

JUDGMENT

(PER HON'BLE SMT. SEEMA GUPTA, TECHNICAL MEMBER)

1. The instant appeal is preferred by the Appellant challenging the common order dated 02.05.2018 (**"impugned Order"**) passed by the Maharashtra Electricity Regulatory Commission (**Respondent No1 / MERC/ State Commission**) in Case Nos. 136 of 2015 and Case No 85 of 2016. By way of the Impugned Order, Respondent No 1, MERC held that the termination of Power Purchase Agreement dated 25.09.2008 ("**PPA**") by the Respondent No. 2 is valid and that the Appellant is not entitled to Liquidated Damages. The said order also directed the Appellant to return the Bank Guarantee of Rs. 51 Crores encashed by it, to Respondent No. 2 within a month as per clause 3.5.1 of the PPA.

2. The facts, in brief, which lead to filing of the instant appeal, are as follows:

The Appellant-Maharashtra State Electricity Distribution Company Limited (for short "**MSEDCL**") is a company formed under Part XIII of the

Electricity Act, 2003 read with the provisions of the Companies Act, 1956. Respondent No.1 is the Maharashtra Electricity Regulatory Commission (for short **"Respondent No.1/MERC/State Commission"**) and Respondent No.2-LancoVidharbha Thermal Power Limited is the Special Purpose Vehicle of Lanco Kondapalli Power Private Limited.

3. The Appellant in order to procure 2000 MW power under case 1 route, as per the guidelines for determination of tariff by bidding process, has issued the request for Qualification ("RFQ") on 24.11.2006. On 03.04.2007, the Appellant issued the Request for Proposal for the selected bidders. Accordingly, Lanco Kondapalli Power Private Limited ("LKPPL") submitted the bid and emerged as the successful bidder in the case 1 bidding process initiated for setting up of the project. Lanco Kondapalli Power Private Limited established a special purpose vehicle ("SPV") i.e. Respondent No.2 herein (earlier known as Lanco Mahanadi Power Private Limited -"LMPPL") to implement the project to supply 680 MW to the Appellant, after setting up the project near Raigarh in Chattisgarh.

4. On 25.09.2008, Respondent No 2 entered into a Power Purchase Agreement ("**PPA"**) with the Appellant for supplying 680 MW power from the project. The effective date for the purpose of the PPA was agreed as 04.09.2008 and the scheduled commercial operation date ("SCOD") for the project under the PPA was 04.09.2012 or such other dates from time to time as specified in accordance with provisions of PPA.

5. Thereafter, with the consent of the Appellant, Respondent No.2 changed the location of the project from Chhattisgarh to Maharashtra. However, the Appellant had clarified that other terms and conditions of the PPA would remain unchanged i.e. there would be no change in the Schedule COD and tariff.

6. Article 3.1.2 of the PPA required Respondent No2 to fulfill certain specified "conditions subsequent" within 18 months from the Effective date (04.09.2008), which broadly included Execution of Fuel Supply Agreement, Appointment of Construction Contractors, Achievement of financial Closure/ financing agreement of atleast 25 % of the debt required One of the Initial Consents (mentioned in Schedule 1), as part of the Conditions Subsequent (Article 3.1.2), was procurement of clearance from the State Pollution Control Board/ Ministry of Environment & Forests (MOEF), i.e., the Environmental Clearance, within 18 months from the Effective Date i.e. by 04.03.2010. On 28.04.2009, Respondent No.2 approached MoEF for issuance of Terms of Reference (TOR) as part of the process of grant of Environmental Clearance for the Project and on 26.08.2009, Expert Appraisal Committee issued approved TOR for carrying out detailed Environment Impact Assessment and on 24.02.2011, Respondent No.2 was granted Environmental Clearance by MoEF. On 25.11.2009, Respondent No.2 awarded the EPC contract to Lanco Infratech Limited for undertaking the construction of the projects.

7. In the meantime, considering that there was delay in getting Environmental clearance, which is a prerequisite for meeting conditions subsequent, Respondent No 2 requested Appellant for extending the time

line for fulfilling conditions subsequent by 10 months vide their letter dated 03.06.2010, which was agreed to be extended by 6 months by the Appellant vide their letter dated 28.07.2010, however scheduled commissioning date to remain unchanged i.e. 04.09.2012.

8. Respondent No 2 has also stated that delay in grant of Environmental clearance led to the delay in the commencement of construction activities at site, and as a result led to the non-execution of the FSA, while the coal linkages were granted to the Respondent No. 2 for Unit 1 on 29.01.2010 and for Unit 2 on 08.04.2010, well in time, since the policy at the time mandated that FSA will only be executed closer to the date of SCOD.

9. On 21.01.2011, since the initial conditions, namely Execution of fuel supply agreement and vacant possession of land, were not fulfilled, the Appellant asked Respondent No.2 for additional performance guarantee of Rs.15.30 Crores as per PPA provision 3.3.1 as well as additional Performance Guarantee by the second week of January 2011 up to fulfillment of the condition subsequent However, Respondent No 2 vide its letter dated 31.01.2011 stated that fuel linkage has been accorded and FSA will be done at the time of plant commissioning as per CEA guidelines; as regards land it was stated that sufficient land had already been purchased and registered in the name of LVTPL and were waiting for the official clearance letter from MoEF to commence the construction activities, and therefore requested to consider the conditions subsequent

as deemed completed and exempt them from submitting additional performance guarantee.

10. Upon Grant of Environmental Clearance on 24.02.2011, Construction activities could commence at site from March 2011 and Respondent No2 vide its letter dated 07.03.2011 informed Appellant that condition subsequent has been fulfilled as per clause 3.1.2 of PPA. Respondent No.2 vide its letter dated 06.09.2011 to Appellant stated that since there is delay of 15 months in commencement of the work due to Non-Natural force majeure conditions in obtaining EC and proposed 31.12.2013 as the realistic commercial operation date.

11. In the meantime, on 22.12.2010, the public hearing conducted on 17.09.2010 for grant of Environmental Clearance, was challenged before the High Court of Bombay (Nagpur Bench) through PIL No. 78 of 2010. The High Court of Bombay in PIL No. 78 of 2010 by its order dated 18.10.2011 ordered for fresh public hearing and clarified that MOEF would be entitled to review the earlier EC in toto or in part, consider the matter afresh, depending on the outcome of the public hearing, in accordance with law. Though no stay was granted on the EC, the Hon'ble Court clarified that any activity undertaken by Respondent No. 2 in pursuance of the EC granted, shall be at its own risk and subject to final outcome of the proceedings. Respondent No. 2 said to have slowed down the construction activities at the Project site.

12. Vide letter dated 02.07.2012, Respondent No.2 withdrew its earlier request for treating the conditions subsequent as having been satisfied

since the conditions subsequent relating to signing of Fuel supply Agreement has not been fulfilled due to occurrence of Force Majeure events. Respondent No 2 vide its letter dated 28.08.2012, informed Appellant that in view of High court order dated 18.10.2011, there is uncertainty about the Environmental clearance and they are unable to stick to scheduled COD as per PPA but it need to be reworked after cessation of said Force Majeure event. Denying the occurrence of force majeure event, the Appellant stated that since Respondent No.2 committed default, the Appellant is entitled to recover the stipulated liquidated damages and asked for submission of additional performance guarantee by Respondent No 2. Acting on the demand for encashment of Bank guarantee letters of the Appellant dated 11.03.2013 and 12.03.2013, Respondent No 2 approached Bombay High Court on 14.03.2013, seeking interim injunction against encashment of Bank Guarantee. However, High Court did not grant any relief to Respondent No.2 and performance bank guarantee of Rs.51 Crores was encashed by the Appellant.

13. It is the contention of Respondent No 2,that pending validation of EC, it had continued with the preliminary construction activities to the extent possible , albeit slowly, and also shared monthly progress report of the plant with the Appellant and also filed Writ Petition before the Hon'ble High Court of Bombay seeking directions to the concerned authorities to expedite the grant of revalidated EC (although same was withdrawn on account of Maharashtra Pollution Control Board letter dated 04.06.2013, that the report of public hearing has been sent to the Ministry for further actions), however, the Appellant proceeded to encash the BG amounting to Rs. 51 crores on 12.03.2013, dehors the provisions of the PPA.

Respondent No. 2 through letters dated 28.03.2013, 18.04.2013, 08.05.2013 requested the Appellant to inform the provisions of the PPA under which the BG was encashed, however, the said letters were not responded to by the Appellant.

14. On 28.05.2013, Respondent No.2 sent a preliminary notice of termination of the PPA as per Article 3.3.3 to the Appellant referring to alleged Force Majeure events regarding uncertainty in grant of Environmental clearance in view of High court order dated 18.10.2011 and likely assurance of only about 50 % domestic coal supplies and machine capability to operate with maximum 20 % imported coal. The Appellant vide its letter dated 13.06.2013 clarified that the encashment of performance guarantee was made by them basing on Clause 3.4.5 of the PPA and sought liquidated damages to the tune of Rs 351 Crore in terms of Clause 4.6.1 of the PPA for not supplying power on the date of SCOD i.e. 04.09.2012. However, vide its letter dated 07.03.2014, termination notice dated 28.05.2013 was withdrawn by Respondent No.2, reserving its right to invoke the grounds of termination in future.

15. Subsequently on 21.08.2014, Environmental Clearance was revalidated, however, on 20.09.2014, Respondent No.2 issued fresh notice of termination of PPA alleging that the EC was revalidated after delay of more than four years from the date prescribed under the PPA for fulfillment of the conditions subsequent under Article 3.1.2 and that the cost of the project had increased making it impossible to perform the project and therefore it was not bound to perform its obligation under PPA. The Appellant while denying the said termination notice stated that the

PPA was valid and reiterated its right to recover the liquidated damages vide its letter dated 28.10.2014.However, Respondent No.2 vide its letter dated 17.11.2014, reiterated its letter dated 20.09.2014 and terminated the PPA with effect from 27.09.2014 citing force majeure events viz belated grant of EC after a period of more than 10 months from the date on which conditions subsequent under the PPA were required to be fulfilled. Subsequent thereto, invoking Article 7.2 of the PPA, Respondent No.2 sent a dispute notice dated 12.08.2015 to the Appellant and also approached the State Commission in Case No. 136 of 2015 in connection with the dispute and differences arising under PPA dated 25.09.2008 entered into between the Respondent No.2 and the Appellant. The Appellant had also filed Case No. 85 of 2016 before the State Commission for adjudication of the disputes and claims arising under the PPA. The State Commission on 02.05.2018, passed the common order in Case No.136 of 2015 and Case No.85 of 2016 observing as under:

> "*31…The Commission is of the view that the termination of the PPA by LVTPL is valid, and that MSEDCL is not entitled to Liquidated Damages. MSEDCL shall return the amount of encash amount of Bank Guarantee of Rs.51 Crore to LVTPL within a month."*

16. Aggrieved by the above-stated common order dated 02.05.2018 passed by the State Commission, the Appellant has approached this Tribunal praying for the following reliefs:

> *A) "Allow the Appeal and set aside the impugned Common Order dated 2nd May 2018passed in Case No. 136 of 2015 and 85 of*

2016 ***Annexure "DD"*** *to the extent challenged in the present Appeal and allow the relief prayed for by Appellant as in MERC Case No.85 of 2016.*

B) Hold and declare that the PPA dated 25th September 2008 is valid, subsisting and binding and in force and the Appellant is entitled for liquidated damages as prayed for by Appellant.

C) For such further and other reliefs as the nature and circumstances of the case may be deemed necessary."

17. Learned counsel for the Appellant submitted that when the 'condition subsequent' stipulated under Article 3.1.2 of the PPA is fulfilled, then party is not entitled to terminate the PPA. Referring to Article 3.3.3 of the PPA, learned Counsel submits that when there is "inability" on the part of the Seller (LANCO) to fulfill the 'condition precedent' specified under Article 3.1.2 of the PPA, the right to terminate the PPA arises. But in this case, the 'condition subsequent' i.e., the mandate to obtain Environmental Clearance [EC] under Article 3.1.2 (i) stood complied with on 24.02.2011, when EC was granted to LANCO by MOEF, therefore, the right of the Respondent No.2 to terminate the PPA as per Article 3.3.3 for non-fulfilment of 'condition subsequent' does not arise. In support of his contention, learned counsel draws our attention to the proposition laid down by the Hon'ble Supreme Court in the case of "***Transmission Corpn. of Andhra Pradesh Ltd. v. GMR Vemagiri Power Generation Ltd. &Anr.," ((2018) 3 SCC 716))***, wherein it was held as under:

"21. In the event of any ambiguity arising, the terms of the contract will have to be interpreted by taking into consideration ***all***

> ***surrounding facts and circumstances, including correspondence exchanged****, to arrive at the real intendment of the parties, and not what one of the parties may contend subsequently to have been the intendment or to say as included afterwards…"*

18. Even the events which took place after the grant of EC on 24.02.2011 may constitute a force majeure providing rights to the parties under Article 4.5.1 and 4.5.2 of the PPA for extension of time, but they do not give right to terminate the PPA.

19. Revalidation of the EC on 21.08.2014 was itself the fulfilment of condition subsequent again, and the right to terminate under Article 3.3.3 subsists only till such time the condition subsequent is not fulfilled, therefore the right of termination could have been exercised only before 21.08.2014 and not thereafter. Further, at the time, when the termination letter was issued, there was no existing 'inability' on the part of the Appellant to fulfill the 'condition subsequent' qua EC under Article 3.1.2 of the PPA, so as to trigger the termination under Article 3.3.3. Therefore, the termination letter issued on 20.09.2014 is bad in law and contrary to the provisions of the PPA.

20. The learned counsel for the Appellant contended that the Interpretation of the term "thereafter" under Article 3.3.3 of the PPA holistically suggests that the said term should be understood contextually and not in isolation. It implies that if force majeure event persists beyond 10 months, termination becomes an option and either party can terminate the PPA. But, the word, "thereafter" cannot be interpreted to mean that the

agreement can be terminated at any time even after 5 or 10 years i.e., during the course when it is being performed. Learned counsel further contended that even if the events that delayed grant of re-validated EC is taken as force majeure event, the said force majeure event came to end on the date when EC was granted on 21.08.2014, therefore the right of termination also came to an end on the date when the EC was granted.

21. Learned Counsel of the Appellant further submitted that the termination of the PPA by LANCO vide its letter dated 20.09.2014, was solely based on the delayed re-validation of the EC and not on any other grounds such as non-execution of the FSA. While initially, LANCO had mentioned the non-obtainment of FSA as a force majeure event in the preliminary termination notice dated 28.05.2013, this assertion was subsequently withdrawn on 07.03.2014, rendering it irrelevant to the later termination. Therefore, LANCO cannot retroactively invoke the non-execution of the FSA as a continuation of a force majeure event under Article 12.3 to trigger termination rights under Article 3.3.3 of the PPA. The termination of the agreement by LANCO was a deliberate action solely based on the EC issue.

22. Learned counsel of the Appellant drew our attention to Article 4.6.1, which outlines the pre-determined compensation for delays in providing the contracted capacity, while Article 4.6.2 limits this compensation calculation to a 12-month period. Notably, Article 4.6.4 explicitly affirms that the formula specified in Article 4.6.1 for calculating liquidated damages represents a ***genuine and accurate pre-estimation of the actual loss*** that the procurer would suffer due to seller's delay in achieving

commissioning of a Unit by its COD. Learned counsel of Appellant submitted that it is difficult to assess the actual loss due to certain dynamic concepts such as substitute power, power cuts or other action taken due to non-availability etc., therefore, they cannot be computed accurately. Hence, Article 4.6.1. provides for a genuine pre-estimate of loss/damages. Therefore, the contract's provision for a genuine pre-estimate of damages in such regulatory agreements aligns with legal principles established by the Supreme Court, as exemplified in the "***BSNL vs. Reliance Communication Ltd" case ((2011) 1 SCC 394),*** wherein the Court recognized the challenges in assessing damages and upheld the validity of pre-estimated amounts as genuine attempts to quantify loss.

23. Learned counsel for the Appellant placing reliance on the legal precedent in the case of "***Desh Raj vs. Rohtash Singh" ((2023) 3 SCC 714)*** submitted that where the terms of contract clearly mention the pre-estimated amount, there exists a presumption that such amounts genuinely represent an attempt to estimate potential losses, sparing the need for extensive evidence to prove damages, unless a party successfully rebuts this presumption by demonstrating the absence of likely loss.

24. Learned Counsel for the Appellant also asserted that the decision reiterated in **"*ONGC Ltd vs. Saw Pipes Ltd"((2003) 5 SCC 705)***further supports the validity of liquidated damages clause in agreements. The Court highlighted that agreements executed by industry experts indicate a clear intention to acknowledge the likelihood of loss and agree to its compensation without requiring exhaustive proof of damages.

25. Further learned counsel of Appellant submits that as regards the entitlement to liquidated damages in contracts with predetermined highest limits as estimated losses is affirmed by legal precedent in the case of **"*Construction & Design Services Vs. DDA" (2015) 4 SCC 263***, where the burden rests on the breaching party to prove the no loss resulting from the breach in question. Additionally, in ***"MSEDCL Vs. MERC & Ors." ((2022) 4 SCC 657)***, the Hon'ble Supreme Court differentiated the case of **"*Kailash Nath Associates Vs. DDA" ((2015) 4 SCC 136),*** highlighting that the latter's observation on determining reasonable compensation applies only when no breach occurred or when the aggrieved party made a profit. The learned counsel further submitted that the LANCO has not contested the occurrence of loss, thereby negating the applicability of the principle outlined in the Kailash Nath Associates case. Additionally, any belated plea to deny MSEDCL's rightful claim for liquidated damages (LD) is legally barred, as Official liquidator/ Respondent No 2 has admitted/ accepted the claimed LD amount along with interest vide its letter dated 17.02.2023. The learned counsel also contended that to prove the penal nature of any pre-estimated earnest money or performance bank guarantee (PBG) lies squarely on LANCO, as per legal precedent, which hasn't been adequately pleaded or demonstrated in the instant case.

26. Per contra, learned counsel for Respondent No.2 at the outset pointed out that majority of the arguments raised by the Appellant are beyond its pleadings and, therefore, should not be taken into account and cannot be raised at the Appellate stage. The arguments such as (i) EC and revalidated EC were issued on 24.07.2011 and 21.08.2014 respectively,

while the Termination Notice was issued on 20.09.2014, therefore, the Notice under Article 3.3.3 is wrong as the Condition Subsequent was already fulfilled on the day of termination; (ii) only extension of SCOD is allowed for any FM event after the fulfilment of a Condition Subsequent under Article 4.5.3; (iii) FSA was made a ground for validating the termination by the Ld. Commission even though the same was not a ground in the termination notice; (iv) liquidated damages are not required to be proved if the same are given as a genuine pre-estimate under the PPA; are dehors the pleadings of the Appellant before this Hon'ble Tribunal and were in fact also not pleaded and argued before the MERC. The Appellant cannot be permitted to make submissions which find no mention in its pleadings. The Appellant is trying to make up a new case which is not set out in its pleadings. The same is impermissible in law.

27. It was emphasized by Respondent No.2 that it had diligently pursued the revalidation of the EC by following up with the Maharashtra Pollution Control Board (MPCB) through letters dated 15.12.2012, 28.02.2013, and 08.05.2013. Despite the delay, preliminary construction activities were continued, albeit at a slower pace, and monthly progress reports shared with the Appellant as per the PPA's Clause 3.2.

28. Despite diligent efforts of Respondent No. 2 to expedite the revalidation of the EC and ongoing communication regarding the project's status, the Appellant encashed the BG amounting to Rs. 51 crores on 12.03.2013, disregarding provisions of the PPA. Despite repeated requests through letters dated 28.03.2013, 18.04.2013, and 08.05.2013,

the Appellant failed to clarify the grounds for BG encashment. The revalidated EC was eventually granted by the Ministry of Environment and Forests (MOEF) on 21.08.2014, four and half years after the stipulated time for completing 'Condition Subsequent' under the PPA and two years ten months after the Hon'ble High Court's order. The Respondent No.2 also submitted that due to the Appellant's lack of response in extending the SCOD, Respondent No. 2 had no choice but to terminate the PPA on 20.09.2014 in terms of Article 3.3.3, which allows either party to terminate the agreement in case of non-fulfillment of Condition Subsequent within the specified time due to force majeure events.

29. Learned counsel for Respondent No.2 submitted that Article 3.3.3 of the PPA allows for a 10-month extension for fulfilling conditions subsequent in case of delays due to force majeure events. After this extended period, either party can terminate the PPA. The Respondent No.2 terminated the PPA after the said delay, and their right to do so was not waived. The termination was justified due to alterations in the underlying basis of the contract and was done on the understanding that force majeure clauses protect contracts for specific periods, and once the said period expires without fulfillment of conditions subsequent, the contract becomes freely terminable.

30. Learned counsel for Respondent No.2 cited non-execution of FSA as ground for terminating the PPA in their letter dated 17.11.2014 and in Petition No. 136 of 2015, the Appellant argued that the condition of execution of FSA was not fulfilled and cited it as a reason for encashment

of BG. The Appellant also acknowledged in their Petition No. 85 of 2016 that the Respondent failed to fulfill condition subsequent, specifically citing non-execution of FSA as justification for BG encashment under Article 3.3.1.

31. It was argued by the learned counsel for Respondent No. 2 that damages cannot be claimed without proof of loss suffered and its computation and accordingly relied on "***Maula Bux Vs. Union of India", (1970 AIR 1955), and "Construction & Design Services Vs. DDA", (2016 SCC Online Del 86)***. It was argued that these judgements do not allow the claim of damages in the absence of proof of the fact of loss being suffered by a party and the proof of such loss where the same can be identified and computed.

32. Furthermore, referring to the Hon'ble Supreme Court case in ***"Fateh Chand Vs. Balkishan Dass"*, (1963 AIR 1405)**, learned counsel submitted that the duty of the court to ascertain reasonable compensation under Section 74 of the Indian Contract Act is emphasized, regardless of whether the contract stipulates a sum for breach or penalty. The court must determine whether the amount specified in the contract is a reasonable compensation for the actual loss suffered, even if such loss or damage is proved or not . This principle was upheld in subsequent cases such as "***UOI Vs. Raman Iron Foundry" (1974 (2) SCC 231) and "ONGC vs. Saw Pipes" (2003 (5) SCC 705).***

33. Learned counsel further submits that while the English law allows genuine pre-estimates of damages to be binding, Indian law focuses on reasonable compensation. The burden of proving actual loss rests with the party claiming compensation, as stated in cases like ***Maula Bux Vs. UOI*** and ***Kailash Nath Associates Vs. DDA (2015 (4) SCC 136).*** Liquidated damages can only be awarded in case proving of actual damages is difficult or impossible, and if the specified amount is a genuine pre-estimate of loss.

34. Learned counsel for Respondent No. 2 submitted that even if PPA clause 4.6.4 states that formula specified in clause 4.6.1 as "a genuine pre-estimation of the actual loss", the duty of the Court under Section 74 of the Indian Contract Act remains unfulfilled. The aggrieved party must substantiate the loss incurred to demonstrate the actual damages suffered, ensuring no unjust enrichment solely due to a liquidated damages clause in the contract.

35. Furthermore, the law settled in these cases ***ONGC Vs. Saw Pipes*** and ***Construction & Design Services Vs. DDA*** highlight situations where determining the actual loss was impractical. In the latter case, only half of the claimed amount was allowed as reasonable compensation due to insufficient evidence from the Respondent regarding the increased costs incurred. Notably, the case of "***MSEDCL Vs. MERC" (2022 (4) SCC 657)*** pertains to late payment surcharge and does not establish precedent on damages treatment. Similarly, ***in "Deshraj Vs. Rohtash Singh" (2023 (3) SCC 714)***, the issue was with regard to earnest money forfeiture, and the

court concluded that the said forfeiture was justified since it remained uncontested by the Respondent and no refund was sought.

36. Learned counsel for Respondent no.2 also submitted that the responsibility lies with the Court to determine both the fact of loss and reasonable compensation. In the present case, the actual loss incurred by the Appellant between the agreed price under the PPA and the cost of procuring alternate power can be quantified. However, the Appellant has neither asserted nor provided evidence to establish the actual loss in monetary terms. The Appellant has merely claimed entitlement to damages under the PPA without pleading or proving the suffered loss. Therefore, the Appellant cannot raise arguments on damages beyond the scope of their pleadings.

37. Learned counsel contended that the Appellant failed to take reasonable steps to mitigate any alleged loss. There is no mention of efforts to mitigate the loss in the pleadings. It is a well-established legal principle that a party must take all reasonable steps to mitigate loss resulting from a breach, and failure to do so prohibits them from claiming damages attributable to their neglect. Consequently, in the absence of steps taken to mitigate the loss, the Appellant is precluded from making any claim for damages.

Discussion And Analysis

38. On a perusal of the material available on record and after considering the submissions of learned counsel on both sides, mainly, the following questions emerge for our consideration:

A) Has the 'conditions subsequent' as per Article 3.1.2 been fulfilled and/or is the termination of PPA by Respondent No 2 valid?

B) Is the Appellant entitled to liquidated damages in case of Breach of PPA as per clauses stipulated in the PPA or should reasonableness of such damages be established based on actual losses incurred?

(A) Fulfillment of 'Conditions Subsequent' as per Article 3.1.2 and whether termination of PPA is valid or not:

39. To deliberate this issue, it is important to enumerate the relevant Clauses from PPA:

> *"Clause 3.1.2 The Seller agrees and undertakes to duly perform and complete the following activities within 18 (eighteen) Months from the Effective Date, unless such completion is affected due to any Force Majeure event or if any of the activities is specifically waived in writing by the Procurer:*
>
> *i. the Seller shall have received the Initial Consents as mentioned in Schedule I either unconditionally or subject to conditions which do not materially prejudice its rights or the performance of its obligations under this Agreement;*
>
> *ii. the Seller shall have executed, Fuel Supply Agreement and provided the copies of the same to the procurer;*

iii. the Seller;

a) the Seller shall have appointed the Construction Contractors, if Seller itself is not the Construction Contractor, for the design, engineering, procurement, construction and Commissioning of the Project and shall have submitted a documentary proof along with the copy of the contract to the Procurer and shall lave given to such contractor an irrevocable Notice To Proceed; and

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

2) in 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 finalised the specific delivery point for supply power in consultation with the Procurer;

vi. the Seller shall have got vacant possession of the Sites and shall have obtained valid, enforceable, unencumbered and insurable freehold or leasehold title thereto and such other real property rights including wayleaves as may be required for the Project or the performance of its obligations under this Agreement;

vii. The Seller shall have sent a written notice to the Procurer indicating that a) the Scheduled COD shall be as per the original

Scheduled COD i.e, (1) for the firs. Unit, 04th September 2012; (II) for the second Unit, 04th September 2012; (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), (hereinafter referred to as "Revised Scheduled COD").”

SCHEDULE 1: INITIAL CONSENTS *[As applicable]*

1. *Land allotment certificate/letter by the Appropriate Government.*
2. *Clearance of State Pollution Control Board/ Ministry of Environment & Forests (MOE&F).*
3. *Forest clearance of MOE&F(in case of forest land).*
4. *Water availability confirmation from State irrigation department.*
5. *Clearance of National Airport Authority / Ministry of Defence for chimney height*
6. *Consent of relevant Panchayat for development of site.*
7. *In Principle Approval for open access up to the Delivery Point from CTU and STU.*

40. As per clause 3.1.2, the two issues which have been raised by Respondent No 2, namely, availability of Environmental Clearance and execution of Fuel Supply agreement squarely falls under the obligations of Seller (Respondent No 2 in present case) which states that Conditions Subsequent to be fulfilled by them within 18 months from the Effective Date (04.09.2008) i.e. by 04.03.2010 unless such completion is affected due to any Force Majeure event or if any of the activities are specifically waived in writing by the procurer. Consequences of non-fulfillment of Conditions mentioned under Article 3.1 is illustrated in Article 3.3, relevant portion of which is reproduced below:

"Clause 3.3.1 If any of the conditions specified in Article 3.1.2 is not duly fulfilled by the Seller even within three (3) Months after the time specified under Article 3.1.2, then on and from the expiry of such period and until the Seller has satisfied all the conditions specified In Article 3.1.2, the Seller shall liable to furnish to the Procurer be additional weekly Performance Guarantee of Rs. Rs. 0.375 lakhs per MW of maximum capacity proposed to be procured within two (2) Business Days of expiry of every such Week. Such additional Performance Guarantee shall be provided to the Procurer in the manner provided in Article 5.1.1 and shall become part of the Performance Guarantee and all the provisions of this Agreement shall be construed accordingly. The Procurer shall be entitled to hold and/or invoke the Performance Guarantee, including such increased Performance Guarantee, in accordance with the provisions of this Agreement.

Clause 3.3.2

(i) fulfillment of any of the conditions, specified in Article 3.1.2 is delayed beyond the period of three (3) Months and the Seller fails to furnish any additional Performance Guarantee to the Procurer in accordance with Article 3.3.1 hereof; or

(ii) the Seller furnishes additional Performance Guarantee to the Procurer in accordance with Article 3.3.1 hereof but fails to fulfil the conditions specified in Article 3.1.2 for a period of eight (8) months beyond the period specified herein,

the Procurer shall have the tight to terminate this Agreement by giving a notice to the Seller/Procurer in writing of at least seven (7) days."

41. The right of termination of the PPA on account of non-fulfillment of 'conditions subsequent' due to Force majeure events beyond certain period and consequence of extension of time for completion of 'conditions subsequent' are defined in Article 3.3.3 and 3.3.4 of the PPA as reproduced below:

> *"Article 3.3.3 In case of inability of the Seller to fulfil the conditions specified in Article 3.1.2 due to any Force Majeure event, the time period for fulfilment of the Condition Subsequent as mentioned in Article 3.1.2, shall be extended for the period of such Force Majeure event, subject to a maximum extension period of ten (10) Months, continuous or non-continuous in aggregate. Thereafter, this Agreement may be terminated by either the Procurer or the Seller by giving a notice of at least seven (7) days, in writing to the other Party.*
>
> *3.3.4 No Tariff adjustment shall be allowed on account of any extension of time arising under any of the sub-articles of Article 3.3. Provided that due to the provisions of Article 3.3.3, any increase in the time period for completion of condition subsequent is mentioned under Article 3.1.2, shall also lead to an equal increase in the time period for scheduled COD and scheduled connection Date."*

42. From a bare reading of the above-mentioned Clauses, it is understood that 'conditions subsequent' are to be fulfilled within 18 months from Effective date, unless affected by Force Majeure conditions or when any of the activities are waived in writing by the Procurer. In the present case, the Environmental Clearance (though subsequently need to be revalidated) was granted on 24.02.2011, approximately 30 months from

the effective date. It is also a fact observed from perusal of the records that Respondent No 2 approached the Expert Appraisal Committee for approval, in reference to grant of EC, for its project site at Mandwa on 15.07.2009, approximately 10 months after the Effective date, some of which can be attributable to change in project site from Chattisgarh to Maharashtra by Respondent No 2. However, such a change was approved by the Appellant with a condition that all other terms of PPA shall remain unchanged i.e. time period for completion of Conditions Subsequent as well as Scheduled COD. Taking into account the delay in getting the Environmental Clearance, at the request of Respondent No 2 for extension of 10 Months time for fulfillment of 'Conditions subsequent', the Appellant vide its letter dated 28.07.2010 extended the time limit for fulfillment of 'conditions subsequent' by 6 months, however, Scheduled COD was remained same as 04.09.2012. Fuel Linkages were granted to Unit I on 29.01.2010 and Unit No 2 on 08.04.2010 and FSA could not be signed due to the fact that as per the policy, FSA can be signed closer to the date of FSA. Upon getting the Environmental Clearance on 24.02.2011, Respondent No 2 through its letter approached the Appellant stating that 'Condition subsequent' should be considered to be deemed fulfilled as EC has been obtained and FSA could not be signed due to extent policy but linkage has already been approved. So non-signing of FSA was not considered as non fulfillment of Condition subsequent by Respondent No 2. However, the claim of fulfillment of 'Condition subsequent' by Respondent No 2 was not agreed by the Appellant, who in turn demanded for submission of enhanced performance guarantee as per Article 3.3.1 of the PPA. From the perusal of Article 3.3.1 of the PPA, it appears that in the event of non-fulfillment of Condition subsequent, even

within three months after the time specified under Article 3.1.2, Seller i.e. Respondent No.2 is liable to furnish additional weekly performance guarantee of Rs.375 lakhs/MW to Procurer i.e the Appellant. Similarly, the Procurer also has a right to terminate the PPA if the seller fails to fulfill the conditions specified in Article 3.1.2 for a period of 8 months beyond the period specified therein, under which situation, the seller is liable to pay to the procurer an amount of Rs 10 Lakh per MW for the maximum capacity proposed to be procured as liquidated damages. However, such a termination option was not exercised by the Procurer i.e the Appellant.

43. On the other hand, as per Article 3.3.3, time period on account of non-fulfillment of 'Condition subsequent' due to Force Majeure condition can be extended for the period of such Force Majeure event, subject to a maximum extension period of 10 months, continuous or non-continuous in aggregate. Thereafter, the Agreement can be terminated by either the procurer or the seller by giving a notice of at least 7 days in writing to the other party. Basing on this, Respondent No 2 choose to terminate the Agreement by its termination notice dated 20.09.2014 w.e.f 27.09.2014. The two questions that emerge from such termination letter are: *what are the provisions of Force Majeure clauses and also events under which the said termination was invoked.*

44. Let us first examine the pertinent Force Majeure Clause within the PPA, which is reproduced hereinbelow:

"*Clause 12.3 Force Majeure*

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

(ii)…. Non-Natural Force Majeure Events:

1. Direct Non - Natural Force Majeure Events

a) Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the Seller or the Seller's contractors;

b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consent required by the Seller or any of the Seller's contractors to perform in their obligations under the Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development operation of the Project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

c) any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality which is directed against the Project Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down."

45. We are concerned with the veracity of Respondent No.2's termination letter dated 20.09.2014 only and not on the earlier termination

letter dated 28.05.2014 as same was withdrawn by the Respondent No 2 for the reasons best known to them. In the termination letter dated 20.09.2014, Respondent No 2 has raised the issue that the Appellant was unable to fulfill the condition subsequent due to the delay in getting the EC revalidated after 4 years from original date of Fulfillment of Conditions subsequent. This enormous delay occasioned due to Force Majeure events has also rendered the project unviable at the tariff fixed under PPA. The relevant Extract of the termination letter dated 20.09.2014 is reproduced below.

> *"In the facts and circumstances stated hereinabove, it is apparent that LV TPL's Environmental Clearance has been revalidated after a delay of more than four (4) years from the original date for fulfillment of Conditions Subsequent, and therefore, the circumstances envisaged to Article 3.3.3 of the PPA for termination have occurred.*
>
> *The enormous delay, occasioned due to Force Majeure events, has also rendered the project unviable at the tariff fixed under the PPA. LVTPL's cost projection at the time of signing the PPA are no longer realistic in the current cost scenario and, therefore, it has become Impossible for EVTPL to complete the project. The supervening impossibility encountered by LVTPL due to the reopening of its Environmental Clearance pursuant to Court's directions hos resulted in frustration of the subject PPA.*
>
> *In view of the aforesaid, LVTPL has decided to exercise its right to terminate the PPA under Article 3.3.3as well as under the provisions of the Indian Contract Act, 1872. Accordingly, LVTP hereby terminates the PPA dated 25.9.2008 with effect from 27th September 2014.*

Additionally, it may be noted that we reserve our right to seek refund of Rs. 51 crore which has been recovered by MSEDCL by wrongful invocation of Bank Guarantee No. 2008002IBGP0256 dated 19.08.2008 issued by IDBI Bank Limited."

46. We are of the view that during the process of revalidation of EC as per the High Court order dated 18.10.2011, though there was no stay granted by the High Court on the Environmental clearance granted on 24.02.2011, undertaking of any further construction activities by Respondent No.2 would be at its own risk. As such, any prudent Business men would not take such a risk in view of the possibility of EC not getting validated. At this stage, it is relevant to note that Respondent No.2 has not cited the non-signing of FSA as Force Majeure event in the termination letter dated 20.09.2014 as pointed out by the Appellant, but the reason cited for termination is delay in revalidation of EC, leading to non-fulfilment of Condition subsequent even after additional ten months period allowed for such fulfilment, and as per Article 3.3.3 they are entitled to terminate PPA by serving a written notice of 7 days. As per Clause 3.3.3, time period for fulfillment of Condition subsequent can be extended for equivalent period of Force Majeure event subject to maximum extension of 10 months and thereafter either party can terminate the PPA. In the present case, the Respondent No. 2 chose not to invoke this clause for termination of PPA when Force majeure condition regarding delay in grant of EC and then validation of EC was subsisting, and it is only after 6 years i.e. 72 Months of Effective date, PPA is terminated. It has been contended by learned counsel for Respondent No.2 that use of the word "thereafter" in

Article 3.3.3 refers to the period after expiry of such 10 months as long as the condition subsequent is not met within the time specified under article 3.3.1. We find it difficult to accept this interpretation of termination rights, as it would tantamount to a situation that any party can terminate the PPA at any time even after commissioning of the project, had there been force majeure event leading to non-fulfilment of condition subsequent within specified time including extension period. This Clause, therefore, does not seem to provide for termination of PPA at any time even when the said Force Majeure condition is not even subsisting. As per our view, this clause gives the option to parties to terminate the PPA, if they so choose, if condition subsequent could not be fulfilled within this extended period, however during such period, Respondent No 2 chose not to invoke this clause for termination of PPA. Lets us examine, if the period prior to revalidation of EC (21.08.2014) be considered under Non-Natural Force majeure event under the PPA. From the Force majeure provisions, under Article 12.3 of the PPA, at the most, situation of delay in validation of EC may only come close to the provisions specified in Article 12.3(ii)(b). However, as the EC approval dated 24.02.2011 was not declared as unlawful etc. by the appropriate Court, the present non-natural Force majeure event fits in Article12.4 (e) as reproduced below:

"12.4 Force majeure Exclusions

Force Majeure shall not include (i) any event or circumstances which is within the reasonable control of the parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force majeure :

12(e) Insufficiency of Finances or funds or the agreements becoming onerous to perform".

47. Further, as per Article 12.5 of PPA, a process, as reproduced below, has been prescribed for notification of Force Majeure event to avail relief under the Force Majeure Event.

"*Affected Party shall give notice to the other Party of any event of Force Majeure soon as reasonably practicable, but not inter than seven (7) days after the date on such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time int specified herein, hence the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement. Provided that such notice shall be a pre- condition to the Seller' entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give their Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other Party may reasonably quest about the situation*".

48. Respondent No.2, did not place any documentary evidence on record to show that procedure prescribed under Article 12.5 regarding issue of Notice of Force Majeure Events as soon as reasonably practicable, but not later than seven days after which the party knew about

the commencement of Force Majeure events, which is a pre-condition to the sellers entitlement to claim relief under the PPA, has been followed by them. In fact we observe that there has been change in stance of Respondent No 2 like after receipt of Environmental Clearance on 24.02.2011 and after getting approval of Fuel linkages on 29.01.2010 and 08.04.2010, Respondent No 2 without signing of FSA (as FSA signing to be done close to SCOD as per CEA guidelines) requested the Appellant to consider deemed fulfillment of Conditions Subsequent vide its letter dated 31.01.2011. Thereafter, Respondent No.2 vide its letter dated 02.07.2012 withdrew the above request expressing Force majeure event on account of non-signing of FSA. Pursuant thereto, Respondent No 2 vide its letter dated 28.05.2013, sent termination notice on account of non-fulfillment of condition subsequent due to FSA issue, however it was subsequently withdrawn vide letter dated 07.03.2014. Finally, in its termination letter dated 20.09.2014, delay in validation of EC has been cited as Non-natural Force majeure Event for non-fulfillment of conditions subsequent, while the EC was validated on 21.08.2014. Furthermore, it has been cited by the Respondent No 2 in its termination letter that the enormous delay in obtaining EC has also rendered the project unviable at the tariff mentioned under the PPA. This aspect has been dealt with in ***"Energy Watchdog Vs CERC"*** **((2017) 14 SCC 80)** wherein it has been held as under:

> *"47…We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by Clause 12.4. pointed out. Alternative modes of performance were available, albeit at a higher*

price. This does not lead to the contract, as a whole, being frustrated. Consequently, we are of the view that neither Clause 12.3 nor 12.7, referable to Section 32 of the Contract Act, will apply so as to enable the grant of compensatory tariff to the respondents. Dr Singhvi, however. argued that even if Clause 12 is held inapplicable, the law laid down on frustration under Section 56 will apply so as to give the respondents the necessary relief on the ground of force majeure. Having once held that Clause 124 applies as a result of which rise in the price of fuel cannot be regarded as a force majeure event contractually, it is difficult to appreciate a submission that in the alternative Section 56 will apply. As has been held in particular, in Satyabrata Ghose case, when a contract contains a force majeure clause which on construction by the Court is held attracted to the facts of the case. Section 56 can have no application. On this short ground, this alternative submission stands disposed of"

49. Based on the above deliberation, viewed from any angle, the grounds invoked in termination notice dated 20.09.2014 are not in accordance with the provisions of PPA signed between the Appellant and Respondent No.2 and that the State commission has erred in holding the termination of PPA by Respondent No.2 as Valid.

B) Appellant's entitlement to Liquidated damages as per PPA or any other reasonable compensation.

50. As per Article 3.1.1 of the PPA, Respondent No.2 has provided a security in the form of performance Bank Guarantee to the tune of Rs 51 Crore, to remain valid till three months after the scheduled COD. In

addition, as per Article 3.3.1, Respondent No.2 has to provide additional weekly performance Guarantee of Rs.375 Lakhs per MW of maximum capacity to be procured in the event of conditions specified are not fulfilled by the Respondent No.2 within three months after the time specified under Article 3.1.2 and to become part of performance guarantee. As per Article 3.4.5, in case the seller i.e. Respondent No 2 is not able to commission each of the units as per scheduled COD subject to conditions in Article 4.5.1, the Appellant is entitled to encash the performance Guarantee so provided as liquidated damages for an amount specified in terms of Article 4.6.1. The relevant Articles 4.5.1, 4.5.3, 4.6.1 and 4.6.4 are reproduced below:

"4.5.1 In the event that:

(a) the Seller is prevented from performing its obligations under Article 4.1.1(b) by the stipulated date, due to any Procurer Event of Default; or

(b) a Unit cannot be Commissioned by its Scheduled Commercial Operations Date because of Force Majeure Events. or

(c) the seller is prevented from performing its obligations under article 4.1.1.(b) by the required date because of delay in provision of open access or transmission facilities for reasons solely attributable to the CTU or

(d) the seller arranges to supply the contracted power to the procurer from alternate sources at the quoted tariff.

The Scheduled Commercial Operations Date, the Scheduled Connection Date and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.5.3, for a reasonable period but not less than 'day for day' basis, to permitted Seller through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Seller or in the case of the Procurer's Event of Default, till such time such default is rectified by the Procurer. In the case of sub article (c) of article 4.5.1 the seller shall have to produce a

certificate from CTU authenticating such delay in provision of open access or transmission facilities.

4.5.3 In case of extension occurring due to reasons specified in Article 4.5.1(a), the original Scheduled Commercial Operations Date of any Unit or the original Scheduled Commercial Operations Date of the Power Station as a whole, would not be extended by more than, two (2) years or the date on which the Seiler elects to terminate this Agreement, whichever is earlier. As a result of such extension, the date newly determined shall be deemed to be the Scheduled Commercial Operations Date for the purposes of this agreement.

4.6.1 If any Unit is not Commissioned by its Scheduled Commercial Operation Date other than for the reasons specified in Article 4.5.1, and the Seller is unable to source the contracted capacity from other sources until commissioning of the Unit for which this Agreement has been entered into, the Seller shall pay to the Procurer liquidated damages, for the delay in such Commissioning or making the Unit's Contracted Capacity available for dispatch by such date. The sum total of the liquidated damages payable by the Seller to the Procurer for such delayed Unit shall be calculated as follows----------":

4.6.4 The Parties agree that the formula specified in Article 4.6.1 for calculation of liquidated damages payable by the Seller under this Article 4.6, read with Article 14 is a genuine and accurate pre-estimation of the actual loss that will be suffered by the Procurer in the event of Seller's delay in achieving Commissioning of a Unit by its Scheduled COD."

51. Thus, in case a generation unit cannot be commissioned by the scheduled COD, because of Force majeure events, then the only option left for Respondent No.2 is deferment of scheduled COD by that period. The right of the Seller i.e. Respondent No 2 to terminate the PPA under Article 4.5.3 can be invoked when deferment of Scheduled COD beyond two years is on account of procurer i.e., the Appellant's event of default.

As such, Respondent No 2 has not pointed out that deferment of Scheduled COD is on account of Appellant's event of default and has not invoked this Article in its termination notice dated 20.09.2014.

52. As per Article 4.6.1, the Liquidated damages for delay in providing Contracted capacity has been mentioned and as per Article 4.6.4, both the parties have agreed that it is genuine and pre-estimation of actual loss that would be suffered by the procurer i.e. the Appellant in the event of delay in achieving the commissioning of a unit by its scheduled COD.

53. In the case of ***ONGC Ltd. Vs. Saw pipes Ltd***, ((2003) 5 SCC 705), the Hon'ble Supreme Court recognized the importance of upholding the terms of the contract agreed upon by the parties, including provisions related to liquidated damages. The case re-affirmed the principle that parties are bound by the terms of the contract they have willingly entered into, including provisions for liquidated damages in case of breach. The relevant portion is given below:

> *"46 From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may*

grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.

64…It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand case [AIR 1963 SC 1405: (1964) 1 SCR 515 at p. 526] wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named In the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved

to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach…"

54. Further, in ***Construction & Design Services vs. DDA's*** case, the Hon'ble Supreme Court held as under:

"15. Once it is held that even in the absence of specific evidence, the respondent could be held to have suffered loss on account of breach of contract, and it is entitled to compensation to the extent of loss suffered, it is for the appellant to show that stipulated damages are by way of penalty. In a given case, when the highest limit is stipulated instead of a fixed sum, in the absence of evidence of loss, part of it can be held to be reasonable compensation and the remaining by way of penalty. The party complaining of breach can certainly be allowed reasonable compensation out of the said amount if not the entire amount. If the entire amount stipulated is genuine pre-estimate of loss, the actual loss need not be proved. Burden to prove that no loss was likely to be suffered is on the party committing breach, as already observed.

18. Accordingly, this appeal is partly allowed and the decree granted by the High Court is modified to the effect that the respondent-plaintiff is entitled to half of the amount claimed with rate of interest as awarded by the High Court. Out of the amount deposited in this Court, the respondent will be entitled to withdraw the said decretal amount and the appellant will be entitled to take back the remaining."

55. However, in the above cited decision, the Hon'ble Supreme Court while holding that in the absence of specific evidence contrary, the party could be held to have suffered loss on account of breach of contract, and it is entitled to compensation to the extent of loss suffered; and since neither of the parties therein led any evidence as to the loss suffered, still, the Hon'ble Supreme Court had awarded half of the amount claimed with interest.

56. Respondent No.2 has relied on the judgments of ***Fateh Chand vs Balkishan Dass*** and ***Raman Iron Foundry****,* that under section 74 of the Indian contracts act the need to ascertain an amount of compensation which is *reasonable.* However, all these judgments put a cap on the amount of compensation to be that which is a ascertained in the agreement. Therefore, a court is well with in its power to grant a reasonable compensation upto the amount which is mentioned in the agreement. The computation of the reasonable compensation is decided as per the actual loss suffered by the parties, but if the entire amount stipulated is a genuine pre-estimation of loss, the actual loss need not to be proved. In this case, the genuine pre-estimation of the loss is considered as the measure of reasonable compensation. As per Article

4.6.4 of the PPA, the parties agreed that the calculation of liquidated damages in the PPA is a genuine and accurate pre-estimation of actual loss. Keeping in mind that both the parties agreed for the said amount and grant of such amount by the court is permissible; any amount upto the amount of the genuine pre-estimation of the loss can be unequivocally granted by the court.

57. In the instant case, it is Respondent No.2 who has to prove that no loss has been suffered by the Appellant to deny the claim of the Appellant for payment of liquidated damages. In the absence of any such evidence put forth by Respondent, basing on the principle laid down in ***Construction & Design Services vs. DDA's*** case, we hold this point in favour of the Appellant.

58. Respondent No 2 has not made out a case that Appellant has not suffered any loss. We do not find force in the argument of Respondent No 2 that Appellant need to demonstrate the steps taken by it to mitigate the loss as it could not show any provision in the PPA which fixes such an onus on the Appellant to claim Liquidated Damages. We notice from Article 4.6.1 of the PPA that there is a provision to obviate paying liquidated damages by providing contracted capacity from other sources, however no such efforts seem to have been made by the Respondent No 2.

59. In view of the above, we are of the considered view that when the parties have agreed for the way the liquidated damages are to be worked out, and the same to be a genuine and accurate pre-estimate of the actual loss that could be suffered by the procurer i.e. Appellant, in the event of

delay in achieving the commissioning of a unit from its scheduled date by Sellers i.e. Respondent No 2 , the question of determining reasonableness of such compensation is not warranted. Thus, in terms of Article 4.6.3 of PPA, the Appellant has acted accordingly to encash the BG to recover the liquidated damages. The Appellant is obligated to return the extra amount, if any, however, in case the amount so encashed is less than the claim of liquidated damages, then Seller i.e, Respondent No 2 is liable to make payment of balance claim of liquidated damages amount to the Appellant.

60. Before parting with the case, one other contention urged on behalf of Respondent No.2 that new pleas have been taken at the Appellate stage, must be dealt with.

Order 6 of the Civil Procedure Code defines pleadings. Order 6 Rule 2 states that every pleading shall contain and contain only, a statement in a concise form, of the material facts relied upon by a party in support of his claim or defence, and the pleading shall not contain evidence by which those facts are to be proved. Pleadings need not contain detailed propositions of law and cannot contain argumentative paragraphs. **(Pearey Lal Workshop Pvt. Ltd. v. Raghunandan Saran Ashok Saran (HUF), 2010 SCC OnLine Del 1033).**

The fundamental rules of pleadings are: (1) Every pleading must state facts and not law. (2) It must state all material facts and material facts only. (3) It must state only the facts on which the party pleading relies, and not the evidence by which they are to be proved. (4) It must state such facts concisely, but with precision and certainty. The material on which a party

relies are *Facta probanda* (the facts to be proved) and they should be stated in the pleadings. The facts by means of which they are to be proved are *Facta probantia* and they are not to be stated. ***(M. Kokila v. A. Dhanalakshmi*, 2014 SCC OnLine Mad 229).** "Pleadings" include particulars and a "pleading" must state only facts and not law. **(Vidyawati Gupta v. Bhakti Hari Nayak, (2006) 2 SCC 777**; **K. Laxmanan v. Thekkayil Padmini, (2009) 1 SCC 354;** and **Sibu Kanungo v. State of Odisha, 2023 SCC OnLine Ori 5209).**

The facts to be stated in the pleadings should be material facts, and in a concise form. The legal consequences that flow from the facts need not be stated in the pleadings. The party must set out the facts and not inferences drawn from those facts. The inferences of law to be drawn from the pleaded facts need not be stated in the pleadings. The Court must consider the legal result of the pleaded facts, although the said legal result may not have been stated in the pleadings. The Court must apply the correct law even if the party pleads the incorrect law. ***(Maharashtra State Warehousing Corpn. v. Pusad Urban Coop. Bank Ltd.*, 2022 SCC OnLine Bom 1433).**

Not only do the pleadings, in the present case, refer to the Power Purchase Agreement, but both the appellant and the 2nd Respondent have also placed substantial reliance thereupon. The interpretation to be placed on different clauses of the PPA, and the inference to be drawn therefrom, need not be specifically stated in the pleadings, in as much as reference is made therein to the PPA. The submission urged on behalf of the 2nd

Respondent, that the contentions raised with respect to the PPA has not been specifically pleaded, does not therefore merit acceptance.

61. In view of the above deliberations, we are of the considered view that the termination of PPA by Respondent No.2-Lanco Vidarbha Thermal Power Limited is not valid. The Appellant is entitled to Liquidated Damages as per the terms of the agreement. Therefore, we set aside the common order dated 02.05.2018 passed by the MERC in Case Nos. 136 of 2015 and 85 of 2016. Accordingly, the appeal is allowed. All the pending IAs shall stand disposed of. There shall be no order as to costs.

Pronounced in open court on this the 30th Day of May, 2024

(Seema Gupta)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

ts/ag/dk

REPORTABLE/~~NON-REPORTABLE~~