IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

Appeal No. 41 of 2019

Dated: 06.02.2024

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

In the matter of:
RattanIndia Power Limited
Through its Authorised Signatory
World Mark – 1, Tower – B,
5th Floor, Aerocity,
Indira Gandhi International Airport,
New Delhi – 110037. …Appellant(s)

Vs.

(1) Maharashtra Electricity Regulatory Commission
Through its Secretary
World Trade Centre,
Centre No. 1,
13th Floor, Cuffe Parade,
Mumbai – 400005.

(2) Maharashtra State Electricity Distribution Company Ltd.
Through its Chairman-cum-Managing Director
4th Floor, Prakashgadh,
Plot No. G-9 Anand Kanekar Marg,
Bandra (East), Mumbai – 400051. …Respondent(s)

Counsel for the Appellant(s) : Mr. Amit Kapur
Mr. Vishrov Mukerjee
Mr. Yashaswi Kant
Ms. Catherine Ranji Ayallore
Ms. Ameya Vikram Mishra
Ms. Raveena Dhamija
Mr. Girik Bhalla

Mr. Janmali Gopal Rao Manikala
Mr. Pratyush Singh
Ms. Juhi Senguttuvan
Mr. Rohit Venkat

Counsel for the Respondent(s) : Mr. G. Umapathy, Sr. Adv.
Mr. Samir Malik
Ms. Nikita Choukse
Mr. Rahul Sinha
Mr. Sahil Sood
Mr. Ravi Prakash
Ms. Pavitra Balakrishna
Mr. Aditya Singh for R-2

JUDGEMENT

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

1) The captioned Appeal has been filed by M/s. Rattan India Power Limited (formerly known as Indiabulls Power Limited) (hereinafter referred as **"Appellant**") assailing the Order dated 23.10.2018 ("**Impugned Order**") passed by the Maharashtra Electricity Regulatory Commission (**"State Commission" or "MERC")** whereby the Appellant was denied compensation for the penalty imposed by the fuel company for non-procurement of minimum quantity of fuel.

2) The Appellant owns and operates a Thermal Power Plant and supplies electricity to MSEDCL under the Power Purchase Agreement (PPA) signed with MSEDCL.

3) The MERC i.e. 1st Respondent is the State Electricity Regulatory Commission constituted under the Electricity Act, 2003 and vested with the power

to adjudicate the dispute in hand.

4) The 2nd Respondent i.e. MSEDCL is the Distribution Company having been granted the Distribution Licence by the MERC for the State of Maharashtra.

5) The Appellant is aggrieved by the decision of the MERC denying compensation for the penalty imposed on it for lifting minimum quantum of coal under the provisions of the PPA citing that such a lower lifting is on account of low despatch schedule or no schedule given by the MSEDCL under the relevant regulations, the Appellant also submitted that it is the duty of the Distribution Company to provide the requisite schedule to the Generating Company and its failure has resulted into non-procurement of coal to the requisite quantity as the power plant could not generate to the required quantum.

6) The Commission vide the Impugned Order has analysed and decided as under :

"Commission's Analysis and Rulings:

9. "RIPL filed this Petition under Section 86 of the Electricity Act, 2003 seeking compensation for penalty imposed by SECL on account of non-procurement of minimum quantity of fuel by RIPL under the FSA in accordance with Clause 4.5 of Schedule 4 of the PPA between RIPL and MSEDCL along with its carrying cost.

10. Clause 4.5.1 of Schedule 4 of the PPA dated 22 April, 2010 and 5 June, 2010 relied on by RIPL is reproduced below:

4.5 Penalty and rights relating to minimum guaranteed quantity of fuel [applicable in case of linkage coal-based Power Station]

4.5.1 In case seller has to pay penalty to the fuel supplier for not purchasing the minimum guaranteed quantity of Fuel mentioned in the Fuel Supply Agreement and if during that Contract Year, Availability of the Power station of the seller is greater than the Minimum Off-take Guarantee but the Procurer has not scheduled energy corresponding to such Minimum off-take Guarantee during that Contract Year, then Seller will raise an invoice for the lower of the following amounts, on the Procurer:

i) Penalty paid to the fuel supplier under the Fuel Supply Agreement in that Contract Year, along with documentary proof for payment of such penalty, or

ii) An amount corresponding to twenty percent (20%) of cumulative Monthly Capacity Charge Payment (in Rs.) made by the Procurer for all the months in that Contract Year multiplied by (I-X/Y) where:

X is the Scheduled Energy during the Contract Year (in kWh): and

Y is the Scheduled Energy corresponding to minimum Off-take Guarantee for the Procurer

during the contract year (in kWh).

Provided, within ten (10) days of the end of each Month after the Delivery Date, the Seller shall provide a statement to the Procurer, providing a comparison of the cumulative Scheduled Energy for all previous Months during the Contract Year with the minimum Off-take Guarantee of the procurer. Further, such statement shall also list out the deficit, if any, in the Fuel off-take under the Fuel Supply Agreement, due to cumulative dispatch being less than the Minimum Off-take guarantee. In case of a Fuel off-take deficit, within a period of fifteen (15) days from the date of receipt of the above statement from the Seller and after giving a prior written notice of at least seven (7) days to the Seller, the concerned Procurer shall have the right to avail such deficit at the same price at which such deficit fuel was available to the Seller under the Fuel Supply Agreement and to sell such deficit to third parties. In case the Procurer exercises such right to avail Fuel equivalent to such deficit, there shall be no liability on the procurer for payment of penalty on account of Minimum Off take Guarantee. "

11. *Thus, as per Provisions in PPA, in case seller (RIPL) has to pay penalty to the fuel supplier for not purchasing the minimum guaranteed quantity of Fuel mentioned in the FSA and if during*

that Contract Year, Availability of the Power station of the seller (RIPL) is greater than the Minimum Off-take Guarantee but the Procurer (MSEDCL) has not scheduled energy corresponding to such Minimum off-take Guarantee during that Contract Year, then such penalty is payable by the procurer (MSEDCL).

12. *However, MSEDCL has contended that such penalty is not payable if, as per proviso to clause 4.5.1 the procurer (MSEDCL) buys such deficit fuel under FSA from the coal supplier. RIPL has contended that though such provision exists in the PPA, FSA signed between RIPL and SECL prohibits such sale of coal to the third party. The said provision of FSA is reproduced below:*

> *"4.4 End-use of Coal*
>
> *The total quantity of Coal supplied pursuant to this Agreement is meant for use at the Indiabulls Power Limited, IPP 1350 (5x270) MW, Unit-1 to 5, Amaravati Thermal Power Project, Nandgaonpet, Distt. Amravati (Maharashtra) as lited in Schedule I. The Purchaser shall not sell / divert and / or transfer the Coal to any third party for any purpose whatsoever and the same Shall be treated as material breach of Agreement, for which the Purchaser shall be fully responsible and such act shall warrant suspension of coal supplies by the Seller in terms of clause 14.1(b). "*

Thus, in view of above conditions of FSA which prohibits any third

party sale of coal, MSEDCL's contention that it would have purchased deficit coal for avoiding imposition of penalty is not correct. Further, this FSA was submitted to MSEDCL in year March, 2013 itself. Hence, now MSEDCL cannot rely on the provision of PPA which is contradictory to the subsequent FSA signed with SECL.

13. *MSEDCL has also contended that non-scheduling of RIPL's generation during FY 2016-17 was not deliberate but was accordance with Merit Order Despatch principles and, Scheduling and Desptach code applicable in Maharashtra. Whereas RIPL has contended that Clause 4.5.1 of the PPA does not provide for any exclusion for MoD operations and hence, MSEDCL needs to repay the penalty paid by it to SECL.*

14. *In this regards, the Commission notes that clause 5.4 of the PPA dealing with Scheduling and Despatch reads as follows:*

> *" 5.4 Scheduling and Despatch*
> *5.4.1 The Seller shall comply with the provisions of the applicable Law regarding Dispatch Instructions, in particular, to the provisions of the ABT and Grid Code relating to scheduling and Dispatch and the matters incidental thereto."*

Thus, under the PPA, Seller is obligated to comply with provisions of ABT and Grid Code, and its scheduling and

despatch will be undertaken accordingly. This provision of PPA was there in the draft PPA which was part of bidding documents. While submitting its bid, every bidder was supposed to consider all laws, rules, regulations and Orders which were applicable on Cut of Date. In the present matter Cut of Date was 31 July, 2009.

15. *Order on `Introduction of Availability Based Tariff Regime at State Level within Maharashtra and other related issues' was issued by the Commission on 17 May, 2007 and it was in force on Cut off Date. In the said ABT Order, the Commission has entrusted the responsibility of least cost despatch on. the Maharashtra State Load Despatch Center (MSLDC). Accordingly, MSLDC has to attain load generation balance on any given day by finalising the schedule of maximum capacity available, starting from the station/unit with the lowest Variable Charge in the Merit Order stack. As a basic principle, MSLDC is required to finalise the despatch schedule based on least-cost principles.*

16. *As on Cut off Date, MoD principles were applicable in Maharashtra. Further, clause 5.4 of the PPA clearly stated that generation schedule and despatch will be strictly as per ABT and Grid Code. Hence, it is obligatory on the bidders including RIPL to have considered and factored in possible implication of MoD principles in its financial offer.*

17. *MSEDCL has submitted that non-scheduling of RIPL's*

generating units in FY 2016-17 was on account of MoD principles. As RIPL is placed at higher position in Merit Order Stack due to its quoted variable charges which is higher than other contracted Generators of MSEDCL. RIPL has not denied that MoD principle has resulted in non-scheduling of its Generating units but it is relying on clause 4.5.1 of PPA which mandates MSEDCL to reimburse penalty paid to Coal supplier if MSEDCL failed to provide schedule for minimum guaranteed offtake.

18. *In this regards, the Commission notes that even if, MSEDCL would have provided schedule to RIPL's generating units, MSLDC whose have been mandated under ABT order for MoD and least cost dispatch, would have not able to provide dispatch schedule to RIPL on account of its higher position in Merit Order Stack. Hence, it is not correct to say that MSEDCL has not provided minimum guaranteed offtake of energy. Further, variable charges because of which RIPL is placed at higher position in Merit Order Stack is quoted by RIPL itself. While quoting such rate in competitive bidding it should have considered implication of MoD principles. Now after taking such commercial decision, alleging MSEDCL for non-scheduling of power from its Generating Units is not correct.*

19. *Therefore, clause 4.5.1 of the PPA, which decides the onus of paying penalty to coal supplier is required to be read synchronously with clause 5.4 of the PPA regarding scheduling*

of energy accordance with ABT and Grid code wherein principles of MoD operations has been stipulated. The Commission is of the opinion that positioning of RIPL in Merit Order Stack and its despatch is based on the variable rate quoted by the RIPL itself. MSEDCL cannot be held responsible for non-scheduling of RIPL generation due to MoD principles. In fact, it is variable charges quoted by RIPL itself which prohibits it from getting despatch. Therefore, penalty imposed by SECL on account of non-procurement of minimum quantity of fuel by RIPL under the FSA cannot be passed on MSEDCL.

20. *Further, as per CEA guidelines dated 8 November, 2017, RIPL needs to maintain 30 days coal stock for 85% of PLF. RIPL has contended that this CEA guideline is not applicable in present matter as period of dispute is FY 2016-17 which is prior to the date of guideline. In this regards, the Commission notes that guidelines dated 8 November, 2017 did not make any changes in normative coal stock levels and hence 30 days coal stock stipulated in the guidelines is relevant for the present matter. RIPL also contended these are just guidelines and not mandatory law, and further most of the thermal Generators in the Country are not able to maintain normative coal stock stipulated in guidelines. The Commission agrees with RIPL that most of the Generators are not able to maintain normative coal stock. However, in the present case, non-maintaining of normative coal stock may have impact on penalty amount for not lifting of the minimum guaranteed coal stock and hence the Commission*

sought the details from RIPL relating to its coal stock position as against CEA norms. Based on the details submitted by RIPL, the Commission computes Annual shortfall in normative coal stock vis-a-vis CEA guidelines as follows:

Month	***Normative Requirement of Coal as CEA Guidelines***	***Opening Stock***	***Coal Received***	***Coal Consumed***	***Closing Stock***	***Actual Generation***	***Monthly Shortfall in Coal***
	(MT)	***(MT)***	***(MT)***	***(MT)***	***(MT)***	***(MUs)***	***(MT)***
April 16	*4,67,848*	*4,25,244*	*1,86,992*	*2,85,856*	*3,26,380*	*487.852*	*1,41,468*
May 16	*4,67,848*	*4,67,848*	*1,58,930*	*2,48,639*	*3,78,139*	*422.354*	*89,709*
Jun 16	*4,67,848*	*4,67,848*	*2,72,007*	*2,93,197*	*4,46,658*	*498.74*	*21,190*
Jul 16	*4,67,848*	*4,67,848*	*39,863*	*2,204*	*5,05,507*	*3.66*	*0*
Aug 16	*4,67,848*	*5,05,507*	*0*	*0*	*5,05,507*	*0*	*0*
Sep 16	*4,67,848*	*5,05,507*	*0*	*48,123*	*4,57,384*	*79.965*	*10,464*
Oct 16	*4,67,848*	*4,67,848*	*7,958*	*35,354*	*4,40,452*	*58.259*	*27,396*
Nov 16	*4,67,848*	*4,67,848*	*1,07,179*	*1,33,490*	*4,41,537*	*227.002*	*26,311*
Dec 16	*4,67,848*	*4,67,848*	*15,079*	*0*	*4,82,927*	*0*	*0*
Jan 17	*4,67,848*	*4,82,927*	*7,723*	*0*	*4,90,650*	*0*	*0*
Feb 17	*4,67,848*	*4,90,650*	*0*	*0*	*4,90,650*	*0*	*0*
Mar 17	*4,67,848*	*4,90,650*	*0*	*57,527*	*4,33,123*	*96.862*	*34,725*

Coal Shortfall for FY 2016-17 with reference to CEA Norma (MT)	***3,51,263***

Thus, if RIPL would have complied with CEA norms, it would have lifted additional 3,51,263 MT of coal from SECL. This would have increased coal lifting ratio to 35% as against 29% for FY 2016-17 and would have reduced the quantum of penalty imposed by SECL. However, in view of non-scheduling of its Generating stations, RIPL has taken commercial decision of not lifting additional coal.

21. *In view of above, RIPL's commercial decision of quoting higher energy charges at the time of submitting its financial bid in competitive bidding process has positioned it at higher level in Merit Order Stack which prohibited it from getting dispatched during FY 2016-17, Therefore, penalty imposed by SECL on account of non-procurement of minimum quantity of fuel by RIPL under the FSA cannot be passed on MSEDCL."*

7) The Appellant is aggrieved by the findings of the State Commission as recorded in the Impugned Order inter-alia deciding as under:

(a) The State Commission vide Order dated 17.05.2007 has introduced Availability-based Tariff ("ABT") Regime in Maharashtra and the responsibility of least cost despatch of power was entrusted with MSLDC, thus, MSLDC has to attain load generation balance on any given day by finalizing the despatch schedule based on merit order stack and in terms of Article 5.4 of the PPA signed between the

Appellant and MSEDCL, generation schedule and despatch will be strictly as per ABT Regime and the Grid Code, therefore, it was obligatory on the bidders, including the Appellant to consider and factor possible implications of the MoD principles in its financial bid.

(b) MSEDCL has submitted that non-scheduling of RIPL's generating units in FY 2016-17 was on account of MoD principles, which has not been denied by the Appellant, even if MSEDCL would have provided schedule to RIPL's generating units, MSLDC would not have been able to provide despatch schedule to RIPL on account of its higher position in the Merit Order Stack, therefore, it is not correct to say that MSEDCL has not provided minimum guaranteed offtake of energy.

(c) The Appellant's commercial decision of quoting higher energy charges at the time of submitting its financial bid has positioned it at a higher level in the Merit Order Stack, which has prohibited it from getting despatched during FY 2016-17, the Appellant ought to have considered the implication of MoD principles while quoting the rate during competitive bidding, thus, the penalty imposed by SECL on account of non-procurement of minimum quantity of fuel by the Appellant, is only because of erroneous decision of the Appellant for taking commercial risk.

(d) As per guidelines dated 08.11.2017 issued by the Central Electricity Authority ("CEA Guidelines"), RIPL was required to maintain 30 days coal stock for 85% of Plant Load Factor ("PLF"), although most generators are unable to maintain normative coal stock stipulated in

the CEA Guidelines, in the present case, non-maintaining of normative coal stock has impacted the penalty amount, if RIPL would have complied with the CEA Guidelines, it would have lifted additional 3,51,263 MT of coal from SECL, this would have increased coal lifting ratio to 35% as against 29% for FY 2016-17 and reduced the penalty imposed by SECL, however, in view of non-scheduling of its generating stations, RIPL has taken the commercial decision of not lifting additional coal resulting into imposition of penalty and therefore, cannot be passed on to MSEDCL.

8) The Appellant submitted that MERC has erred in ignoring Clause 4.5.1 of Schedule 4 of the PPA and thus, has disregarded express terms of the PPA, the Clause 4.5.1 of Schedule 4 of the PPA mandates MSEDCL having contractual obligation to provide reimbursement for any penalty paid by RIPL to SECL for not lifting the minimum guaranteed fuel under the FSA if the same is on account of scheduling of power lower than Minimum Offtake Guarantee under the PPA, the State Commission has failed to consider that MSEDCL was aware of its own demand forecast and power purchase requirements, still knowing this and the MoD principles, executed the PPA and agreed to assume financial implications in the event MSEDCL fail to schedule power according to the PPA, therefore, MSEDCL cannot be permitted to wriggle out of its obligation to compensate RIPL for the penalty paid to SECL despite no fault of the Appellant.

9) The Appellant placed reliance on the following:

(a) *Phulchand Exports v. 0.0.0 Patriot reported as (2011) 10 SCC 300 [Sr. No. 4, Pg. 114 @ 129 CC]* wherein Supreme Court

while interpreting a commercial contract held that where experienced businessmen are involved in a commercial contract, the agreed terms must be respected as the parties may be taken to have regard to the matters known to them. [Para 37]

(b) *Har Shankar v. Excise & Taxation Commr., reported as (1975) 1 SCC 737 [Sr. No. 5, Pg. 131 @ 139 CC] wherein* Supreme Court held that commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions, those who contract with open eyes must accept the burdens of the contract along with its benefits. [Para 16]

(c) This Tribunal's judgment dated 22.08.2014 in Appeal No. 279 of 2013 titled *Gujarat Urja Vikas Nigam Limited v. Gujarat Electricity Regulatory Commission [Sr. No. 6, Pg. 158 @ 237 CC]* wherein this Tribunal held that a power purchase agreement is a binding contract and rights and liabilities under it cannot be escaped by the parties. [Paras 123-126]

(d) This Tribunal's judgment dated 16.12.2011 in Appeal No. 82 of 2011 titled *Essar Power Ltd. v. Uttar Pradesh Electricity Regulatory Commission [Sr. No. 7, Pg. 267 @ 355 CC]* wherein this Tribunal held that power procurement done pursuant to the Act is statutory in nature and has legal sanctity. [Para 135]

10) The Appellant in the light of the aforesaid decisions submitted that MSEDCL entered into the PPA knowing that in terms of Clause 4.5.1 of Schedule 4 and in case it fails to give lower schedule than the Minimum Offtake Guarantee under the

PPA, MSEDCL is mandated to pay for any penalty paid by the Appellant for not lifting the minimum guaranteed fuel under the FSA.

11) Also added that MSEDCL, admitting such liability to compensate the Appellant for the penalty imposed by SECL, has addressed letters dated 09.10.2017 and dated 18.12.2017 to Principal Secretary (Energy), Government of Maharashtra, further, MSEDCL has also admitted liability before the Alternate Dispute Resolution Mechanism ("ADRM") Committee, which has been recorded in the Order dated 09.01.2018 passed by the ADRM Committee.

12) Also argued that it is settled law that public authorities cannot be permitted to take stands which are diagonally opposite, reliance was placed on *Central Warehousing Corporation v. Adani Ports Special Economic Zone Limited & Ors. reported as 2022 SCC OnLine SC 1398 (Para 52)*, therefore, MSEDCL, being a State Distribution Licensee under the Electricity Act, 2003, cannot be permitted to renege from its admitted contractual obligations on the ground of non-scheduling of power on the basis of MoD principles.

13) The Appellant argued that the State Commission has failed to appreciate that Clause 4.5.1 of Schedule 4 of the PPA is independent of reasons for failure to despatch power, in terms of Clause 4.5.1 of Schedule 4 of the PPA, MSEDCL is required to compensate RIPL for penalty imposed by SECL on RIPL for not purchasing the minimum guaranteed quantity of fuel under the FSA, if the availability of the power station is greater than the Minimum Offtake Guarantee and the Procurer has not scheduled energy corresponding to the Minimum Offtake Guarantee during that Contract Year.

14) It is Appellant's submission that in terms of Clause 4.5.1 of Schedule 4 of the PPA, RIPL vide various communications provided MSEDCL with a comparison of cumulative Scheduled Energy for the previous months during FY 2016-17 along with the Minimum Offtake Guarantee alongwith the Fuel Offtake deficit due to cumulative despatch being less than the Minimum Offtake Guarantee, further, informed MSEDCL that due to low scheduling from its power plant, RIPL may attract penalty from SECL against the minimum fuel offtake as per FSA, however, against 100% plant availability by RIPL, MSEDCL has only scheduled approximately 16% power for FY 2016-17 which is much less than the Minimum Offtake Guarantee of 65% under the PPA.

15) The Appellant placed reliance on this Tribunal judgment dated 15.09.2022 in Appeal No. 256 of 2019 and Batch titled *Parampujya Solar Energy Pvt. Ltd. & Anr. v. Central Electricity Regulatory Commission & Ors* wherein it has been held that terms of the PPAs cannot be read in a manner to limit their scope, further, held that while interpreting the terms of the PPAs, contractual clauses and statutory framework must be kept in consideration, therefore, RIPL satisfies conditions in Clause 4.5.1 of Schedule 4 of the PPA and is entitled to be compensated by MSEDCL since MSEDCL has failed to schedule energy corresponding to Minimum Offtake Guarantee.

16) The Appellant also submitted that the contention of MSEDCL that the penalty imposed by SECL is only in terms of the FSA which is between RIPL and SECL, thus, no liability can be attributed on MSEDCL, the foregoing contention ought to be rejected since the provisions relating to imposition of penalty by SECL have been incorporated in Clause 4.5.1 of Schedule 4 of the PPA, therefore, the PPA and the FSA are intertwined contractual documents, thus, MSEDCL is under

a contractual obligation to compensate RIPL for any penalty paid on account of short lifting of minimum guaranteed fuel under the FSA in terms of Clause 4.5.1 of Schedule 4.

17) The Appellant, further, submitted that MERC has erred in disallowing its claim for compensation on the ground that non-scheduling of power was due to high variable charges quoted by it and by doing so, MERC has introduced a new condition in the PPA which is impermissible, it is settled law that implied terms cannot be read into a contract, reliance was placed on *Parampujya Solar Energy Pvt. Ltd. & Anr. v. Central Electricity Regulatory Commission & Ors. (Para [79 & 83]); Nabha Power Limited v PSPCL reported as (2018) 11 SCC 508 (Para 72) [Sr. No. 1, Pg. I @39 CC]; Transmission Corporation of Andhra Pradesh Ltd. and Ors. v. GMR Vemagiri Power Generation Ltd. and Ors., reported as (2018) 3 SCC 716 [Para 26] [Sr. No. 2, Pg. 40 @ 53 CC] and Judgment dated 17.05.2018 passed in Appeal No. 283 of 2015 titled Nabha Power Ltd. v. Punjab State Power Corporation Ltd. (Para 9.20)] [Sr. No. 3, Pg. 56 @ III CC]*.

18) Additionally, it is submitted that MSEDCL was aware of Article 5.4 of the PPA (compliance with ABT and Grid Code) *inter-alia* its demand forecast and power purchase requirements, despite this, MSEDCL executed the PPA and agreed to compensate for any penalty paid to SECL on account of short lifting of minimum guaranteed fuel under the FSA due to scheduling of power lower than Minimum Offtake Guarantee under the PPA.

19) The Appellant argued against the observation of the MERC in the Impugned Order and *inter-alia* rejecting the RIPL's claim for compensation for payment of penalty to SECL on the ground that non-scheduling of power was due to high

variable charges quoted by RIPL, thus, MERC has failed to consider that penalty under Clause 4.5.1 of Schedule 4 of the PPA is linked to the difference between availability and despatch which can only arise when MSEDCL's aggregate demand is less than its contracted capacities, lower offtake of power from the Project would only arise in case MSEDCL's demand is lower than the availability, therefore, RIPL's tariff has no bearing on the present case.

20) The Appellant, further, pleaded that the intent of Clause 4.5.1 was to provide safeguards to power generators who are ready and willing to supply energy but are incurring losses as a result of non-scheduling due to lack of demand of electricity by the procurers who have signed PPAs with much higher aggregate capacity against the demand, pertinently, MSLDC scheduled power as per the despatch schedule given by MSEDCL, therefore, the reason for non-despatch was lower demand from MSEDCL and not MSLDC's decision, claimed that MERC has incorrectly relied on the implications of the MoD principles as the reason for denying the Appellant reimbursement for penalty paid to SECL under the FSA, thus, MERC, by disallowing RIPL compensation claim, has rendered Clause 4.5.1 of Schedule 4 of the PPA otiose, it is a settled principle that Courts ought to give an interpretation that does not render the provisions of the contract (PPA) otiose, reliance is placed on *[Nabha Power Limited v. PSPCL: (2018) 11 SCC 508 (Para 72) [Sr. No. 1, Pg. 1 @ 39 CC]; Adani Power (Mundra) Ltd. v. GERC & Ors.: (2019) 19 SCC 9 (Para 24, 30,31) [Sr. No. 12, Pg. 581 @ 606 CC]; Union of India v. M/s D.N. Revri & Co. & Ors.: (1976) 4 SCC 147 (Para 7)/ [Sr. No. 13, Pg. 614 @ 618 CC].*

21) Further, in terms of Article 1.2.13, different parts of the PPA are to be taken as mutually explanatory and supplementary to each other and that in case of any

inconsistency, PPA ought to be interpreted in a harmonious manner.

22) The Appellant also assailed the decision of MERC denying its claim for compensation based on non-compliance with the CEA Guidelines in terms of which RIPL was guided to maintain 30 days coal stock for 85% of PLF, in the Impugned Order, it has been held that if RIPL had complied with the CEA Guidelines, it would have lifted additional coal from SECL resulting into increased coal lifting ratio to 35% as against 29% for FY 2016-17 and would have reduced the quantum of penalty imposed by SECL, further, MERC has failed to appreciate that the CEA Guidelines were issued on 08.11.2017, which is subsequent to the period of dispute i.e., FY 2016-17 and that the CEA Guidelines are merely advisory in nature, relying on this Tribunal judgment dated 14.08.2018 passed in Appeal No. 111 of 2017 and Batch titled *GMR Warora Energy Limited v. CERC & Ors*. considered whether directions to make arrangements for handling facility for imported coal issued by CEA in view of the shortage in availability of domestic coal, were mandatory or advisory in nature, inter-alia decided that since the directions did not mention any section under which they were issued, the said directions could not be considered as mandatory, similarly, CEA Guidelines have not been issued under any particular provision under the Act and merely provides guidelines for monitoring coal stock at coal based thermal power plants, therefore, cannot be declared as mandatory, added that MERC has erred in its finding that the CEA Guidelines are mandatory and binding on RIPL which is in contradiction to the aforesaid judgment of this Tribunal.

23) The Appellant also submitted that it has informed the comparison of cumulative Scheduled Energy for all previous months during FY 2016-17 with the Minimum Offtake Guarantee including Fuel Offtake deficit due to the cumulative

despatch being less than the Minimum Offtake Guarantee, however, at no point did MSEDCL asked RIPL to maintain coal stock of certain days or deny its liability to pay on account of Fuel Offtake deficit, further, pleaded that since coal is a combustible substance which suffers GCV loss, maintaining coal stock for a period of 30 days, as recommended by the CEA Guidelines, is not in sync with prudent utility practices, this has also been noted by MERC that most thermal Generators are unable to maintain normative coal stock, additionally informed that during FY 2016-17, MSEDCL gave complete shut-down instructions for prolonged periods, therefore, in such circumstances, it was neither prudent nor practical for RIPL to procure and keep coal stock for certain days, there has been no occasion wherein RIPL has failed to supply power to MSEDCL using SECL coal on account of unavailability of SECL coal, despite this MERC held that RIPL ought to have complied with the CEA Guidelines and lifted additional coal from SECL.

24) Further, submitted that the MERC failed to appreciate the fact that lifting coal from SECL is directly proportionate to scheduling of power, RIPL was unable to lift the minimum guaranteed fuel under the FSA as a consequence of non-scheduling of power by MSEDCL, at no point did MSEDCL dispute or contended that the penalty imposed on RIPL by SECL was on account of RIPL's fault/omission, therefore, the MERC has erred in holding that MSEDCL is not liable to pay the penalty charged by SECL for non-lifting of minimum quantity of fuel under the FSA.

25) The Appellant also claimed, SECL, on 06.05.2019, raised revised invoice levying an additional amount of Rs. 7,15,82,170 towards GST, over and above the penalty amount of Rs. 39,76,78,719.63, subsequently, on 04.12.2019, RIPL raised a supplementary invoice on MSEDCL for Rs. 7,15,82,170 towards GST on the penalty amount imposed by SECL.

26) Since MSEDCL is liable to compensate RattanIndia in terms of Clause 4.5.1 of Schedule 4 of the PPA, tax imposed on the penalty amount of Rs. 39,76,78,719.63 is also payable by MSEDCL, additionally RIPL is also entitled to claim Late Payment Surcharge ("LPS") in terms of Clause 8.8.3 of the PPA on account of delayed payment of supplementary invoices by MSEDCL, and also, the Carrying Cost on the amounts paid to SECL as penalty, the Appellant submitted that it is settled law that Carrying Cost is essentially time value of money which ought to be granted to do complete justice to the claims of compensation as denial of Carrying Cost deprives the affected party of its legitimate dues, this position stands settled in a catena of judgments including:

(a) Constitution Bench of the Hon'ble Supreme Court in Central Bank of India v. Ravindra & Ors. reported as (2002) 1 SCC 637 (Para 44) [Sr. No. 8, Pg. 414 @ 444 CC]

(b) T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd. reported as (2014) 11 SCC 53 (Paras 73-75) [Sr. No. 9, Pg. 453 @ 482 CC]

(c) Indian Council of Enviro-Legal Action v. Union of India & Ors. reported as 2011 (8) SCC 161 ("ICELA Judgment") (Paras 178-180) [Sr. No. 10, Pg. 485 @ 565 CC]

27) Accordingly, the Appellant sought following relief: -

(a) Allow the Appeal and set aside the Impugned Order dated 23.10.2018 passed in Case No. 146 of 2018 by Ld. MERC;

(b) Direct Respondent No. 2, MSEDCL to release amount of Rs. 39,76,78,719.63 which was paid by RattanIndia as penalty to SECL

for the period April 2016 to March 2017, along with interest and Carrying Cost;

(c) Direct Respondent No. 2, MSEDCL to release the amount of Rs. 7,15,82,170 towards GST imposed by SECL on RattanIndia, along with interest and Carrying Cost.

28) The Respondent No. 2, MSEDCL countered the contentions of the Appellant and submitted that the energy accounting in the state was as per Final Balancing and Settlement Mechanism (FBSM) for the period August 2011 to September 2021 as per directives of ABT order dated 17.05.2007 in case no 42 of 2006 and scheduling of RIPL has been done as per provisions of ABT order and scheduling & despatch code as approved by MERC, according to such scheduling, as per Merit order dispatch principles, the following procedure was followed:

a. **Generator** – Declares the availability of its units as per PPA,
b. **DISCOM** – Discom/ MSEDCL uploads Aggregated requisite drawl schedule in total/ forecasted load requirement with MSLDC-OD on day-ahead basis for scheduling period of 15-minute duration, the load forecast schedule for each DISCOM include the load forecast schedule for 96 time blocks each of 15-minute duration for following day, this is done through the Lodestar software link available on SLDC website, however, this schedule does not include a generator wise drawl schedule, therefore, only the total aggregated requisite Schedule drawl details uploaded on SLDC website is available in public domain and the Day wise total aggregated requisite schedule drawl data in 96 blocks (each 15 min) for the period of FY 2016-17, has been uploaded by MSEDCL on the SLDC website.

c. **MSLDC** – Based on the abovementioned data, MSLDC analyses the position of the generator in the MoD stack by undertaking load-generation balancing and adopting MOD principles at reference frequency of 50 Hz and thereafter notifies the actual dispatch/schedule to the GENCOs and the State Pool Participants based on least cost dispatch.

29) It is, further, the argument of MSEDCL that the instructions for the schedule to generators are despatched through MSLDC as per MOD principle as envisaged in ABT order and scheduling & despatch code as approved by MERC, further as per Section 3.2 (c) of the ABT order authorises MSLDC (OD) to take all decisions with regard to the dispatching of stations after evaluating all possible network parameters/ constraints congestions in the transmission network and in the eventuality of any aberration in the network, the role of Discom is limited to upload its 15 minute time block aggregated requisite drawl schedule on day ahead basis for the next day, further as an example, Load generation balance sheet for 15.04.2023 shows the requisite aggregated drawl schedule given by MSEDCL and schedule given to each generator by SLDC based on centralised MoD, accordingly, based on certificates provided by MSLDC, MSEDCL has considered availability declared by M/s. RPL and has made payment towards capacity charges as per clause 4.2.2 of schedule-4 of PPA.

30) We, at this stage, are refraining ourselves from taking strong exception to the submission of the MSEDCL, which neither as part of their oral arguments nor as part of reply has made such submission before us, further, MERC also has not considered such an argument while deciding the matter, it is well settled principle that anything which is not part of the pleadings, cannot be taken as part of the

adjudication process, the supreme court, in the case of *Ram Sarup Gupta (dead) by L. Rs Vs. Bishun Narain Inter College and others, (AIR 1987 SC 1242),* has held that evidence, if any, provided by the parties cannot be considered in the absence of pleadings, also no party should proceed beyond its submissions as part of pleadings including oral arguments, and that the party should argue all required and relevant evidence in support of the case it has set up, the true spirit of pleading is to allow the opponent's party to know the case they have to face, *inter-alia* to provide a fair trial.

31) MSEDCL, further, submitted that RPL has entered into PPA through competitive bidding as per Section 63 of the Electricity Act, 2003 where RPL was free to quote the levelized tariff and tariff stream for 25 years in terms of RFP Provisions 2.6 & 2.4 (B), accordingly, it was RPL who itself quoted the higher energy charges (The quoted Tariff, as in Format 4.11) during initial years of PPA and lower energy charge for subsequent periods, hence neither MSEDCL nor MSLDC is responsible for Non-scheduling of RPL units, though MSEDCL desired to procure power from RPL's units, RPL units failed to get itself dispatched/scheduled due to its higher position in MoD stack as consequence of RPL's own commercial decision of quoting higher non-escalable energy charges in initial years of the PPA.

32) It is the argument of MSEDCL that the penalty, thus, levied by SECL on RPL is due to RPL's own mismanagement of fuel and its own Commercial decision of quoting higher non escalable energy charges in the initial years which resulted in its higher position in MoD stack.

33) Also countered that Clause 4.5 and 5.4 of the PPA are to be read conjointly

and harmoniously else it will render clause 5.4 otiose, also placed before us Clause 4.5 and 5.4, as afore quoted.

34) The MSEDCL also supported the decision of the State Commission regarding observation on CEA guidelines by stating that the MERC rightly noted in para 20 that the said guidelines are applicable on RPL since it did not make any changes in normative coal stock levels and if RPL would have complied with CEA norms, it would have lifted additional 3,51,263 MT of coal from SECL, and this would have increased coal lifting ratio to 35% as against 29% for FY 2016-17, this would have reduced quantum of penalty imposed by SECL.

35) We fail to understand such a contention whether it is an advice to the Appellant for reducing their commercial risk or acceptance of liability on the part of MSEDCL against the penalty imposed because of their failure, it seems that the submission is only to ensure reduction of liability on the part of MSEDCL.

36) We also decline to accept the contention of the MSEDCL that the Appellant can't be permitted to take contradictory stand before this Tribunal as the Appellant claimed for shortfall of coal for FY -2016-17 under CA No. 1805 of 2021 which has in fact been allowed by the Supreme Court and on other hand RPL is claiming in the present appeal that it was not able to lift the coal due to huge amount of coal pending in stock because of the alleged non-scheduling of its units by MSEDCL, the only issue before us whether the short lifting of coal by the Appellant is due to failure of the MSEDCL in providing the schedule with minimum offtake guarantee of 65%.

37) It may therefore be seen that the whole issue revolves around the

applicability of Clause 4 and Clause 5 of the PPA signed between the Appellant and the 2nd Respondent i.e. MSEDCL, also the minimum offtake guaranteed to be ensured by the MSEDCL under its schedule should be 65% of the contracted capacity, wherein, the PPA stipulates that the minimum offtake guaranteed shall mean the guarantee offtake of 65 per cent (65%) of the aggregate contracted capacity for the procurer, as the case may be during the contract year.

38) The Clause 4.5.1 of Schedule IV attached to the PPA provides that seller has right to raise invoice for the lower capacity of lifting of coal *inter alia* to pay penalty if the procurer has not scheduled energy corresponding to such minimum offtake guaranteed during the any contracted year, the MERC has ignored Clause 4.5.1 of Schedule IV of the PPA, *inter-alia*, the claim of the Appellant that MSEDCL is under a contractual obligation to provide reimbursement of any penalty paid by the Appellant to the Coal Company i.e. SECL for not lifting the minimum guaranteed fuel under the Fuel Supply Agreement (FSA) if the same is on account of lower scheduling of power that is the minimum offtake guarantee under the PPA by MSEDCL.

39) It cannot be disputed that MSEDCL was aware of its own demand forecast in power purchase requirement in addition to the Merit Order Despatch (MoD), however, signed PPAs for excess quantity as against the demand with open eyes with such financial implications resulted due to lifting of lower minimum offtake guarantee of coal due to the failure on the part of the MSEDCL to schedule the requisite minimum offtake quantity.

40) It is a settled principle of law that the agreed terms under a contractual agreement must be respected as the parties have considered the same after

knowing the implications therein, reliance has been placed upon the Supreme Court Judgement ***"Phulchand Exports V. O.O.O. Patriot reported as (2011) 10 SCC 300 [Sr. No. 4, Pg. 114 @ 129 CC)", "Har Shankar V. Excise & Taxation Commr., reported as (1975) 1 SCC 737 [Sr. No. 5 Pg. 131 @ 139 CC]"***.

41) Further, MSEDCL signed the PPA with the knowledge of the provisions contained in Clause 4.5.1 of Schedule IV to the PPA and therefore obligated to compensate for the penalty paid by the Appellant due to lower lifting of the minimum guaranteed fuel under the FSA signed with the Coal Company, *inter-alia* MSEDCL is bound to comply with the provision under Clause 4.5.1 due scheduling lower power within the minimum offtake guarantee.

42) From the Letter dated 09.10.2017 addressed by the MSEDCL to the Principal Secretary (Energy), Government of Maharashtra and further Letter dated 18.12.2017 written to the Energy, Labour and Industries Department, Government of Maharashtra, it is confirmed that the MSEDCL has admitted the liability to compensate the Appellant for the penalty imposed by SECL, further, submission of MSEDCL before Alternate Dispute Resolution Mechanism Committee regarding the liability affirms the same as seen from the Order recorded vide dated 09.01.2018, the main contents of the Letter dated 09.10.2017, wherein it has been conveyed by MSEDCL to the Principal Secretary (Energy) are reproduced as under:

> *"MSEDCL has signed long term PPA under Case 1 stage II bidding process with M/s. RPL's 5 x 270 MW units at Amravati and subsequently, Coal India Limited has given linkage of 5.49 lacs Tonnes from SECL. In view of Demand supply scenario, MSLDC by following*

the MOD principle schedules the power in the state. During FY 16-17, due to the higher variable cost of RPL's set were not falling in MOD most of the time and hence power was not scheduled upto the minimum offtake quanum i.e.65% of contracted capacity and M/s. RPL was thus unable to lift coal upto 75% of offered ACQ by SBCL.

As per the FSA signed with SECL, in case RIPL is unable to lift 75% of ACQ offered by SECL, then RIPL is liable for the penalty. Subsequently as per PPA Provisions, if MSEDCL unable to schedule energy corresponding to 65% (i.e. minimum off take) of Contracted capacity then the penalty levied by SECL is to be paid by MSEDCL. Further as per the PPA provision, for waival off such penalty, MSEDCL have the right to avail such deficit coal quantum at the same price and to sell such deficit to third parties.

But contrary to this PPA provision, as per FSA Provisions the RPL cannot sale/divert /transfer the coal to any third party and is material breach of contract. Hence MSEDCL cannot buy/sell such deficit quantity from SECL.

Now, as per the provision of FSA SECL has raised the penalty of 85.93 Crs to RIPL and subsequently RIPL has passed it to MSEDCL which will eventually be passed on to consumers of state of Maharashtra. This matter was already taken up to CMD coal India for the waiver of the penalty at your level vide Itr dtd. 18.08.17. However, CIL Is repeatedly following up with RPL for payment of the Penalty and has informed to stop the coal supply.

In view of above, it is requested to take up this matter at the level of Chief Secretary to Secretary, Ministry of Coal to form a committee called Alternative Dispute Re-Dressesal Mechanism Committee

(ADRM) for the redressal of this Issue of penalty waiver off levied on RIPL which is being passed on to MSEDCL".

43) Further, MSEDCL's Letter dated 18.12.2017, as placed before us, again submitted as under :

"This has reference to the above subject, Ministry of coal, has formed a ADRM (Maharashtra) Committee and a meeting has been scheduled on dated 21.12.17 at 3.30 pm at New Delhi.

The member of ADRM Committee from the State of Maharashtra is requested to kindly make it convenient to attend the meeting along with the representatives of RIPL and MSEDCL. Also, the CMDs of CIL and SECL are requested to depute concerned officials to attend the meeting along with relevant documents.

The brief of the matter is, MSEDCL has signed long term PPA under Case 1 stage II bidding process with M/s. RPL's 5 x 270 MW units at Amravati and subsequently, Coal India Limited has given linkage of 5.49 lacs Tonnes from SECL.

As per the FSA signed with SECL, in case RIPL is unable to lift 75% of ACQ offered by SECL, then RIPL is liable for the penalty. Subsequently as per PPA Provisions, if MSEDCL unable to schedule energy corresponding to 65% (i.e. minimum off take) of Contracted capacity then the penalty levied by SECL is to be paid by MSEDCL. Further as per the PPA provision, for waival off such penalty, MSEDCL have the right to avail such deficit coal quantum at the same price and to sell such deficit to third parties.

But contrary to this PPA provision, as per FSA Provisions the RPL cannot sale/divert /transfer the coal to any third party and is material breach of contract. Hence MSEDCL cannot buy/sell such deficit quantity from SECL.

Now, as per the provision of FSA, SECL has raised the Final penalty of Rs. 39 Crs to RIPL and subsequently RIPL has passed it to MSEDCL which will eventually be passed on to consumers of state of Maharashtra. For redressal of this issue on the request of GoM, the ADRM committee is formed".

44) It is also seen from the Order dated 09.01.2018 that the Alternate Dispute Resolution Mechanism Committee, Ministry of Coal, Government of India has decided as under:

"Maharashtra State Electricity Distribution Company limited (MSEDCL) have referred the issue of charging penalty for short lifting by SECL under Fuel Supply Agreement (FSA) with Rattan India Power Limited (RIPL) for the year 2016-17.

Representative of MSEDCL stated that as per the provisions of Power Purchase Agreement (PPA) between MSEDCL and RIPL, the penalty levied on RIPL will be passed on to MSEDCL and ultimately to the consumers. RIPL could not lift required quantity of coal as per FSA commitment because of less scheduling of power as per Merit Order Dispatch (MOD) stipulation. Under FSA provisions coal has to be procured and used only for power generation and supply under PPA. As such, less scheduling of power makes a case of waiver of penalty.

CIL representative stated that ADRM forum is constituted to deal with disputes between PSUs only. As this issue is not arising out of any contract and / or dispute between two PSUs, therefore it is not in the purview of ADRM. Further, penalty on short lifting / supply under FSA between Coal Companies and Power utilities is based on "take or pay" principle under New Coal Distribution Policy (NCDP), Penalties are therefore applicable to the defaulting party as per FSA provisions. Same provisions apply across the board to all Power Utilities / Coal Companies,

On a query, SECL clarified that coal supply to RIPL are continued but RIPL is yet to make the payment of penalty. The level of lifting for the year 2016-17 by RIPL was below 30% making the FSA liable for termination. However, a general dispensation has been granted by CIL to allow a power utility to keep the FSA alive in such cases by paying the penalty for short lifting at applicable slab / rate. As such, any dispensation or waiver of FSA obligation is not feasible. This would be against the provisions of a bilateral contract between SECL and RIPL and also discriminatory with other Power Utilities. In any case, any dispute between RIPL and SECL is neither in the purview of ADRM nor is being pleaded before ADRM in the instant case.

Order of ADRM:- After hearing all the parties, ADRM is of the view that the matter of penalty, claim for short lifting by SECL to RIPL is not in the purview of ADRM. This need to be dealt as per the provision of bilateral FSA between RIPL and SECL irrespective of any PPA conditions between RIPL and MSEDCL which is a separate bilateral contract between them."

45) Also, Supreme Court Judgement titled ***Central Warehousing Corporation v. Adani Ports Special Economic Zone Ltd. & Ors. (2022 SCC OnLine SCC 1398*** (para 52), settled the principle that the Public Authority cannot be permitted to take stand which are diagonally opposite and therefore MSEDCL cannot be permitted to renege from its contractual obligations on the ground of not providing the schedule by shouldering the responsibility on the MSLDC in the light of MoD principles.

46) From the above, it is clear that MSEDCL vide their letters dated 09.10.2017 and 18.12.2017 addressed to the Principal Secretary (Energy), Energy Labour and Industries Department, Government of Maharashtra has admitted that "subsequently as per PPA provisions, if MSEDCL unable to schedule energy corresponding to 65% (i.e. minimum offtake) of contracted capacity then the penalty levied by SECL is to be paid by MSEDCL", these letters were written by the CMD, MSEDCL.

47) It also cannot be disputed that with the admission of the liability on behalf of MSEDCL, the matter was taken up with Government of India, Ministry of Coal which after detailed deliberation with the MSEDCL and the Appellant ordered that "*after hearing all the parties, ADRM is of the view that the matter of penalty, claim for short lifting by SECL to RIPL is not in the purview of ADRM. This need to be dealt as per the provision of bilateral FSA between RIPL and SECL irrespective of any PPA conditions between RIPL and MSEDCL which is a separate bilateral contract between them*."

48) We are not satisfied with the submission of MSEDCL that it is the duty of the MSLDC to schedule any power under the ABT norms and MSEDCL is not bound

to give any schedule, therefore, at this stage, taking a complete U turn which is contrary to their submissions made vide the said letters cannot be accepted by citing provisions which are not relevant in the present context.

49) It is also important to take a note of the provisions contained in the Scheduling and Dispatch Code notified by MERC, pursuant to section 33 of the State Grid Code, the relevant provisions i.e. Article 9 (Scheduling and Despatch procedure) is quoted as under:

> *"9. Scheduling and Despatch procedure*
>
> *1 By 10 AM each day, each InSGS shall furnish to MSLDC, their station-wise ex-power plant generation schedule in MW and MU taking into consideration any outage of its generating unit for the next day, i.e., from 0000 hrs to 2400 hrs of the following day in 15 minute blocks in Form No. MSLDC/OP-105/F-1.*
>
> *2 By 10 AM each day MahaGenco shall furnish a consolidated schedule for small hydro stations for next day in Form No. MSLDC/OP-105/F-2 for the next day*
>
> *3* ***By 10 AM each day each Distribution Licensees/Discom/Individual Mumbai Utilities shall furnish their drawal schedule for next day, on 15 minute block basis against bilateral power tentatively and same to be confirmed by 14:00 hrs*** *and IPP requisitions they have contracted on short term and long term basis and collective transactions in Form Nos.*

MSLDC/OP-105/F-3 and MSLDC/OP-105/F-3 (A) respectively for the next day.

4 *By 10 AM each day all Transmission Open Access Users shall furnish to MSLDC their drawal and/or injection schedules for next day in Form No. MSLDC/OP-105/F-4 for the next day."*

50) It is, therefore, clear that it is the duty of the Distribution Licensee i.e. MSEDCL to provide the daily schedule as per the relevant provisions as quoted above and therefore Article 5.4 as referred and relied by the MERC and also by MSEDCL on the pretext of Merit Order Despatch cannot be agreed to, the Merit Order Despatch shall come into picture only once a schedule is given in advance by the Generating Company and also by the Distribution Licensee/Beneficiary, however, we find that MSEDCL has failed to provide requisite schedule for minimum guaranteed offtake as per Clause 4.5.1 and as such the provision under this Clause is attracted in favour of the Appellant, the Merit Order Despatch is on real time basis and operates against the schedules available with the MSLDC.

51) The MERC while relying upon the MoD principle stated that the *"MSLDC has to attain load generation balance on any given day by finalising the schedule of maximum capacity available, starting from the station/unit with the lowest Variable Charge in the Merit Order stack. As a basic principle, MSLDC is required to finalise the despatch schedule based on least-cost principles",* however, erred in noting that MSLDC has to balance the generation (supply) and load (demand) only if the schedules are available/ given by the generator and the distribution licensees in compliance with the Scheduling and Dispatch Code notified by MERC.

52) We are, therefore, inclined to consider the arguments of the Appellant and the admitted fact by MSEDCL cannot be considered differently as also the observation of the MERC and its reliance on Clause 5.4 of the PPA which need to be rejected.

53) We also decline to accept the contention submitted by the MSEDCL regarding the process followed in compliance to ABT principles, as the same was submitted without having oral arguments or in their reply, further, in case MSEDCL has provided schedule to MSLDC, it ought to have given the same to the Appellant in compliance with the provision contained under Scheduling and Despatch Procedure and also Clause 4.5.1 of the PPA as aforequoted.

54) Also reliance on the guidelines/ norms specified by the Central Electricity Authority are the guiding norms and are not mandatory, further, the table as quoted in the Impugned Order, indicates that the Appellant has maintained the coal stocks with marginal deviations as per the CEA norms and even more than the norms for certain months, it is only for the month of April, 2016 and March, 2017, the opening coal stock was below the required level, however, any variation from the CEA norms cannot be taken as a default on the part of the Appellant, the distribution licensee is certainly mandated to comply with Clause 4.5.1 of the PPA, it is a settled law that mere guidelines issued by CEA in order to provide guiding norms, cannot be treated as mandatory till the same is adopted or incorporated under the legislation.

55) On the other hand, the failure of the procurer, MSEDCL to provide schedule corresponding to '*off-take Guarantee*' will attract invocation of Clause 4.5.1 of Schedule 4 of the PPA as quoted in the preceding paragraphs, and MSEDCL

cannot take shelter under the aforequoted Clause 5.4 of the PPA, therefore, we find that the arguments put forth by the Respondents lack merit, on the other hand, arguments and the legal provision placed by the Appellant are found to be in order.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 41 of 2019 filed by Rattan India Power Limited has merit and is hereby allowed.

The Impugned Order dated 23.10.2018 passed by the Maharashtra Electricity Regulatory Commission is set aside to the extent whereby the Appellant was denied compensation for the penalty imposed by the fuel company for non-procurement of minimum quantity of fuel.

We also direct the Respondent No. 2 i.e. MSEDCL

i) to make payment of Rs. 39,76,78,719.63 to the Appellant which was paid by RattanIndia as penalty to SECL for the period April 2016 to March 2017, along with Carrying Cost, and

ii) to make payment of Rs. 7,15,82,170 towards GST imposed by SECL on the Appellant, along with Carrying Cost.

PRONOUNCED IN THE OPEN COURT ON THIS 6TH DAY OF FEBRUARY, 2024.

(Virender Bhatt)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

pr/mkj