No. N/381/2017

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,

No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.

Dated: 05.08.2021

Present

Shri Shambhu Dayal Meena : Chairman
Shri H.M. Manjunatha : Member
Shri M.D. Ravi : Member

OP No.207/2017

BETWEEN:

M/s Nirani Sugars Limited,
A Company incorporated under the
provisions of Companies Act, 1956
having its Registered Factory Site
No.166, Kulali Cross, Mudhol Taluk,
Bagalkot District-587 313.
Karnataka.
Represented by its General Manager) ..... **PETITIONER**

(Represented by Sri Shridhar Prabhu, Advocate
for M/s Navayana Law Offices)

AND:

1) Power Company of Karnataka Limited (PCKL)
A Company Registered under the provisions of
Companies Act, 1956 having its Registered
Office at Room No15, Kaveri Bhavan,
KPTCL Building, K.G. Road,
Bengaluru-560 001.
Represented by its Managing Director)

2) Bangalore Electricity Supply Company Limited (BESCOM),
A Company Registered under the provisions of
Companies Act, 1956 having its Registered
Office at K.R. Circle,
Bengaluru-560 001.
(Represented by its Managing Director)

3) Chamundeshwari Electricity Company Limited (CESC),
A Company Registered under the provisions of
Companies Act, 1956 having its Registered
Office at L.J. Avenue,
New Saraswathipuram,
Mysuru-570 009.
(Represented by its Managing Director)

4) Gulbarga Electricity Supply Company Limited (GESCOM),
A Company incorporated under the provisions of
Companies Act, 1956 having its
Registered Office at Station Road,
Kalaburgi-585 102.
(Represented by its Managing Director)

5) Hubli Electricity Supply Company Limited (HESCOM),
A Company incorporated under the provisions of
Companies Act, 1956 having its
Registered Office at Navanagar,
Hubbali-580 025.
(Represented by its Managing Director).

6) Mangalore Electricity Supply Company Limited (MESCOM),
A Company incorporated under the provisions of
Companies Act, 1956 having its
Registered Office at A.B. Shetty circle,
Mangaluru-575 001.
(Represented by its Managing Director) **.....RESPONDENTS**

(Respondent No.1 to 6 represented by Sri S. Sriranga
& Ms. Sumana Naganand, Advocates
for M/s JUSTLAW Advocates)

O R D E R S

1. The present petition is filed under Sections 86 (1) (f) of the Electricity Act, 2003, praying for the following reliefs:

    a) To declare the deduction of Rs.1,30,58,567 as compensation charges by Respondent No.1 vide pre-audited proforma bills

for the period from March 2016 to May 2016 raised by Respondent No.1 as illegal and unauthorized; and

b) To direct Respondents severally to pay Rs.1,30,58,567 + interest for the energy supplied for the month of March, April & May 2016.

2. The material facts required for the disposal of the controversies involved in the case, as can be gathered from the pleadings and documents produced by the petitioner may be stated as follows:

   a) That the petitioner is a bagasse based cogeneration power generating company with the installed capacity of 62 MW and the fuel used for generation is bagasse and coal, situated at factory site No.1, 166 Kulali Cross, Mudhol taluk, Bagalakote district. The petitioner is registered as a company under the provisions of Companies Act, 1956 having its registered office at the factory site.

   b) The 1st respondent (PCKL) on behalf of other respondents 2 to 6 who are the distribution licensees in the State of Karnataka, invited tender for procurement of 500 MW RTC firm power for the period from 15.09.2015 to 31.05.2016 on short-term basis (Case 1 bidding process), vide Notification dated 23.06.2015. The petitioner was one of the selected bidders for sale and supply of electricity of 15 MW contracted capacity for the period from 01.11.2015 to 31.05.2016 at the price of Rs.5.08 per unit for the entire contracted period. Accordingly, the Letter of Intent (LoI) dated 21.08.2015 was issued in

favour of the petitioner by the 1st respondent (PCKL). Thereafter, the petitioner and respondents 2 to 6 entered into Power Purchase Agreement (PPA) dated 14.10.2015 as per Annexure-P1, with the terms and conditions stated therein.

c) The petitioner commenced the supply of power from 01.11.2015 as required. During the course of power supply on 11.03.2016 at about 11.45 a.m, there was fire accident due to short circuit at bagasse yard and immediately Fire Force was intimated and on their arrival the fire was extinguished along with the help of security personnel of the petitioner. Due to that fire accident about 26,500 MTs bagasse stock was burnt out of the total quantity of 94,718.56 MTs bagasse stock. In this regard, the petitioner filed complaint before police on 16.03.2016. The petitioner has also obtained a certificate dated 18.03.2016 issued by District Fire Officer, Bagalkote. The copies of complaint and the said certificate are produced at Annexure-P3. The petitioner also intimated the incident through e-mail dated 12.03.2016 (Annexure-P4) to the 1st respondent (PCKL) and requested to consider the said event as a Force Majeure as per Article 7.1 of the PPA and to allow the petitioner for reducing the exportable power appropriately as against the agreed term and to treat this e-mail as an intimation as per clause 7.1 (ii) of the PPA. The petitioner also wrote another letter dated 12.03.2016 (Annexure-P5) to the 1st respondent (PCKL).

d) Subsequently, the Executive Engineer, Karnataka Neeravari Nigam Limited issued a notice dated 22.03.2016 (Annexure-P6) directing the petitioner to stop drawing water from the Barrage for any industrial and commercial purpose, due to scarcity of rainfall during 2015-16 in the catchment area of Hidkal Dam.

e) The petitioner averred that even after the fire incident, the petitioner with great difficulty managed to schedule the contracted capacity of power up to 18.03.2016. Subsequent to the receipt of letter dated 22.03.2016 (Annexure-P6) from the Executive Engineer, Karnataka Neeravari Nigam Limited, the petitioner was forced to stop the generation and shut the plant. Therefore, the petitioner by its letter dated 22.03.2016 (Annexure-P7) intimated the 1st respondent (PCKL) to cancel the PPA in question for the remaining period from 18.03.2016 to 31.05.2016 as per Force Majeure clauses of the PPA. The 1st respondent (PCKL) by its letter dated 24.03.2016 (Annexure-P8) requested the petitioner to provide documentary evidence and assessment by Competent Authority regarding the quantity of bagasse burnt to take further needful action.

f) Subsequently by letter dated 12.04.2016 (Annexure-P9), the 1st respondent (PCKL) informed the petitioner that the grounds stated by the petitioner were not covered under the Force Majeure event under the PPA and also informed to take recourse as per clause 5.1.4 of the PPA for supply of energy from alternative source, in default the

petitioner would be liable to pay the damages as per clause 6.2.5 of the PPA.

g) The petitioner informed the 1st respondent (PCKL) vide letter dated 01.05.2016 (Annexure-P10) that again there was fire accident on 27.04.2016 at about 7.30 p.m. at bagasse stock yard due to which about 1 lakh MTs of bagasse stored for generating the power till the end of May 2016 and the coal handling system were burnt and to treat the event as Force Majeure and requested not to impose any penalty for non-supply of power as per terms of the PPA. The said events were again intimated through e-mail dated 02.05.2016 (Annexure-P11) to the petitioner along with certain attachments showing the loss caused to bagasse and coal handling system.

h) The petitioner vide letter dated 02.05.2016 (Annexure-P12) offered alternative source of power supply through one Mittal Processers Private Limited from 04.05.2016 to 31.05.2016 and requested the 1st respondent (PCKL) to give its consent for the same as per the terms of the PPA to the same effect, the petitioner also sent e-mail dated 03.05.2016 (Annexure-P13) to the petitioner. The petitioner again sent another e-mail dated 04.05.2016 (Annexure-P14) reminding the 1st respondent (PCKL) to give its consent for supply of energy from alternative source from 06.05.2016 onwards.

i) In response to the request made by the petitioner to give consent for supply of energy from alternate source, the 1st respondent (PCKL) wrote letter dated 05.05.2016 (Annexure-P15) giving its consent and intimating that the energy could be injected from 07.05.2016 from the alternate source in terms of clause 5.1.4 of the PPA.

j) The petitioner wrote letter dated 07.05.2016 (Annexure-P16) to the 1st respondent (PCKL) stating that in view of the Force Majeure events, the petitioner was not obliged to arrange for the alternate source and that the petitioner was entitled to suspend its obligations under the PPA for the remaining period. The petitioner sent e-mail dated 14.05.2016 (Annexure-P17) to the 1st respondent (PCKL) to the same effect. In both the Annexures-P16 & P17, the petitioner described the subject of these letters as "cancellation of PPA for the remaining period from 18.03.2016 to 31.05.2016."

k) The petitioner has produced bills for payment towards energy scheduled by it, passed by the 1st respondent (PCKL) for the months of November 2015, December 2015 & January 2016 to March 2016 (At Annexure-P2 collectively). Further, it produced the bills for payments towards energy scheduled for the months of April 2016 and May 2016 (at Annexure-P18 collectively).

l) The petitioner has stated in support of its case that the fire accidents and the restriction imposed from drawing water should be treated as Force Majeure events under clause 7.1 (ii) of the PPA, thereby there is

no liability on the petitioner to pay the Liquidated Damages etc. The availability of bagasse and the huge quantity of water were essential for the generation of power from the co-generation plant of the petitioner, without which it could not have generated power.

3. The respondents appeared through their counsel. The respondents 1, 3, 5 & 6 have filed the statement of objections and the respondent No.2 adopted the same. The learned counsel for the respondents have submitted that the statement of objections filed by others may be treated as the objection of 4th respondent also, as all of them are having common defence. The grounds urged in the statement of objections may be stated as follows:

a) The several correspondences exchanged between the petitioner and the 1st respondent (PCKL) and the execution of PPA between the petitioner and the respondent No.2 to 6, are not disputed. However, the truth and correctness of the contents of letters issued by the petitioner are disputed by the respondents.

b) It is denied that the alleged fire incidents or the restrictions imposed to draw the water from the Barrage of Hidkal Dam, do fall under the definition of Force Majeure as per Article 7.1 of the PPA. In any case, for failure of generation of energy from the co-gen plant of the petitioner for any reasons, the petitioner was bound to supply from alternate source as provided in Article 5.1.4 of the PPA to fulfil its

obligations under the PPA. The 1st respondent (PCKL) had intimated this fact to the petitioner at appropriate time.

c) In spite of informing the same, the petitioner failed to supply the required quantum of energy for the months of March to May 2016 and the energy supplied for these months were 44.32%, 12.90% & 80.29% respectively of the contracted energy.

d) Due to non-compliance of supply of the contracted capacity, the respondents have claimed the Liquidated Damages as per Articles 6.2.4 read with 6.2.5 of the PPA. It is contended that the amount payable by the petitioner for short supply of energy as per the relevant terms of the PPA, the respondents have deducted the same from the energy bills submitted by the petitioner for payment.

e) Though the petitioner offered supply of energy from alternate source, without any reasons it did not pursue it and illegally stated that the obligation to supply was ceased for the reasons stated by the petitioner. The petitioner was well aware that it had the obligation to supply energy from alternate source, in the event, the energy could not be generated from co-gen plant.

f) Therefore, the respondents prayed for dismissal of the petition.

4. We have heard the learned counsel for the parties.

a) Apart from urging the grounds stated in the petition, the learned counsel for the petitioner submitted that at any rate the petitioner was

also totally absolved from its obligation to supply energy under Section 56 of the Indian Contract Act, 1872 (Contract Act, for short) due to impossibility to perform the contract for non-availability of bagasse and the required water for power generation and hence, the question of payment of any compensation does not arise at all. Further, he submitted the recovery of alleged Liquidated Damages by the respondents out of the bills for energy supplied, is illegal and opposed to law. Elaborating his arguments, it is submitted that the damage can be awarded only if the respondents plead and prove that breach of contract has resulted in loss or damages to the respondents and even in the case of a contract providing for Liquidated Damages, the same principle would apply and unless the Court or other Adjudicating Authority decides the entitlement for damages, the Liquidated Damages cannot be recovered. Further, he submitted in the present case, the non-supply of energy to certain extent had not caused any loss to the respondents 2 to 6, as the rates for electricity was far less than Rs.5.08 per unit agreed in the PPA, in the event these respondents had purchased the energy in the market.

b) The learned counsel for the respondents refuted the contentions raised by the learned counsel for the petitioner. Reiterating the grounds already urged in the statement of objections, he submitted that the rate was not cheaper as urged and the power could not have been easily purchased as suggested by the petitioner, as and

when the petitioner failed to supply the energy. The State was reeling under scarcity of energy during that relevant period and the Government had imposed Order u/s 11 of the Electricity Act, 2003 for procuring the energy. Further, he submitted in the case of non-supply of energy as per the agreement, it is almost impossible to prove the actual loss or damage sustained by the distribution licensees/ consumers. Therefore, he submitted that in the present case, the proof of actual loss or damage sustained need not be or could not be produced. He also pointed out that the Liquidated Damages agreed between the parties is a legitimate pre-estimation arrived by the parties taking into consideration of the relevant facts. Therefore, he submitted that there is no merit in the petition filed by the petitioner.

c) Both the parties relied upon several decisions and the same would be referred wherever necessary.

5. From the pleadings of the parties and their rival submissions, the following issues arise for our consideration:

<u>Issue No.1:</u> Whether the destruction of bagasse and the extreme scarcity of water stated by the petitioner affecting the power generation of Co-gen plant, fall within the meaning of 'Force Majeure Event' as provided in Article 7.1 (ii) of the PPA?

Issue No.2: Whether the petitioner has proved that the entire extent or a major portion of bagasse stored by it was destroyed due to the fire incidents and whether there was extreme scarcity of water as a result of which power generation from Co-gen plant was impossible?

Issue No.3: Whether the case of the petitioner falls u/s 56 of the Indian Contract Act, 1872 so as to grant any relief to it?

Issue No.4: Whether the claim for Liquidated Damages under Article 6.2.4 read with Article 6.2.5 of the PPA by the respondents is established by them, as required u/s 74 of the Indian Contract Act, 1872?

Issue No.5: Whether the deduction of amounts claimed towards Liquidated Damages by the respondents from out of the energy charges payable to the petitioner in respect of energy bills for the energy supplied is illegal and invalid as contended by the petitioner?

Issue No.6: Whether the petitioner is entitled to get refund of Rs.1,30,58,567 deducted from out of energy bills, with interest?

Issue No.7: To which reliefs the petitioner is entitled to?

Issue No.8: What Order?

6. After considering the submissions of the parties and the pleadings and records, our findings on the above issues are as follows:

7. Issue No.1: Whether the destruction of bagasse and the extreme scarcity of water stated by the petitioner affecting the power generation of Co-gen plant, fall within the meaning of 'Force Majeure Event' as provided in Article 7.1 (ii) of the PPA?

a) Article 7.1 dealing with Force Majeure Event and Article 7.2 dealing with 'Duty to Mitigate' the effect of 'Force Majeure Event' stated in the PPA read as follows:

"Article 7.1 Force Majeure

i) Any restriction imposed by RLDC/SLDC in scheduling of power due to breakdown of Transmission/Grid constraint shall be treated as Force Majeure without any liability on either side.

ii) Any of the events or circumstances, or combination of evens and circumstances such as act of God, exceptionally adverse weather conditions, lightning, flood, cyclone, earthquake, volcanic eruption, fire or landslide or acts of terrorism causing disruption of the system.

iii) The contracted power will be treated as deemed reduced for the period of Transmission Constraint. The non/part availability of transmission corridor should be certified by concerned RLDC / SLDC.

The Affected Party shall give intimation to the other Party of any event of Force Majeure immediately but not later than 24 Hours.

7.2 Duty to Mitigate

To the extent not prevented by a Force Majeure event, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable."

b) The learned counsel for the petitioner submitted that the fire incidents and extreme scarcity of water due to exceptional weather conditions, are the events or the circumstances narrated in Article 7.1 (ii) of the PPA and due to these events or combination of these events, there could not

have been any generation from the Cogen Plant thereby a case for Force Majeure under Article 7.1 (ii) of the PPA is made out.

c) On the other hand, the learned counsel for the respondents submitted that the phrase "causing disruption of the system" stated in Article 7.1 (ii) of the PPA is restricted to the disruption of the transmission/distribution system facilitating the evacuation of power from Cogeneration Plant and the said phrase does not include the disruption of the Cogeneration Plant as such for any reason like breakdown of the Cogeneration Plant or the scarcity or non-availability of fuel or water etc. Therefore, according to him, even if it is assumed that the entire stock of bagasse stored was burnt or there was extreme scarcity of water or its non-availability, cannot fall under the definition of 'Force Majeure Event' as contemplated in Article 7.1 (ii) of the PPA.

d) After considering the rival submissions and also the relevant provisions of the PPA, we are of considered view that the contention put-forth by the learned counsel for the respondents is to be accepted. The reasons may be stated as follows:

(i) Article 7.1 (iii) is to be read in continuation with the Article 7.1 (ii) of the PPA. The consequence of 'disruption of the system' due to the reasons stated in Article 7.1 (ii), is stated in Article 7.1 (iii) of the PPA, to the effect that 'the contracted power will be treated as deemed reduced for the period of Transmission Constraint'. This sub-clause does not say that

'the contracted power will be treated as deemed reduced for the period of generation constraint' of the generating unit. There is no provision in Article 7.1 of the PPA providing available relief to the generating plant due to disruption caused as a consequence of any Force Majeure event stated in Article 7.1 (ii) of the PPA. The absence of such relief to a generating plant makes it clear that 'disruption of the system' stated in Article 7.1 (ii) of the PPA is restricted only to disruption of the transmission/distribution system, but not to the generating plant.

(ii) Article 5.1.4 of the PPA also clearly suggests that if the Seller is unable to provide supply of power to procurer up to the Contracted Capacity from the Delivery Point except due to a Force Majeure event, the Seller shall supply power up to Contracted Capacity from an alternative generation source to meet its obligations under the PPA with consent of the procurer. This Article in the PPA clearly points out that for want of fuel or due to breakdown of generating plant, if power could not be supplied, the generator has to arrange for alternative generation source to meet its obligation under the PPA. But such obligation to supply from alternative source does not arise if the Seller is unable to supply power due to a Force Majeure event as noted in Article 7.1 of the PPA. Had

the non-generation of power due to breakdown of generating plant or for want of fuel, were to be a Force Majeure event under Article 7.1 (ii) of the PPA, there would not have been any liability to supply through alternative source, in the event the Seller was unable to provide supply of power to the procurer in terms of the PPA. Therefore, it is clear that non-generation of power due to breakdown of plant or for want of fuel etc., does not fall under the Force Majeure stated in Article 7.1 (ii) of the PPA.

(iii) The learned counsel for the petitioner relied upon the 2nd para of Article 6.2.5 of the PPA to contend that the grounds urged by the petitioner would fall under the Force Majeure event. The said 2nd para reads as follows:

> *"If Seller fails to schedule the capacity approved for the open access for the concerned period on account of loss of Generation i.e., failure of Generator/ Transmission constraints then Seller shall provide an undertaking regarding the failure of Generation and confirming that power has not been sold to a third party during the period. For the purpose of clarity, third party would mean party other than ESCOMs of Karnataka and notified customers of the Sellers. The list of notified customers would be submitted by Seller 15 days before the commencement of supply of power. The list will also specify the quantum of power which needs to be supplied to notified customers as per their agreements with Seller. In case, rescheduling is required, rescheduling shall be done proportionately.*

> *This list, upon submission will be an integral part of the Agreement.*"

According to the learned counsel for the petitioner, this 2nd para provides for the contingency where there was loss of generation because of the failure of generator and thereby the Seller fails to schedule the capacity approved for open access for the required period, there would be no liability except the generator providing an undertaking that power has not been sold to a third party during the said period. Therefore, he submitted loss of generation of power for any acceptable reason to be assigned by the generator is to exclude it from any liability except from filing an undertaking to the effect that power has not been sold to any third party. This contention of the learned counsel appears to be not well-founded. The 1st part of the Article 6.2.5 of the PPA provides for payment of compensation to procurer in case of deviation from Seller in scheduling the power as stated therein. In continuation of it, in the 2nd part of the Article 6.2.5 of the PPA, an obligation is imposed on the Seller whenever it fails to schedule the power as required, the Seller has to satisfy the procurer that it had not illegally diverted any capacity to the third persons. Therefore, the 2nd part of the Article 6.2.5 of the PPA does not relieve the Seller from its liability to pay the damages under Article 6.2.5 of the PPA or it does not relief the

generator from any other liability agreed under the PPA. Therefore, this 2nd part of Article 6.2.5 of the PPA cannot be treated as a provision giving relieve to the petitioner for loss of generation due to any reason claimed by the petitioner.

e) For the above reasons, we hold Issue No.1 in the negative.

8. Issue No.2: Whether the petitioner has proved that the entire extent or a major portion of bagasse stored by it was destroyed due to the fire incidents and whether there was extreme scarcity of water?

a) The destruction of bagasse due to fire incident and the scarcity of water urged by the petitioner are not admitted by the respondents. The petitioner stated that during the first fire incident that took place on 11.03.2016 at around 12 noon, about 26,500 MTs of bagasse was burnt out of 94,718.56 MTs stored in the yard as per the narrations stated in Annexure-P3 complaint. The petitioner urged that during second fire incident that took place on 27.04.2016 at about 7.30 p.m. again there was destruction of bagasse due to heavy fire and the damage was also caused to coal handling system and bagasse stock yard (Annexure-P10 & P11). The petitioner has not specifically stated the approximate quantum of bagasse burnt during the second fire incident, but has only stated that the quantum is to be assessed.

b) During the months of November, December, 2015, January & February, 2016, the petitioner had scheduled the required quantum of energy and might have generated and supplied the same. In these months, the

petitioner had scheduled the energy of 97,65,000, 1,11,38,000, 1,09,72,250 & 1,02,79,250 units respectively. Subsequent to the fire incident, the petitioner had scheduled energy of 49,45,750, 13,92,750 & 89,60,580 units for the months of March to May 2016 respectively.

c) In para 10 of the petition, the petitioner has stated that during the 2nd fire incident, the entire remaining bagasse was burnt down. The same fact is reiterated in para 21 of the written arguments submitted by the petitioner. The documents produced by the petitioner do not support the contention that the entire remaining bagasse was burnt during second fire incident. As noted above, the petitioner had scheduled and supplied energy during the months of March to May 2016. Though the scheduling of energy for these months were not to the extent of contracted energy with allowable variation, certain quantum of energy for these months were scheduled as noted above. Therefore, we are of the considered opinion that a portion of bagasse stored might have destroyed due to fire but not the entire extent of bagasse was destroyed.

d) In para 6 of the petition, the petitioner has stated that the Executive Engineer, Karnataka Neeravari Nigam Limited, issued a notice dated 22.03.2016 (Annexure-P6) directing the petitioner to stop drawing water from the barrage for any industrial and commercial purpose. However, Annlexure-P6 does not support such a fact. The perusal of Annexure-P6 shows that the petitioner had made a request on 21.03.2016 for drawing water from Ghataprabha river and in response to it, Annexure-P6 dated

22.03.2016 was written by the Executive Engineer, Karnataka Neeravari Nigam Limited, stating that due to scarcity of rain in 2015-16, the water level in Hidkal Dam was low thereby there was direction to use the available water from Hidkal Dam only for drinking purpose. Therefore, impliedly, the letter states that the request of the petitioner to draw water was not allowed. This letter does not suggest that the petitioner was previously drawing water from Ghataprabha river and he was prevented from drawing water on issue of this letter. Along with Annexure-P6, the petitioner has produced a reminder dated 09.03.2016 issued by the Deputy Commissioner, Bagalkote, to the concerned subordinate officials to stop unauthorised drawing of water by farmers for agriculture from Almatti reservoir back-water. At best, this letter may establish that there was scarcity of rain during the relevant season and there was difficulty in getting water for industrial purpose.

e) From the analysis of the above facts, we hold Issue No.2 partly in affirmative and partly in negative.

9. Issue No.3: Whether the case of the petitioner falls u/s 56 of the Indian Contract Act, 1872 so as to grant any relief to it?

a) The learned counsel for the petitioner submitted that even by assuming for a moment that the 'Force Majeure' Clauses in the PPA were not applicable to the facts of this case, still the provisions of Section 56 of the Contract Act, was applicable, due to supervening impossibility to perform the contract as a consequence of non-availability of fuel and

water required for power generation. Section 56 of the Contract Act, reads as follows:

> *"56. Agreement to do impossible act. – An agreement to do an act impossible in itself is void.*
>
> *Contract to do act afterwards becoming impossible or unlawful. – A contract to do an act, which, after the contract is made, becomes impossible, or, by reason of some event, which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."*

The petitioner has relied upon a portion of para 18 of the decision of the Hon'ble Supreme Court of India in *Satyabrata Ghose Vs Mugneeram Bangur & Company & Another reported in Manupatra/SC/0131/1953 (equivalent to 1954 SCR 310:AIR 1954 SC 44),* which reads as follows:

> …………*"In the large majority of cases, however, the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the*

root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object. This may be called a rule of construction by English Judges but it is certainly not a, principle of giving effect to the intention of the parties which underlines all rules of construction. This is really a rule of positive law and as such comes within the purview of Section 56 of the Indian Contract Act,".

b) The close reading of the above paragraph of the decision of the Hon'ble Supreme Court of India, would show that the supervening impossibility contemplated in para 2 of Section 56 of the Contract Act, would apply when the whole purpose or basis of contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. In the present case, the whole purpose or the basis of the contact was not frustrated due to shortage in bagasse stock or scarcity of water stated by the petitioner. It may be true that the petitioner had to incur extra expenses in getting the required bagasse or the water for the production of power. Such difficulty cannot be treated as defeating the purpose or the basis of the contract.

c) We may also note the principles noted in paragraphs of 19 & 20 of the above said judgment of the Hon'ble Supreme Court of India, which read as follows:

> *"19. It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in Matthey V. Curling L.R. (1922) 2 A.C. 110 at 234.*
>
> > *a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King's enemies … or vis major.*
>
> *20. This being the legal position, a contention in the extreme form that the doctrine of frustration as recognized in English law does not come at all within the purview of Section 56 of the Indian Contract Act cannot be accepted."*

d) As already noted, in the present case the parties contemplated the possibility of non-generation of power from the Cogeneration plant of the petitioner for one or the other reason and expressly stipulated that the contract would continue despite such circumstances, by allowing the petitioner to arrange for alternate supply of power from some other source. The said Article 5.1.4 of the PPA is reads as follows:

"*Article 5.1.4 - Alternate source of power supply:*

If the Seller is unable to provide supply of power to the Procurer (s) up to the Contracted Capacity from the Delivery Point except due to a Force Majeure Event, the Seller shall supply power up to the Contracted Capacity from an alternative generation source to meet its obligations under this Agreement with the consent of Procurer (s). Such power shall be supplied to the Procurer (s) at the same Tariff as per the terms of this Agreement. In case the Open Access Charges and other incidental charges, including but not limited to application fees for open access, RLDC/SLDC charges, etc., applicable from the alternative source of power supply are higher than the applicable Open Access Charges from Delivery Point to Procurer (s) Periphery, the Seller would be liable to bear such additional charges."

e) However, if there was no provision in the PPA as contained in Article 5.1.4 for alternate power supply, the contention of the petitioner could have been accepted, as having some force, because bagasse and water were essential for generation of power from Cogen Plant. The non-availability of bagasse due to fire incidents and non-availability of water due to extreme drought conditions could have been taken as the facts not in the hands of the petitioner. Therefore, these facts could have been treated as supervening events as contemplated in para 2 of Section 56 of the Contract Act.

f) It is not the case of the petitioner that it made sincere attempts for supply of energy from alternate source and it could not secure such alternate source. For establishing subsequent impossibility so as to treat the

contract as void, the petitioner was required to establish the non-availability of fuel and extreme scarcity of water which prevented the generation of electricity from co-generation plant and also non-availability of alternate source for power supply. The petitioner has failed to prove these facts.

g) For the above reasons, we hold Issue No.3 is in the negative.

10. Issue No.4: Whether the claim for Liquidated Damages under Article 6.2.4 read with Article 6.2.5 of the PPA by the respondents is established by them, as required u/s 74 of the Indian Contract Act, 1872?

a) The learned counsel for the petitioner has urged that the claim of the respondents for Liquidated Damages is opposed to Section 74 of the Contract Act. Elaborating his submissions, the learned counsel for the petitioner urged the following grounds:

(i) That the damages can be awarded only if the respondents plead and prove that breach of contract has resulted in loss or damage to the respondents. Section 74 of the Contract Act, does not distinguish between stipulations by way of "*liquidated damages*" and by way of "*penalty*". It provides for uniform principle applicable in both cases. The award of compensation needs to be reasonable and needs to be determined as per the settled principles. Section 74 of the Contract Act, does not dispense with the requirement that the party seeking damages should prove that it has suffered loss or damage. Even if a sum is named as liquidated damages and stated

in the contract/agreement, the Respondents can only be awarded reasonable compensation (not exceeding the amount stated as liquidated damages) in case of breach which has resulted in loss or damage and it cannot claim or recover the amount of purported damage. The compensation which can be awarded is to be ascertained having regard to the conditions that existed on the date of breach.

(ii) The party complaining of a breach of contract can receive a reasonable compensation of such liquidated amount only, if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Commission. A genuine pre-estimated damages can be awarded without proof of actual damages only in case the damages suffered by the respondents could not be estimated. But it was not so in the present case.

(iii) The respondents have not suffered any loss or they have not even claimed that they have actually suffered any loss. In the absence of actual loss being established and the Commission not adjudicating on the damages payable to the respondents there is no crystalized amount due from the petitioner to the respondents.

(iv) In support of the above principles, the learned counsel for the petitioner relied upon:

(a) Fateh Chand Vs. Balkishan Das in MANU/SC/ 0258/1963 (AIR 1963 SC:1405);

(b) *Union of India (UoI) Vs. Rampur Distillery and Chemical Company Limited in MUANU/SC/0035/ 1973 (AIR 1973 SC:1098); and*

(c) *Union of India (UoI) Vs. Ram Iron Foundry and Others in MANU/SC/0005/1974 (AIR 1974 SC:1265).*

v) The learned counsel for the petitioner relied upon two facts in support of his contention that in the present case, the respondents have not incurred any loss or damage due to short supply of energy by the petitioner for the months of February 2016 to May 2016. The 1st fact relied upon is that short term power purchase prices for these months were considerably less than the price of Rs.5.08 per unit payable to the petitioner. Therefore, it is contended that the respondents 2 to 6 could have purchased energy on short term basis from other sources and thereby they would have gained from such purchases. The 2nd fact relied upon is that the cost of power purchased from the petitioner was much more than the average cost of the supply determined to each of the ESCOMs for the period from 01.04.2015 to 31.03.2016 as per retail tariff order dated 02.03.2015. Hence, it is contended that by not getting power from the petitioner, the respondents in fact saved money by not incurring loss. These facts are pleaded only in the written arguments filed in the fag end of hearing but not in the petition.

b) The learned counsel for the respondents have not denied the principles of law as to whether the claim is for the Liquidated Damages or for Unliquidated Damages, no pecuniary liability arises till the Court or Forum

has determined the damages payable to the party complaining the breach of any term of the contract. However, he contended that in a case where there is breach of term of the agreement regarding supply of energy, the distribution licensee has the right to claim the Liquidated Damages without leading any evidence in proof of the actual damages suffered due to the breach of such term. He further submitted that in the case of supply of energy to the distribution licensee, it is very difficult to lead any evidence in proof of the actual damages sustained. Therefore, he submitted that the PPA would contain a term regarding payment of Liquidated Damages pre-determined by the parties, for the breach of any particular term of contract. Further, he submitted that without requiring any evidence, the Commission has to presume the loss caused to the respondents 2 to 6 as agreed in the Liquidated Damages clause. In support of his contention, he relied upon the following decisions:

(i) Bharat Sanchar Nigam Limited Vs. Reliance Communication Limited [reported in (2011) 1 SCC 294];

(ii) PTC India Limited Vs. Gujarat Electricity Regulatory Commission [Appeal No.62 of 2013 decided on 30.06.2014];

(iii) Lanco Kondapalli Power Limited Vs. Andhra Pradesh Electricity Regulatory Commission & Others [reported in (2015) SCC Online APTEL 140];

(iv) Oil & Natural Gas Corporation Vs. Saw Pipes Limited [reported in (2003) 5 SCC 705]; and

(v) Construction and Design Services Vs. DDA [reported in (2015) 14 SCC 263]

The learned counsel for the respondents has denied the truth and correctness of the contentions raised on behalf of the petitioner that the short term power purchase price was considerably lower than Rs.5.08 per unit, thereby the respondents could have purchased cheaper power and that the respondents were saved from incurring the loss by not getting power from the petitioner for the months of February to May 2016.

c) On consideration of the citations relied upon by the parties on this issue, we hold that the legal principles have been almost settled and in each case, it should be ascertained whether a party claiming Liquidated Damages could lead evidence to establish the actual loss or damage sustained. Therefore, the following points arise for our consideration:

i) Whether respondents have not suffered any loss due to non-supply of power under PPA?

ii) Whether it is possible to prove the actual damage or loss?

iii) Whether the liquidated amount named in the contract is genuine pre-estimate of damage or loss?

i) <u>Regarding the 1st point:</u> Whether respondents have not suffered any loss due to non-supply of power under PPA?

- The contention of the petitioner that the respondents had not suffered any loss and even they were benefitted due to non-supply of power under the PPA is to be rejected out-rightly. Admittedly, there was scarcity of energy during the relevant period and the

respondents had taken steps to purchase the short term power and the State Government had also issued Order under Section 11 of the Electricity Act, 2003, directing the Generating companies in the State to supply power to the State grid. The Distribution Licensee is required to follow certain procedure before purchasing the short term power. The compliances of these procedures require sufficient time and the short term power cannot be purchased within a short gap of time. The short term power purchase from inter-state Sellers could be finalised only if there is no corridor constraint. The required quantum of electricity cannot be purchased by distribution licensee so easily as in the case of purchase of marketable goods available in the open market. The petitioner has further contended that in OP No.33/2015 & other connected cases filed for determination of price for the energy supplied u/s 11 Order of the Electricity Act, 2003, this Commission has determined the price at Rs.4.67 per unit. Here itself it may be noted that as against the Order of this Commission, the Hon'ble High Court of Karnataka in WP Nos.60231-233/2016 decided on 18.09.2017, restored the price at Rs.5.08 per unit as fixed by the State Government. Therefore, the petitioner cannot contend that the short term power purchase cost was less than Rs.5.08 per unit and that the respondents could have obtained the power from Inter-state traders or generators.

- The petitioner further contended that the cost of power purchased from the petitioner was much more than the average cost of supply determined to each ESCOMs, thereby not getting power from the petitioner, the respondents were in fact saved money by not incurring loss. Elaborating this contention, it is submitted that the net cost of supply for the relevant period for each of the respondents 2 to 6 would be Rs.6.09, Rs.6.00, Rs.6.32, Rs.6.40 & Rs.5.95 per unit respectively by adding transmission loss, distribution loss to while the average cost of supply as in the retail tariff order dated 02.03.2015. It is contended that the above calculation did not include the SLD charges and transmission charges and if these two components are added, the cost of power per unit would be more than the amount stated above. Therefore, according to the petitioner by purchasing the energy at Rs.5.08 per unit from the petitioner and further incurring the transmission and distribution losses and other charges, the net cost per unit would be as noted above. It is further submitted that these respondents would sell the energy at a tariff lower than the above net cost incurred per unit. Therefore, it is contended that by not getting power from the petitioner, the respondents were in fact saved money by not incurring loss.

- The above assumptions made by the petitioner are contrary to the existing facts. In a tariff order average cost of supply is arrived after

taking into consideration, the power purchase cost and all other revenue expenses incurred by the distribution licensee on the energy sales. Therefore, it is not correct to add again the distribution or transmission line losses to arrive at the average cost of supply. It may be noted that the tariff for industrial and commercial installations were in the range of Rs.6.40 to Rs.8.42 per unit during the period from 01.04.2015 to 31.03.2016. Even for the next financial year, these tariffs were not reduced. The short term power purchases were made mainly to supply power to industrial and commercial installations. Therefore, we hold that the above assumptions and the reasons stated by the petitioner are not correct.

ii) <u>Regarding the 2nd point:</u> Whether it is possible to prove the actual damage or loss?

- As already noted the methods stated by the petitioner to establish that the respondents 2 to 6 have not incurred loss due to non-supply of power by the petitioner, are not acceptable. As held in different decisions relied upon by the respondents, the breach of term of the PPA regarding supply of energy to the distribution licensee has to be treated as a case where it is very difficult to lead any evidence in proof of the actual damages sustained. Therefore, we hold that the respondents 2 to 6 could not have led any evidence in proof of the actual damages or loss sustained by them due to non-supply of energy by the petitioner.

iii) <u>Regarding the 3rd point:</u> Whether the liquidated amount named in the contract is genuine pre-estimate of damage or loss?

- When there is a term contained in a contract entered into between the parties regarding the payment of liquidated damages, the initial presumption is that the quantum of liquidated damages fixed is a genuine pre-estimate of the damage or loss in the case of the breach of the term of the contract. In the present case, Article 6.2.4 relates to payment for Liquidated Damages by the respondents-procurers in case of deviation from procurer side is more than 15% of either contracted energy for which open access has been allocated or the energy corresponding to actual availability, whichever is lower on monthly basis. In the same way, Article 6.2.5 relates to payment for Liquidated Damages by the petitioner-seller in case deviation from seller side is more than 15% of contracted energy for which open access has been allocated on monthly basis. In both the contingencies, the payment of Liquidated Damages is same at 20% of the tariff per unit for the deviation. The petitioner has not shown that the Liquidated Damages agreed is unreasonable or by way of penalty, though the initial burden of proof is on the petitioner.
- Article 10.8 of the PPA relating to breach of obligations states as follows:

> "*<u>10.8 – Breach of Obligations</u> – The Parties acknowledge that a breach of any of the obligations contained herein would result in injuries. The Parties further acknowledge that the amount of the liquidated damages or the method of calculating the liquidated damages specified in this Agreement is a genuine and reasonable pre-estimate of the damages that may be suffered by the non-defaulting party in each case specified under this Agreement.*"

- It may be noted that the terms of the PPA were stipulated in line with the "*guidelines for short term procurement of power by the distribution licensees through tariff based bidding process, 2012*" issued by the Ministry of Power, Government of India, u/s 63 of the Electricity Act, 2003. In the said guidelines, the quantum of liquidated damages payable for the deviation beyond 15% of contracted energy for which open access has been allocated on monthly basis either from seller or procurer, is prescribed at the same rate. Therefore, the claim of the respondents is in the nature of a claim under a statutory contract, where-under presumption could be drawn that the liquidated damages stipulated are genuine pre-estimate of the loss or damage.
- In the decision of Bharat Sanchar Nigam Limited Vs. Reliance Communications Limited, the Hon'ble Supreme Court of India at paragraph 20 has noted as follows:

"20. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and therefore, the court should not be astute to categorize as penalties the clauses described as liquidated damages. The principle is relevant to regulatory regimes. It is important to bear in mind that while categorizing damages as "penal" or "liquidated damages", one must keep in mind the concept of pricing of these contracts and the level playing field provided to the operators because it is on costing and pricing that the loss to BSNL is measured and, therefore, all calls during the relevant period have to be seen."

- Therefore, we hold that the liquidated amount named in the contract is genuine pre-estimate of damage or loss.

d) For the above reasons, we hold Issue No.4 in affirmative.

11. Issue No.5: Whether the deduction of amounts claimed towards Liquidated Damages by the respondents from out of the energy charges payable to the petitioner in respect of energy bills for the energy supplied is illegal and invalid as contended by the petitioner?

a) The learned counsel for the petitioner submitted that the deduction of the amount from out of the dues payable to the petitioner in respect of pending tariff invoices by the respondents, towards the satisfaction of the claim for liquidated damages is invalid and the respondents could not have deducted the amount from out of the pending tariff invoices, until and unless the liquidated damages payable is ascertained by of an Order passed by this Commission in a duly instituted proceeding. In support of his contention, he relied upon the relevant portion in para 9

of the decision cited in MANU/SC/0005/1974 [(1974) 2 SCC 231] between Union of India Vs. Raman Iron Foundry & Others.

b) In the above said Raman Iron Foundry case in paragraph 9, the principles laid down are as follows:

> *"9………… that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6 (e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred…………….*
>
> *……………...A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under Clause 18, to recover the amount of such claim by appropriating other sums due to the contractor……………..."*

c) The learned counsel for the respondents denied the said contentions of the petitioner. He submitted that the respondents are entitled to effect adjustments of the liquidated amounts from out of the dues payable to the petitioner towards pending tariff invoices. He further pointed out that the finding in the decision of Raman Iron Foundry case to the extent that "…..*A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and*

payable and the purchaser is not entitled, in exercise of the right conferred upon it under Clause 18, to recover the amount of such claim by appropriating other sums due to the contractor…." has been over-ruled. That submission appears to be correct.

d) It is stated in paragraph 52 of the decision cited in *(2003) 5 SCC 705 between Oil & Natural Gas Corporation Limited (ONGC) Vs. Saw Pipes Limited* which reads thus:

> *"52. Firstly, it is to be stated that in the aforesaid case the Court has not referred to the earlier decision rendered by the five-Judge Bench in Fateh Chand case or the decision rendered by the three-Judge Bench in Maula Bux case. Further, in H.M. Kamalauddin Ansari and Co. v. Union of India a three-Judge Bench of this Court has overruled the decision in Raman Iron Foundry case and the Court while interpreting similar term of the contract observed that it gives wider power to the Union of India to recover the amount claimed by appropriating any sum then due or which at any time may become due to the contractors under other contracts and the Court observed that clause 18 of the standard contract confers ample powers on the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount."*

e) The legal position regarding the entitlement of the defendant, in a suit for recovery of money, to raise a plea of adjustments is well established. Whenever a plea of adjustment is taken by the defendant an adjudication by the Court has to take place with respect to the validity of defence in respect of adjustment.

f) For the above reasons we hold Issue No.5 in the negative.

12. Issue No.6: Whether the petitioner is entitled to get refund of Rs.1,30,58,567 deducted from out of energy bills, with interest?

In view of the findings rendered on the above issues, it is to be held that the petitioner is not entitled to get the refund of Rs.1,30,58,567 deducted from out of the energy bills. Further, the question of awarding any interest does not arise.

13. Issue No.7: To which reliefs the petitioner is entitled to?

The petitioner is not entitled to any of the reliefs as prayed for in the petition.

14. Issue No.8: What Order?

For the foregoing reasons, we pass the following:

O R D E R

The petition is dismissed, holding that the petitioner is not entitled to any of the reliefs prayed for in the petition.

sd/-	sd/-	sd/-
(SHAMBHU DAYAL MEENA)	(H.M. MANJUNATHA)	(M.D. RAVI)
Chairman	Member	Member